

COMMENTARIES

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COMMENTARIES

ON THE

LAW OF SCOTLAND,

AND ON

THE PRINCIPLES OF MERCANTILE JURISPRUDENCE.

BY

GEORGE JOSEPH BELL, ESQ., ADVOCATE,

PROFESSOR OF THE LAW OF SCOTLAND IN THE UNIVERSITY OF EDINBURGH.

SEVENTH EDITION,

BEING A RE-PUBLICATION OF THE FIFTH EDITION

WITH ADDITIONAL NOTES,

ADAPTING THE WORK TO THE PRESENT STATE OF THE LAW, AND COMPRISING ABSTRACTS OF THE MORE
RECENT ENGLISH AUTHORITIES ILLUSTRATIVE OF THE LAW OF SCOTLAND.

BY

JOHN M'LAREN, ESQ., ADVOCATE,

SHERIFF OF CHANCERY.

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TABLE OF CONTENTS.

BOOK V.

OF REAL SECURITIES OVER THE MOVEABLE ESTATE.

	PAGE
CHAP. I. DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY,	1
SEC. 1. THINGS CORPOREAL, DISTINGUISHED AS HERITABLE OR MOVEABLE,	<i>ib.</i>
SEC. 2. THINGS INCORPOREAL, DISTINGUISHED AS HERITABLE OR MOVEABLE,	3
CHAP. II. OF VOLUNTARY SECURITIES OVER MOVEABLES,	10
SEC. 1. ASSIGNATION AND DISPOSITION OF MOVEABLES IN SECURITY,	11
SUBSEC. 1. Securities on Corporeal Moveables,	<i>ib.</i>
1. Mortgage of Ships,	<i>ib.</i>
2. Consignments of Goods from a Distance,	12
3. Transfer of Bills of Lading,	14
4. Assignment of Invoices, etc. without the Bill of Lading,	<i>ib.</i>
5. Assignment of Goods in another's Custody,	15
SUBSEC. 2. Transference of Debts,	<i>ib.</i>
1. Assignment,	16
2. Intimation,	<i>ib.</i>
3. Assignations not requiring Intimation,	17
4. Assignment necessary to convey Diligence, etc.,	18
SEC. 2. SECURITIES BY MEANS OF PLEDGE,	19
SUBSEC. 1. Pledge of Commodities,	21
SUBSEC. 2. Pledge of Debts,	22
SUBSEC. 3. Pledge of Titles,	23
SEC. 3. OF HYPOTHEC,	24
SUBSEC. 1. Conventional Hypothec,	<i>ib.</i>
SUBSEC. 2. Tacit Hypothec,	26
1. Superior's Hypothec for Feu-Duties,	<i>ib.</i>
2. Landlord's Hypothec for Rents,	27
Sequestration,	33
3. Law Agent's Hypothec,	34
4. Maritime Hypothecs,	38
To Freighter on Ship for Goods,	<i>ib.</i>
For Average Loss,	39
5. Hypothec for Public Duties, and Taxes and Exchequer Bills,	<i>ib.</i>

	PAGE
CHAP. III. OF JUDICIAL SECURITIES OVER MOVEABLES,	40
SEC. 1. OF THE CROWN'S PREFERENCE BY WRIT OF EXTENT,	<i>ib.</i>
SUBSEC. 1. Extents in Chief in several Degrees,	41
1. Extents in Chief in the First Degree,	<i>ib.</i>
2. Extents in Chief in the Second, Third, and Fourth Degrees,	45
SUBSEC. 2. Of Extents in Aid,	<i>ib.</i>
SUBSEC. 3. Process for making Effectual Hypothec for certain Excise Duties,	49
SUBSEC. 4. Of the King's Remedy after the Debtor's Death,	50
SUBSEC. 5. Of Opposition to Writs of Extent,	<i>ib.</i>
SUBSEC. 6. Rules of Preference between King and Subject,	51
SEC. 2. OF ORDINARY DILIGENCE AGAINST THE MOVEABLE PROPERTY DURING THE DEBTOR'S LIFE, AND OF THE LAWS ESTABLISHING EQUALITY,	55
SUBSEC. 1. Of Poining,	56
1. Poining of the Ground,	<i>ib.</i>
2. Personal Poining,	58
SUBSEC. 2. Of Arrestment and Forthcoming,	62
1. Of Arrestment in general—Distinction between Arrestment in Execution and in Security,	<i>ib.</i>
Arrestment in Execution, with Forthcoming,	<i>ib.</i>
Arrestment in Security,	64
Distinction between these,	65
Recall of Arrestment in Security,	66
Loosing of Arrestment,	<i>ib.</i>
2. Proper Application of Arrestment,	67
3. Criterion of Preference,	69
4. Objections which may be stated against Arrestments,	<i>ib.</i>
Objection to the Debt,	<i>ib.</i>
Objection to the Arrestment as in Improper Hands,	70
Objection to the Arrestment as Premature,	72
5. Extent of the Claims secured by Arrestment,	73
Commentary on the Laws equalizing Diligence against Moveables during the Debtor's Life,	<i>ib.</i>
SEC. 3. OF DILIGENCE AGAINST MOVEABLES AFTER THE DEBTOR'S DEATH, AND OF THE LAWS OF EQUALITY,	77
SUBSEC. 1. Of Confirmation as Executor Nominate or Dative,	78
SUBSEC. 2. Of Proceedings competent to the Creditor of the Deceased,	79
1. Where Executor is confirmed,	80
2. Where Executor is not confirmed,	81
SUBSEC. 3. Equalizing of Diligence after Death—Commentary on the Act of Sederunt,	82
SUBSEC. 4. Of Diligence by the Creditors of the Executor himself, and of the Preference secured to the Creditors of the Deceased,	85
CHAP. IV. OF SECURITIES OVER MOVEABLES IN THE NATURE OF REAL RIGHT RESULTING FROM POSSESSION,	86
SEC. 1. OF THE DOCTRINE OF RETENTION, OR LIEN,	87

TABLE OF CONTENTS.

VII

	PAGE
SUBSEC. 1. Of Retention in general,	87
SUBSEC. 2. Of Special Retention, or Lien,	92
1. Lien on Ship for Repairs,	93
2. Lien on Goods for Carriage,	94
3. Lien for Shipmaster's Engagements,	98
4. Lien for Wages of Mariners,	99
5. Lien for Salvage and for Average Loss,	<i>ib.</i>
6. Lien of Innkeepers,	<i>ib.</i>
7. Lien for Grass-mail,	100
8. Lien to Workmen,	<i>ib.</i>
SUBSEC. 3. Of General Liens,	101
1. General Lien by Usage of Trade or Special Custom,	103
2. Lien grounded on Special Agreement or Course of Dealing,	104
3. Lien raised by Advertisement,	105
4. Constructive Liens admitted at Common Law,	106
Lien to Law Agent,	107
Lien to Factors,	109
Lien to Bankers,	113
Lien to Policy Brokers,	115
Lien to Trustees,	117
Lien to Cautioners,	118
SEC. 2. OF COMPENSATION OR SET-OFF, AND THE BALANCING OF ACCOUNTS IN BANKRUPTCY,	<i>ib.</i>
SUBSEC. 1. Of the Nature and Circumstances of the Debts that may set off against each other,	122
SUBSEC. 2. Of the Parties between whom Compensation may be pleaded,	124
1. Trustees or Administrators,	125
2. Principal and Agent,	<i>ib.</i>
3. Parties to Insurance Contract,	126
4. Master and Servant,	131
5. Assignees,	<i>ib.</i>
6. Company and Partners,	132
CHAP. V. OF PREFERENCES BY EXCLUSION,	<i>ib.</i>
SEC. 1. OF PERSONAL EXCEPTIONS TO CLAIMS OF PREFERENCE, AND OF CONSENTS TO A PREFERENCE,	133
SEC. 2. OF INHIBITION,	134
SUBSEC. 1. Nature and Effect of Inhibition,	<i>ib.</i>
1. Inhibition on Depending Action,	136
2. Inhibition on Debts actually due,	<i>ib.</i>
SUBSEC. 2. General View of the Objections against Inhibitions, and of their Effect,	143
SEC. 3. LIS PENDENS IN REAL ACTIONS, OR LITIGIOSITY AS A GROUND OF EXCLUSIVE PREFERENCE,	144
SUBSEC. 1. Litigiosity in Real Actions,	<i>ib.</i>
SUBSEC. 2. Litigiosity in Diligence,	145
CHAP. VI. OF PRIVILEGED DEBTS,	147
SEC. 1. OF FUNERAL EXPENSES, AND MEDICAL ATTENDANCE,	148
SEC. 2. OF SERVANTS' WAGES,	149

	PAGE
SEC. 3. OF REVENUE PRIVILEGES,	150
SEC. 4. OF WIDOW FUNDS AND FRIENDLY SOCIETIES,	<i>ib.</i>
SUBSEC. 1. Ministers' Widow Fund,	<i>ib.</i>
SUBSEC. 2. Friendly Societies,	151

BOOK VI.

SYSTEM OF THE BANKRUPT LAWS.

PART I.

OF INSOLVENCY AND BANKRUPTCY, AND THE RESTRAINTS WHICH THEY IMPOSE ON THE VOLUNTARY
ACTS OF THE DEBTOR.

CHAP. I. OF INSOLVENCY AND BANKRUPTCY,	152
SEC. 1. OF INSOLVENCY,	153
SEC. 2. OF BANKRUPTCY,	154
SUBSEC. 1. Of Notour Bankruptcy,	156
1. Insolvency as an ingredient in Notour Bankruptcy,	159
2. Diligence by Horning and Caption,	<i>ib.</i>
3. Imprisonment and its Equivalents,	160
Imprisonment,	<i>ib.</i>
Forcibly defending,	162
Absconding,	<i>ib.</i>
Retiring to Sanctuary,	163
4. Provisions introduced by later Statutes,	<i>ib.</i>
5. Date of Actual Bankruptcy,	165
SUBSEC. 2. Constructive or Retrospective Bankruptcy,	166
SUBSEC. 3. Termination of Bankruptcy,	168
CHAP. II. OF EMBEZZLEMENT OF FUNDS BY INSOLVENT DEBTORS, AND OF ALIENATIONS TO RELATIONS AND CONFIDANTS,	170
SEC. 1. COMMENTARY ON THE FIRST BRANCH OF THE STATUTE 1621, C. 18,	171
SUBSEC. 1. Title to Challenge,	172
Challenge by a Single Creditor,	173
Challenge by a Trustee,	174
SUBSEC. 2. Grounds of Challenge,	<i>ib.</i>
1. Description of Conjunct and Confident Persons,	<i>ib.</i>
2. Consideration for which the Deed is granted,	176
Original Deeds,	<i>ib.</i>
Deeds in fulfilment of Prior Obligations,	177
3. Question of Solvency,	180

TABLE OF CONTENTS.

IX

	PAGE
SUBSEC. 3. Form of the Challenge,	181
SUBSEC. 4. Effect of the Nullity,	182
SEC. 2. OF ALIENATIONS WITHOUT ONEROUS CONSIDERATION AS REDUCIBLE AT COMMON LAW,	184
CHAP. III. OF CONVEYANCES TO THE PREJUDICE OF DILIGENCE BEGUN AGAINST THE DEBTOR'S ESTATE,	184
1. TITLE TO CHALLENGE,	186
2. DEEDS LIABLE TO CHALLENGE,	188
Payment,	<i>ib.</i>
<i>Nova Debita</i> ,	<i>ib.</i>
3. EFFECT OF THE REDUCTION,	190
CHAP. IV. OF PREFERENCES TO PARTICULAR CREDITORS AFTER BANKRUPTCY, ACTUAL OR CONSTRUCTIVE,	191
SEC. 1. COMMENTARY ON THE STATUTE OF 1696, C. 5, AS AMENDED BY 54 GEO. III. C. 137,	192
SUBSEC. 1. Of Alienations in Satisfaction or Security of Debts already due,	194
1. Title to Challenge,	<i>ib.</i>
2. Form of Action,	196
3. Deeds liable to Challenge,	<i>ib.</i>
Deeds of direct Alienation or Preference,	<i>ib.</i>
Deeds operating indirectly in constituting Preference,	198
Supplementary Deeds or Acts,	200
Securities and Payments forming Exceptions to the Rule of the Statute,	<i>ib.</i>
1. Payments in Cash,	201
2. Transactions in the course of Trade,	202
3. <i>Nova Debita</i> ,	205
Date of the Deed,	213
4. Effect of the Reduction,	216
SUBSEC. 2. Of Securities for Debts to be afterwards contracted, and of the Manner of securing a Cash Account Heritably,	218
1. Description of Securities for Future Debts,	219
2. Method of securing Cash Accounts,	220
SEC. 2. OF ALIENATIONS AND SECURITIES OBJECTIONABLE AS FRAUDS AT COMMON LAW,	226
SEC. 3. OF PAYMENTS MADE, AND TRANSACTIONS ENTERED INTO, BY THE BANKRUPT AFTER SEQUES- TRATION,	232

PART II.

OF PROCEEDINGS AGAINST THE ESTATE OF A BANKRUPT OR INSOLVENT DEBTOR.

CHAP. I. OF JUDICIAL SALE OF LANDS, AND OF THE RANKING OF THE CREDITORS UPON THE PRICE,	233
SEC. 1. DESCRIPTION AND NATURE OF THE ACTION OF RANKING AND SALE—DISTINCTIONS WHEN PURSUED BY A CREDITOR OR BY AN APPARENT HEIR—LEGAL EFFECTS OF THE COMMENCE- MENT OF THE ACTION,	236

	PAGE
SUBSEC. 1. Nature and Objects of the Process of Judicial Sale,	236
SUBSEC. 2. Title to pursue this Action,	240
SUBSEC. 3. Subjects liable to Judicial Sale,	242
SUBSEC. 4. Litigiosity,	243
SEC. 2. SEQUESTRATION OF HERITABLE ESTATES, AND MANAGEMENT PREVIOUS TO JUDICIAL SALE,	244
Nature of this Process,	<i>ib.</i>
Effect,	245
Form and Proceedings,	<i>ib.</i>
Factor,	246
SEC. 3. OF THE ELECTION, POWERS, AND DUTIES OF COMMON AGENT IN THE SALE, AND OF THE COMMITTEE OF CREDITORS,	247
SUBSEC. 1. Of the Common Agent,	<i>ib.</i>
SUBSEC. 2. Of the Committee of Creditors,	250
SEC. 4. OF THE SALE OF LANDS,	<i>ib.</i>
SUBSEC. 1. Proof of the Value of the Lands,	251
SUBSEC. 2. Place, and Time, and Notice of Sale,	254
SUBSEC. 3. Preparations for the Sale, Articles of Roup, and Consignation and Discharge of the Price,	<i>ib.</i>
SUBSEC. 4. Of the Purchaser's Title, of the Effect of Stipulations in the Articles of Roup, and of the Extent of the Right,	257
1. Questions on the Purchaser's Title,	258
2. Questions on the Extent of the Right conveyed,	262
SEC. 5. OF THE RANKING OF THE CREDITORS AFTER JUDICIAL SALE,	264
SUBSEC. 1. Proof of Debts,	266
SUBSEC. 2. Effect of Certification,	<i>ib.</i>
SUBSEC. 3. State of Claims, and Order of Ranking,	267
SUBSEC. 4. Decree of Ranking,	<i>ib.</i>
SUBSEC. 5. Scheme of Division, Interim Warrants, and Final Decree,	268
CHAP. II. OF JUDICIAL SALE UNDER THE SEQUESTRATION LAW,	269
CHAP. III. OF SALES BY CREDITORS UNDER POWERS CONTAINED IN THEIR SECURITIES,	<i>ib.</i>
1. EFFECT OF THE CLAUSE OF SALE AGAINST THE DEBTOR AND HIS REPRESENTATIVES,	270
2. EFFECT OF IT AGAINST SUBSEQUENT SECURITIES,	272
CHAP. IV. OF THE PROCESSES FOR DISTRIBUTING THE MOVEABLE OR PERSONAL ESTATE, WHERE THE DEBTOR IS NOT A TRADER,	275
SEC. 1. OF THE ACTION OF MULTIPLEPOINDING,	276
SEC. 2. OF THE PROCESS OF FORTHCOMING CONSIDERED AS A PROCESS OF DISTRIBUTION,	280
SEC. 3. OF THE PROCESS OF DISTRIBUTION OF THE PRICE OF POINDED GOODS,	<i>ib.</i>
CHAP. V. OF THE SEQUESTRATION OF THE ESTATES OF BANKRUPTS,	281
SEC. 1. PROCESS OF SEQUESTRATION,	<i>ib.</i>
1. History of the Law of Sequestration,	<i>ib.</i>
2. Nature and Object of Sequestration,	283

TABLE OF CONTENTS.

XI

	PAGE
3. Forum,	283
4. Whose Estates may be sequestrated,	284
5. Application for and awarding of Sequestration,	285
6. Qualification of Creditors,	288
7. Citation of Debtor,	293
8. Awarding Sequestration after Citation,	<i>ib.</i>
9. Recall of Sequestration,	294
10. Publication and recording of Sequestration,	297
11. Protection and Liberation of the Debtor,	298
12. Interim Preservation of the Estate,	299
SEC. 2. CONSTITUTION OF THE TRUST,	302
13. The Trustee, and who may be elected,	<i>ib.</i>
14. Creditor's Oath to Vote and Claim,	304
15. Accounts, Vouchers, and Title,	309
16. Meeting for and Election of the Trustee,	312
17. Confirmation, Removal, Resignation, and Death of Trustee,	315
18. Duties and Liabilities of the Trustee,	318
19. Duties of Commissioners, Accountant, and Agent,	320
20. Accountant,	322
21. Agents,	<i>ib.</i>
22. Bankrupt's Duties and Rights,	323
SEC. 3. INVESTIGATION, MEETINGS OF CREDITORS, AND JUDICIAL PROCEEDINGS,	325
23. Examination of the Bankrupt,	<i>ib.</i>
24. Examination of others than the Bankrupt,	327
25. Evidence of Bankrupt, and Reference to his Oath,	329
26. Meetings of Creditors,	330
27. Review of Resolutions and Judgments,	331
SEC. 4. ATTACHMENT, VESTING, MANAGEMENT, AND REALIZATION OF THE ESTATE,	333
28. Effect of Sequestration. Diligence,	<i>ib.</i>
29. Vesting of the Moveable Estate in the Trustee,	334
30. Vesting of the Heritable Estate in the Trustee,	337
31. Heritable Estate of a deceased Debtor,	341
32. Real Estate out of Scotland,	<i>ib.</i>
33. Management of the Estate,	342
34. Sale of the Moveable Estate,	344
35. Sale of Heritable Estate,	<i>ib.</i>
36. Liability of Heritable Creditors for Expenses,	346
SEC. 5. COMPOSITION CONTRACT, DISTRIBUTION OF THE FUNDS, WINDING UP, AND DISCHARGE,	348
37. Composition Contract,	<i>ib.</i>
38. Enforcement and Challenge of the Composition Contract,	358
39. Fund of Division, and Ranking of Creditors,	361
40. Payment of Dividends,	365
41. Winding up the Estate,	366
42. Discharge of the Bankrupt,	367
43. Discharge of the Trustee, Unclaimed Dividends, and Surplus,	373

	PAGE
44. Winding up the Estate of a deceased Debtor,	374
45. Discharge of Bankrupt as in <i>Cessio</i> ,	375
SEC. 6. INTERNATIONAL LAW IN RELATION TO BANKRUPTCY,	<i>ib.</i>
46. General Principles of International Law and Bankruptcy,	<i>ib.</i>
47. Effect of International Law on Moveable Estate,	376
48. Effect of International Law on Real Estate,	378
49. Bankrupt's Discharge or Certificate,	379

PART III.

OF EXTRAJUDICIAL SETTLEMENTS BETWEEN INSOLVENT DEBTORS AND THEIR CREDITORS.

CHAP. I. OF TRUST-DEEDS INDEPENDENTLY OF ACCESSION BY THE CREDITORS,	382
SEC. 1. OF TRUST-DEEDS FOR BEHOOF OF CREDITORS NOT AFFECTED BY THE BANKRUPT STATUTES,	383
1. Conditions of the Trust,	<i>ib.</i>
2. Requisites of the Trust Conveyance,	384
SEC. 2. EFFECT OF THE BANKRUPT LAWS ON TRUST-DEEDS NOT ACCEDED TO BY ALL THE CREDITORS,	387
1. Insolvency alone no Ground of Challenge,	<i>ib.</i>
2. Effect of the Bankrupt Acts of 1621 and 1696 on Trust-deeds,	388
3. Effect of Sequestration Statute,	390
SEC. 3. EFFECT OF TRUST WITHOUT ACCESSION AGAINST RANKING AND SALE OR SEQUESTRATION,	<i>ib.</i>
SEC. 4. EFFECT OF TRUST-DEEDS IN RELATION TO THE CREDITORS,	391
CHAP. II. OF MUTUAL CONTRACTS BY TRUST-DEED AND DEED OF ACCESSION,	392
SEC. 1. OF THE TRUST-DEED,	393
SEC. 2. ACCESSION OF THE CREDITORS,	<i>ib.</i>
1. Accession in General,	<i>ib.</i>
2. Deed of Accession, and chief Points to which it is commonly directed,	395
CHAP. III. OF THE ADMINISTRATION OF THE TRUSTEE,	396
CHAP. IV. DISCHARGE OF THE BANKRUPT, AND EXONERATION OF THE TRUSTEE,	397
SEC. 1. SUPERSEDERE AND DISCHARGE OF THE BANKRUPT,	<i>ib.</i>
SEC. 2. EXONERATION OF THE TRUSTEE,	398
SEC. 3. OF PRIVATE COMPOSITIONS,	<i>ib.</i>

PART IV.

OF THE DIVISION OF THE FUNDS AMONG THE CREDITORS.

CHAP. I. OF THE FUNDS OF DIVISION,	401
CHAP. II. ORDER OF RANKING OF CREDITORS HOLDING SECURITIES,	402
SEC. 1. ORDER OF RANKING OF CREDITORS HOLDING SECURITIES OVER THE FEUDAL ESTATE NOT DISTURBED BY EXCLUDING DILIGENCE OR CONSENTS,	<i>ib.</i>
SEC. 2. RANKING OF CREDITORS CLAIMING PREFERENCES OVER THE HERITABLE PROPERTY UNFEU- DALIZED,	405

TABLE OF CONTENTS.

XIII

	PAGE
SEC. 3. RANKING OF CREDITORS HOLDING SECURITIES OVER THE MOVEABLE FUND,	405
1. Goods in General,	406
2. Debts in General,	<i>ib.</i>
3. Specialties respecting Moveables and Debts of particular kinds,	<i>ib.</i>
SEC. 4. RANKING OF CREDITORS ENTITLED TO PREFERENCES BY EXCLUSION,	407
CHAP. III. ORDER OF RANKING OF CREDITORS HOLDING DOUBLE SECURITIES,	414
SEC. 1. EFFECT OF DOUBLE SECURITIES WHERE THERE ARE NONE SECONDARY,	<i>ib.</i>
1. One indivisible Estate over which the Creditor holds double Securities,	<i>ib.</i>
2. Two or more distinct Subjects over each of which there are Securities for the same Debt,	415
3. Where the Creditor holds Collateral Securities by Caution, or over Property not belonging to the Bankrupt,	416
SEC. 2. RANKING OF CATHOLIC AND SECONDARY SECURITIES,	417
CHAP. IV. RIGHT OF CREDITORS HOLDING SECURITIES TO RANK ON THE GENERAL FUND,	419
CHAP. V. RANKING OF PRINCIPALS AND SECURITIES, AND OF ACCOMMODATION AND CROSS BILLS,	420
CHAP. VI. EFFECT OF PAYMENTS AND INTROMISSIONS ON THE CLAIMS OF CREDITORS HOLDING SECURITIES,	424
OF INDEFINITE PAYMENTS,	427

PART V.

OF PROCEEDINGS AGAINST THE PERSON OF THE BANKRUPT.

GENERAL SPIRIT OF THE LAW OF IMPRISONMENT FOR DEBT,	428
CHAP. I. OF IMPRISONMENT FOR CIVIL DEBT,	430
SEC. 1. OF THE WARRANT FOR IMPRISONMENT, AND OF ITS EXECUTION,	435
SEC. 2. OF THE CUSTODY OF PRISONERS,	439
1. Provision for Sickness of Prisoners,	440
2. Provision for the Maintenance of Prisoners,	444
3. Act of Grace,	445
CHAP. II. OF IMPRISONMENT AS IN MEDITATIONE FUGÆ,	449
SEC. 1. OF THE PROCEEDINGS IN MEDITATIONE FUGÆ,	450
1. Proofs necessary to Authorize the Debtor's Apprehension,	451
2. Proofs and Proceedings after Apprehension,	452
SEC. 2. EFFECT OF THE WARRANT DE MEDITATIONE FUGÆ,	456
SEC. 3. CLAIMS OF DAMAGES ON MEDITATIONE FUGÆ WARRANTS,	457

	PAGE
CHAP. III. OF PROTECTIONS AGAINST IMPRISONMENT BY SANCTUARY, PRIVILEGE, OR JUDICIAL AUTHORITY,	458
SEC. 1. OF EXEMPTION FROM IMPRISONMENT BY PERSONAL PRIVILEGE,	458
1. Infants and other Incapable Persons,	<i>ib.</i>
2. Privilege of Parliament,	460
SEC. 2. PROTECTION BY PRIVILEGE OF TIME OR PLACE,	<i>ib.</i>
1. Holidays,	<i>ib.</i>
2. Sanctuary,	461
SEC. 3. PERSONAL PROTECTION AND SUPERSEDERE,	465
CHAP. IV. OF CESSIO BONORUM,	470
SEC. 1. TITLE TO PURSUE,	473
SEC. 2. NATURE OF THE ACTION—PERSONS TO BE CALLED AS DEFENDERS—ONUS PROBANDI,	477
SEC. 3. DEFENCES—ONUS PROBANDI,	479
SEC. 4. INTERLOCUTOR—DISPOSITION OMNIUM BONORUM—OATH—DECREE OF CESSIO,	481
CHAP. V. OF FRAUDULENT BANKRUPTCY,	486
CONCLUSION OF BOOK VI.—GENERAL REVIEW OF THE PRACTICAL APPLICATION OF THE BANKRUPT LAW,	488
1. Consultation by a Person Insolvent how to arrange with his Creditors,	<i>ib.</i>
2. Consultation by Creditors how to settle an impending Bankruptcy,	491
3. Of some Points in the Vesting of Estates in Trust, Judicial or Voluntary,	496

BOOK VII.

OF PARTNERSHIP.

CHAP. I. GENERAL VIEW OF THE PRINCIPLES OF PARTNERSHIP,	500
SEC. 1. OF THE COMMON PROPERTY OR STOCK OF THE COMPANY,	<i>ib.</i>
SEC. 2. POWERS OF ADMINISTRATION IN THE PARTNERS,	503
SEC. 3. PERSONAL RESPONSIBILITY OF PARTNERS,	507
SEC. 4. COMPANY A SEPARATE PERSON IN LAW,	<i>ib.</i>
SEC. 5. DELECTUS PERSONÆ,	508
CHAP. II. OF PARTNERSHIP PROPER,	510
SEC. 1. CONSTITUTION OF PRIVATE PARTNERSHIP,	<i>ib.</i>
SEC. 2. OF JOINT-STOCK COMPANIES, AND THE DISTINCTION BETWEEN A FIRM AND A DESCRIPTIVE NAME,	516
SEC. 3. OF THE DISSOLUTION OF PARTNERSHIP,	520
1. Dissolution of Partnership in relation to the Parties,	521
2. Dissolution of Partnership in relation to Third Parties,	528
3. Final Settlement of the Affairs of the Company on Dissolution,	535
SEC. 4. RIGHTS OF PARTNERS BY PARTICULAR STIPULATIONS,	<i>ib.</i>

TABLE OF CONTENTS.

XV

	PAGE
CHAP. III. OF JOINT ADVENTURE,	538
CHAP. IV. OF PART OWNERSHIP,	544
CHAP. V. OF PUBLIC COMPANIES HAVING PRIVILEGE BY CHARTER OR ACT OF PARLIAMENT,	545
CHAP. VI. OF CLAIMS ARISING ON THE BANKRUPTCY OF COMPANIES OR OF PARTNERS,	547
SEC. 1. CLAIMS ARISING ON THE BANKRUPTCY OF A PARTNER, THE COMPANY REMAINING SOLVENT, .	<i>ib.</i>
SEC. 2. CLAIMS ARISING ON BANKRUPTCY OF THE COMPANY, THE PARTNER REMAINING SOLVENT, .	548
SEC. 3. CLAIMS ARISING ON THE BANKRUPTCY OF THE COMPANY AND OF ITS PARTNERS,	549
CHAP. VII. OF THE DOCTRINE OF ELECTION WHERE SEVERAL FIRMS HAVE BEEN USED AMBIGUOUSLY,	558
CHAP. VIII. OF PROCEEDINGS FOR DISTRIBUTION OF THE FUNDS OF THE COMPANY AND OF THE PARTNERS AMONG THE CREDITORS,	560
SEC. 1. PROCEEDINGS TO RENDER THE COMPANY BANKRUPT,	<i>ib.</i>
SEC. 2. OF PROCEEDINGS BY SEQUESTRATION ON THE BANKRUPTCY OF COMPANIES,	562

CONCLUSION.

OF THE MUTUAL RELATIONS OF THE SCOTTISH AND FOREIGN LAWS IN BANKRUPTCY.

SEC. 1. OF PROCEEDINGS AGAINST DEBTORS ABROAD,	568
SEC. 2. EFFECT OF BANKRUPTCY IN THE COUNTRY OF THE DEBTOR'S DOMICILE,	569
Proceedings against the Estate,	<i>ib.</i>
SEC. 3. RECIPROCAL EFFECT OF THE BANKRUPT'S CERTIFICATE OR DISCHARGE,	575

INDEX,	579
TABLE OF CASES CITED BY THE AUTHOR,	687
TABLE OF CASES CITED BY THE EDITOR,	717

ERRATUM.

Vol. I. p. 626. The sections of the Merchant Shipping Act quoted with reference to the Rule of Road at sea are repealed by 25 and 26 Vict. c. 63, schedule (C), and rules slightly different are substituted. The new rules have been adopted by several of the European maritime powers.

COMMENTARIES

ON

THE LAW OF SCOTLAND.

BOOK V.

OF REAL SECURITIES OVER THE MOVEABLE ESTATE.

CHAPTER I.

DISTINCTION BETWEEN HERITABLE AND MOVEABLE PROPERTY.

THE distinction between heritable and moveable property is one of the most important [1] in practical jurisprudence. In relation to questions of succession, and the law of death-bed,—to the diligence required for attaching property,—to the forms of conveyancing,—to the rights of husband and wife,—to the effect of the Crown's diligence,—to the efficacy of foreign deeds, this distinction is essentially necessary to be settled. And in passing from the view of those securities which affect the heritable estate, to those which affect the moveable estate, a fit occasion seems to be presented for considering this question.

According to the division of the Roman law, things were corporeal or incorporeal; the former comprehending such property as is perceptible to sense, the latter such as consists in legal right merely. This is a division consistent with nature, and which ought not to be discarded.

SECTION I.

THINGS CORPOREAL DISTINGUISHED AS HERITABLE OR MOVEABLE.

Things corporeal are distinguished in law as heritable or moveable, *first*, By their own nature and description; *secondly*, By their connection with other things; *thirdly*, By the destination towards such connection.

1. NATURE OF SUBJECT.—The leading rule by which things corporeal are distinguished, as in their own nature heritable or moveable, is, that land and the several parts and pertinents of land, and generally everything in its nature immoveable, or which, though it

may possibly be moved, is not as a whole used to be so, is in law held as heritable. Whatever by its own nature, and by use, is as a whole capable of being moved from place to place, is in law held to be moveable.¹

2. CONNECTION.—By connection with land, things which in their own nature fall under the class of moveables become heritable. Houses and other buildings furnish the most common examples. Fixtures, on the same principle, are heritable. We have already had occasion to consider this subject.² Referring to that discussion, the rule now seems to apply to ordinary fixtures, and to buildings, and even machinery intended for the permanent use of the land;³ while an exception seems admissible of those things which, being naturally in the class of moveable or personal property, may be said to have only an accidental or temporary connection with land or houses, as mainly destined for the occasions of a trading establishment.

Natural fruits, which require not seed and cultivation, are before separation heritable, as parts of the soil; industrial fruits are moveable, as manufactures, towards the creation of which recourse is had to the productive powers of the earth.⁴ Woods or natural grass furnish examples of the former; corn, of the latter. Of grass sown with white crops, the hay of the second crop (the first crop having come up along with the corn) is held heritable.⁵

But natural fruits, trees, minerals, stones, etc., heritable by connection, and while forming part of the soil, become pure moveables on separation.⁶

All corporeal subjects which are moveable, and not attached to land, or which are capable of being removed from their place, without injury or change of nature to themselves, or to the subject with which they may be connected, are moveable; carried by confirmation after death, and attached by arrestment and poinding during life. Neither size nor value is regarded in this question. Ships, valuable beyond most other moveables, are ranked in this class.

3. DESTINATION.—By express destination a moveable subject may be declared heritable; a jewel or picture, for example, may be entailed.⁷ And by tacit and implied destination, a similar effect in questions of succession between heirs and executors may be produced. Thus, 1. The materials which either have composed a building that has been accidentally thrown down, or those which are deposited for the purpose of being built up, as part of a structure actually begun and proceeding, are heritable by destination. The Roman law, in regulating the question of accession between the seller and purchaser, admitted a distinction between these two cases;—the presumption of an intention of reunion being held to imply accession; that of an intention to make use of new materials being considered as insufficient to combine the materials with the subject.⁸ Erskine (ii. 2. 14) lays this down as the law [3] of Scotland in the question of succession, though a very different principle ought to operate in any presumption of will as regulating the succession. It has accordingly been decided, that building materials, though newly provided, are to be held as accessories, and

¹ Stair ii. 1. 2.

² See above, vol. i. p. 786.

³ [Fisher v Dixon, 1843, 5 D. 775; aff. 26 June 1845, 4 Bell 285.]

⁴ Stair ii. 1. 2; Ersk. ii. 2. 4.

⁵ Sinclair v Dalrymple, 1744, M. 5422; Wight v Inglis, 1796, M. 5446; M. of Tweeddale v Somner, 19 Nov. 1816. See in Fac. Coll. the interlocutor of Lord Alloway, p. 214, and the opinion of Lord Balgray, which show that the Court had before them all the difficulties proceeding from the late improvements in sown grasses. [These decisions are at least doubtful in point of principle. As between landlord and tenant, hay of the second year is now regarded as an industrial crop. Keith v Logie's Heir, 1825, 4 S. 272; Lyall v Cooper, 1832, 11 S. 96. See Princ. 1473.]

⁶ Bruce v Erskine, 1707, M. 14092. [Hence growing trees, being *pars soli*, can only be transferred in property along with the land itself. Paul v Cuthbertson, 3 July 1840, 2 D. 1286. But shrubs and plants growing in a nursery for sale seem to be moveable, on the same principle as industrial crops. Begbie v Boyd, 1837, 16 S. 232; Gordon v Gordon, 1806, Hume 188. *Idem*, as to greenhouses and frames. Syme v Harvey, 1861, 24 D. 202.]

⁷ The effect of this on third parties is another question. But, *inter hæredes*, it thus becomes heritable. [See Veitch v Young, 1808, M. App. Service 4; Baillie v Grant, 21 May 1859, 21 D. 1838.]

⁸ *Ea quæ ex ædificio detracta sunt ut reponantur ædificii sunt; at quæ parata sunt ut imponantur non sunt ædificii.* Dig. lib. 19, tit. 1; De Act. Empt. l. 17, sec. 10.

heritable, where they are fitted to the house, and the operation is actually proceeding;¹ but it is not yet fixed whether such alterations (effectual in questions of succession *ex presumpta voluntate*) are sufficient to rule the diligence to be used for attaching such property. They certainly will affect it where the debtor has died, and the creditor has to proceed against the succession; service and adjudication, not confirmation, being the methods of attaching and making up titles to subjects heritable *destinatione*. And the analogy will probably be held to rule the diligence during the debtor's life.² 2. This principle of presumed destination may, in questions of succession, be applied to rule the question as to moveable subjects, often of considerable value,—namely, collections of manure prepared for agriculture. In the civil law, dunghills where held to be accessories of the soil; a distinction, however, being admitted where the usual practice of the farm, or the established intention of the proprietors, was to sell them separately.³ With us, in questions between landlord and tenant, they are held moveable; in questions of succession during a lease, or on the death of a proprietor farming his own land, they might perhaps be regarded as heritable.⁴ 3. Heirship moveables are by destination heritable. These are the best of certain moveables, which by presumed destination are excepted from the right of the nearest in kin, and appropriated to the heir's use, that he may not succeed to his mansion and estate totally dismantled.⁵

SECTION II.

THINGS INCORPOREAL DISTINGUISHED AS HERITABLE OR MOVEABLE.

Following the same course with corporeal subjects, rights of an incorporeal nature partake of the character of heritable or moveable, either, 1. By their nature; 2. By connection; or, 3. By destination.

1. Rights are heritable or moveable, according as the MATTER thereof is heritable or moveable. 1. All real rights to the ground, whether rights of property or rights in security, whether in fee or in liferent, common, servitude, reversion, leases, rights of annualrent, wadsets, heritable bonds and dispositions,⁶ reserved burdens, and faculties to burden, are heritable. 2. Rights which are in their nature personal, affecting the person only, and demandable as such, are moveable. This holds, though the debtor may be liable as holder of an heritable fund. Thus, (1.) The right of a partner in a trading concern is properly a *jus crediti* against the company,—a share of the *jus incorporale*, not of the individual subjects; therefore stock in trade is moveable, although the company be possessed of heritable property.⁷

¹ *Johnson v Dobie*, 1783, M. 5443, Hailes 919. [Money required to complete a house in course of erection was held heritable in a question with a child claiming legitim. *Malloch v M'Lean*, 1867, 5 Macph. 335. See *Robson v Macnish*, 1861, 23 D. 420.]

² [‘The character thus accidentally impressed on subjects by destination is not admitted to change them in respect to diligence. *Forbes v Drummond*, 1772, 5 B. S. 583.’ Princ. 1475.]

³ See Ulpian's doctrine, and his approval of Trebatius' distinction, Dig. 19, 1 de Act. Empt. l. 17, sec. 2.

⁴ [This distinction is more than doubtful. *Lees v Wilson*, 1808, Hume 191, Princ. 1475.]

⁵ See 1474, c. 53. Stair iii. 5. 9; Ersk. iii. 8. 17. See Hope's Minor Practics for a list. [The right to heirship moveables is abolished. 31 and 32 Vict. c. 101, sec. 160.]

⁶ [Heritable securities are now moveable with regard to the creditor's succession, unless executors are expressly ex-

cluded in the original security, or in an assignation or recorded minute. But such securities remain heritable in questions between husband and wife with regard to the fisc, and in computing legitim. 31 and 32 Vict. c. 101, sec. 117.]

⁷ *Nelson and Rae*, 1742, M. 716, Elch. Arrestment 20, and Society 7. This applied where part of the company's stock was bonds, bearing interest. *Young v Campbell*, 1790, M. 5495, where an heritable bond formed part of the fund. *Corse*, petitioner, 1802, M. App. Her. and Mov. No. 2, where a dockyard was part of the company's stock. *Sime v Balfour*, 1804, M. App. Her. and Mov. No. 3, where the stock of the company consisted of houses. See Lord Eldon's opinion on remitting, 20 July 1811, 19 Fac. Coll. 684, 5 Pat. 525. *Murrays v Murray*, 1805, M. App. Her. and Mov. 4. In these three last cases the subjects in question were heritable, but the partner's share was held moveable, as part of the stock. [*Irvine v Irvine*, 1851, 13 D. 1367; *Minto v Kirkpatrick*, 23 May 1833, 11 S. 632.]

[4] (2.) Shares in the stock of a public company are on a similar principle moveable. There is nothing peculiar in such stock that should alter the condition of the *jus crediti* from moveable to heritable, unless by the statute or charter of erection such alteration is made. The three public banks of Scotland are incorporated as bodies politic, under the authority or sanction of Acts of Parliament;¹ but the charters contain nothing to alter the natural condition of the *jus crediti*. On the contrary, it is directed to be confirmed as moveable or personal estate. But although bank stock is thus moveable, and transmitted on death by the forms applicable to moveable succession, yet where it is declared by the charter of erection not to be subject to arrestment or attachment, adjudication seems to be the only mode fit for accomplishing the transfer of such stock by legal diligence.²

2. Rights, though not yet completed as real rights, provided they are CONNECTED WITH or affect LAND, and the creditor has it in his power to complete them, are heritable. An heritable bond, for example, on which sasine has not yet been taken, is heritable.³ But where the connection with land is suspended, the right in the meanwhile is moveable. So, where an heritable bond contained a warrant for infeftment, failing payment at the term, the right (which by the infeftment would have been from connection heritable) remains moveable.⁴

3. Rights having a tract of FUTURE TIME, though of a personal nature, and unconnected with land, are heritable.⁵ The precise character of such a right is, that it is periodical and future; the payments not being the mere fruits or accessories of a capital or principal debt vested in the person who holds the right, but falling to the creditor as periodical payments, independent of each other, the right to each vesting only at the elapse of the successive terms of payment. A right of annuity is a proper example of this;⁶ so is a liferent of a sum;⁷ so the husband's interest in a bond due to a wife, of which the capital is hers, the interests only as they accrue being his.⁸ But no debt is considered as having a tract of future time, merely because the term of payment is postponed, although interest in the meanwhile be periodically payable; nor because it is payable by instalments. For in these cases the whole debt vests absolutely from the first.⁹ Bank stock or Government stock are not held as having a tract of future time, or as heritable on that account; for they have relation to a precise capital or principal sum, which in the eye of law is due, and vests, although the sum can be procured only by carrying the right to market.¹⁰ When a right having a tract of future time is adjudged, the periodical payments become attached as they fall due; the arrears are properly moveables. See below, p. 9.

[5] 4. TITLES of honour, and offices which are granted to continue after the death of the patentee or office-bearer, are heritable.¹¹

5. The JUS CREDITI under a deed of trust for others than the truster, is in the general case moveable; where it is intended to vest a specific heritable subject, it is held heritable.¹² The doubtful case is, where the trustees are to sell and pay off debts, and to distribute the proceeds, or convey over the unsold estates. In such a case, accord-

¹ See above, vol. i. p. 101.

² See above (vol. i. p. 100 et seq.), in respect to Government Stock, Bank Stock, Patents, and Copyright, all that seems to be necessary on the question of heritable and moveable.

³ Ersk. ii. 5. *Menzies v Menzies*, 1738, M. 5519. Here sasine was not taken, and the creditor died before the term of payment. [*Hadaway v Barker*, 1830, 8 S. 800.]

⁴ *Fisher v Pringle*, 1718, M. 5516; Ersk. ii. 2. 5.

⁵ Ersk. ii. 2. 6.

⁶ *E. of Dalhousie v Gilmour*, 1789, M. 15915.

⁷ *Ewing v Drummond*, 1752, M. 5476.

⁸ *Clunie's Crs. v Sinclair*, 1739, M. 713.

⁹ [*Hogg v Grieve*, 1807, Hume 189; *Fraser v Bowie*, 1804,

Hume 210; *Haining v Young*, 1808, Hume 214; *Gray v Walker*, 1859, 21 D. 709.]

¹⁰ *Murray*, 1710, M. 5470; *Sir John Dalrymple*, 1735, M. 5478; *Hog*, 1791, M. 5478.

¹¹ Ersk. ii. 2. 6.

¹² *Grierson v Ramsay*, 1780, M. 759, Hailes 855. See p. 5, note 8. *Angus v Angus*, 1825, 4 S. 279. Observe the distinction between that case and *Durie v Coutts*, 1791, M. 4624. In *Angus'* case, it was a general right to call the trustees to account for a share of the proceeds of an estate. In *Durie's*, the right was to a share of an heritable subject specifically conveyed. In the former the right was held moveable; in the latter it was held heritable. See also *Wilson v Smart*, 31 May 1809, F. C.

ingly, much doubt was entertained; but the Court held the heir to have right to the unsold estates.¹

6. Debts, in their own nature and original constitution, personal and moveable, may become heritable by a COLLATERAL SECURITY being superadded to them, though not completed into a real right.² Thus, 1. Personal bonds, containing an assignation to an heritable subject in further security, are heritable.³ And this holds even where the assignation is separate, and the subject assigned a lease; so that a creditor of the person to whom the debt so secured is due, cannot attach it by arrestment.⁴ 2. Where an heritable bond has been taken for the debt, either by the creditor himself, or during his absence from the country by his commissioner or attorney, properly empowered to regulate the investment of his money, the right is heritable.⁵ In the same way, where the creditor has accepted an heritable bond of corroboration, or has adjudged, the debt becomes heritable as soon as the heritable bond is delivered or the decree is pronounced; but should the creditor die before decree is pronounced, the debt remains unaffected.⁶ 3. Where the debtor conveys his lands to his creditors by name, for security and payment of their debts, and the creditors are with their own consent infeft, the debts become heritable, and so continue while the conveyance remains in force. The same effect is produced where the land is conveyed to a trustee for behoof of creditors specially named, and where the trustee is infeft, and the creditors have acceded to the trust.⁷ But where the trust is merely for the purpose of selling and paying the debts, the creditors have no real right, and the condition of the debts remains unaltered.⁸

¹ *Burrell v Burrell*, 1825, 4 S. 314. [It is quite clearly settled that an *express direction* to sell effects is a conversion of the beneficiary's interest from heritable to moveable, whether it has actually been carried into effect or not; and as this constructive conversion proceeds on the principle of giving effect to the testator's intention, it has place also in the case of an implied direction to sell, i.e. where there is a power of sale, and it is *indispensable* to the execution of the trust that it should be carried into effect. *Buchanan v Angus*, 13 March 1860, 22 D. 979, revd. 4 Macq. 374; *Weir v Lord Advocate*, 22 June 1865, 3 Macph. 1006; *Speirs v Speirs*, 21 Nov. 1850, 13 D. 81. It would seem that a different rule must be applied to determine the quality of the succession to the testator himself, where questions arise between his heirs in heritage and in moveables. *Cathcart v Cathcart*, 26 May 1830, 8 S. 810; *Patrick v Nichol*, 1838, 1 D. 207; *Pearson v Ogilvie*, 1857, 20 D. 105; *White v White*, 1860, 22 D. 1335. See, on this subject, *Wills and Succession*, vol. i. 207-229.]

² *Stair* ii. 1. 3.

³ *Ersk.* ii. 2. 12. *Fraser's Trs. v Fraser*, 1749, M. 5491. [An assignation to the rents of an entailed estate, with infeftment limited to that effect, was held with difficulty not to make a debt heritable. *Massie's Trs. v Massie*, 1816, Hume 193. And a marriage contract provision was held to remain moveable, although the husband assigned to the trustees an heritable bond to the amount due. *Meiklam's Trs. v Mrs. Meiklam's Trs.*, 1852, 15 D. 159. In *Napier v Orr*, 1864, 3 Macph. 57, a family provision made a real burden on lands was held heritable.]

⁴ *Watson v M'Donnell*, 1794, M. 731. [But such an assignation of a lease did not affect the creditor's succession. *Duncan v Rae*, 15 Feb. 1810, F. C.]

⁵ *Davidson v Kyde*, 1797, M. 5597, aff. 4 Pat. 63. See also *Trotter v Trotter*, 1826, 5 S. 78, aff. 3 W. and S. 407. See below, respecting Tutors, p. 7.

[The agent must be properly authorized. Without the principal's authority, investment of money in land does not appear to affect the quality of the succession. See *M'Millan v M'Millan's Exrs.*, 1824, 3 S. 214; *Marshall v Lyell*, 1859, 21 D. 514, 526. And see below, p. 7, note 7.]

⁶ *Carnegie v Carnegies*, 1700, M. 5537; *Ersk.* ii. 2. 14. Lord Elchies says: 'That the share of the price of lands sold judicially, falling to an adjudger ranked on the estate, is not affectable by arrestment, was agreed among the Lords, but not decided, because of other points to be determined, which they remitted back to the Ordinary.' 9 Dec. 1742. See *Wedderburn's Crs. v M'Kenzie*, Elchies' Arrestment 21.

⁷ *Cave's Crs. v Murray*, 1736, Elchies' Her. and Mov. No. 4. The debt here was held moveable; but in the opinion of the Court, in *Smith v Smith*, 11 Nov. 1737, Elchies, *ib.* No. 6, this decision was bad. *Ersk.* ii. 2. 14. His doctrine, however, is not sufficiently precise.

⁸ *M'Ewan v Thomson*, 1798, M. 5596. The trust-deed here enumerated the debts, and was declared to be for the purpose of selling and paying the debts, and of securing the creditors in the meanwhile, and in case of a sale not taking place. The Court held 'the sole object of the trust to be, to enable the creditors to convert the estate into money, and obtain payment out of the price; and that it neither made, nor was intended to make, the debts real burdens on the lands.' *Grierson v Ramsay*, 1780, M. 759. Here the debts were not enumerated, nor the trustee infeft. The case of *Murray Kinnymond v Cathcart*, 1739, M. 5590, is provisionally denied in the case of *M'Ewan*, if the trust-deed was of the same personal nature. It appears that, besides the trust here, the creditors had assigned their debts to the trustee, and he had adjudged. [The principle appears to be the same as that which fixes the quality of the succession under other trusts; and the creditor's right will be heritable where it is a right in a specific heritable subject, which remains till

[6] A general process of attachment and distribution (as ranking and sale, or sequestration) does not produce any alteration on the nature of the debts claimed under them as heritable or moveable. So the production of a claim in a ranking and sale has been held to have no effect in making a debt heritable.¹

7. The question naturally suggested in the next place is, how far a subject heritable in its nature, or a debt heritable by its connection with land, or in consequence of a collateral right or security, may become moveable by the SALE of the subject? And where the proprietor himself sells his estate voluntarily, the price is moveable from the moment the sale is completed.² The right of creditors whose debts form real burdens is regulated thus:—*First*, If the sale be extrajudicial, and by consent of the creditors, the completion of the sale divests of their heritable character all those debts which became heritable only by the incidental security, although the price should be unpaid; while the claim upon the unsold subjects is heritable.³ *Secondly*, If the sale be judicial, the debts continue heritable till payment.⁴ The statutes respecting judicial sales, and also the late Sequestration Act, relative to lands sold in the course of a sequestration (54 Geo. III. c. 137, sec. 42), preserve to the creditors the effect of their securities, and declare the price to be a real burden upon the lands purchased.⁵ Nay, even the reversion in the purchaser's hands, after paying the heritable debts, has been found heritable and adjudgeable.⁶ *Thirdly*, But if the purchaser has consigned the price in the bank, in terms of the statute,⁷ as the lands are in such case disburdened of the debts, it would seem that each creditor's claim is merely personal, and subject to the diligence of moveables.⁸

8. Recollecting the effect of DESTINATION in altering the condition of corporeal moveables, it seems natural that destination should have still greater effect on the state of *jura incorporalia*. The resolution to recover payment indicates an intention to make the subject moveable; but still this is not conclusive, so as to alter the condition of the right: it may be connected with a further design of again laying out the money on similar security, or purchasing lands; and therefore it is not held sufficient to convert an heritable debt into a moveable, that the creditor has proceeded to take steps for enforcing payment.⁹ This [7] was first decided relative to an heritable bond.¹⁰ Next, it was solemnly decided on a

his debt is paid; moveable, when he can only claim payment from the trustee of the debt, and has no right except in the price of the lands when sold. *Hawkins v Hawkins*, 1843, 5 D. 1035.]

¹ *Henderson v Stewart*, 1796, M. 5534.

² *Chiesly*, 1704, M. 5531. In this case, the sale was not complete: it was a question of succession, and destination had much influence. *Ersk. ii. 2. 17.* A minute of sale will complete the sale in this sense. [Intention was not the ground of decision in *Chiesly*; and even where land is sold under compulsory powers in a statute, but not conveyed or taken possession of, the price belongs to the seller's personal representatives. *Heron v Espie*, 1856, 18 D. 917. See *Garland v Stewart*, 1841, 4 D. 1. But it was held, that where an apparent heir sells lands, the price comes in place of the lands, and belongs to the next heir who makes up titles. *Emslie v Groat*, 1817, Hume 197. Where land is sold by missives, which declare the price a burden on the subject sold, the price is heritable. *Mead v Anderson*, 1828, 6 S. 1034, aff. 4 W. and S. 328.]

³ *Smith v Smith*, 1737, M. 5534; *Elchies*, *Her. and Mov. 6.* See *Dunbar v Brodie*, 1748, M. 5591; *Elchies*, *Her. and Mov. 14.*

⁴ 'As to what was argued for the heir with regard to the subjects sold, that, notwithstanding the sale of a subject adjudged, the debt stood secured by the adjudication, as nothing but payment can extinguish an adjudication, which

is a settled point in judicial sales, the answer was, that judicial sales proceed without consent of the creditor, whose security, therefore, it would be unjust in the law to loose till the creditor should obtain payment, which does not apply to the case of a voluntary sale.' *Kilk. 245, M. 5592.*

⁵ [The present sequestration statute (19 and 20 Vict. c. 79, sec. 102) provides that the transfer and vesting of the bankrupt's heritable estate in the trustee shall have no effect on any question of succession between the heir and executor of any creditor claiming, except that the Act and warrant shall operate in their favour as complete diligence.]

⁶ *Gardiners v Spalding*, 1779, M. 730, *Hailes 842.* [It was doubted in *Heron v Espie*, *supra*, whether this case was decided on the general principle stated in the text. But see *Bell's 8vo Ca. 244.*]

⁷ 54 Geo. III. c. 137, secs. 6, 42. [19 and 20 Vict. c. 79, sec. 113.]

⁸ This has not been adjudged in court. But there seems to be a good analogy in the case of consigned redemption money in wadsets, etc.; the right of the creditor ceasing to be heritable where declarator has extinguished the power of recall, and put an end to the heritable security. *Ersk. ii. 8. 23.* See below, p. 7 (9).

⁹ *Ersk. ii. 2. 16.*

¹⁰ *Dickson v Douglas*, 1751, M. 5577, 5 B. S. 793. [See *Johnston v Greigs*, 1831, 9 S. 806.]

hearing in presence, relative to a debt originally moveable, and made heritable only by adjudication.¹ And, lastly, it was determined that a bond heritable *destinatione* merely was not rendered moveable by an action for payment, even though followed by an assignation.² But when the heritable security is by the act of the creditor removed, as by a sale made by him under powers to that effect, the debt becomes moveable.³

9. The condition of the creditor's right cannot be altered by any act of the debtor unaccompanied to by the creditor, unless judicially confirmed. Consigned money for redemption is heritable till declarator; which is a sentence of the Supreme Court declaring the wadset redeemed, by which the feudal right is dissolved, and the money is no longer secured on land.⁴ After declarator, the consigned money is arrestable in the consignee's hand.⁵

10. Although the supervening of an heritable security, even where the creditor is abroad, makes a moveable debt heritable,⁶ this effect does not follow from a security taken by a tutor, or by a factor *loco tutoris*.⁷ As this, however, proceeds on the injustice of allowing a tutor to make a will indirectly for his ward, which would be the inevitable consequence of an opposite decision, adjudication might perhaps be held the legitimate diligence for attaching such a debt.

11. A BOND of borrowed money, when taken simply to the creditor and his heirs, is moveable and arrestable; but when executors are excluded, it is heritable in succession, and requires service. And this holds not only as to the heir of the original creditor; but even in his person, and with regard to his succession, the bond is heritable.⁸

12. A bond with a stipulation of interest is at common law moveable before the term of payment,⁹ heritable afterwards. But by statute (1641, c. 57, revived by 1661, c. 32), in order to enlarge the provision for younger children, such bonds are declared to descend to children and next of kin, though they still continue heritable as before, in so far as regards the rights of husband or wife, and questions of forfeiture.¹⁰ This heritable character is not extinguished by a process for payment at the creditor's instance.¹¹ Neither will an assignation in trust, under a backbond, to hold count for what shall be recovered, or to retrocess the creditor, his heirs and assignees, make the debt moveable.¹² And such a bond assigned to the creditor's eldest son, and his heirs, without mention of executors as either admitting or excluding them, has been held to go to his heir, not to his executor.¹³ But the expense of appraising such debts was found an intolerable burden; and the Legislature, in the same year in which those bonds were made heritable, gave the alternative of either arresting [8] or adjudging, though still the diligence proper to heritage is alone competent after death.¹⁴

13. RENTS, and interests of heritable bonds, are heritable or moveable (*i.e.* go to the heir or to the executor of the landlord or creditor), as they are held to have vested *in bonis* at the time of death.¹⁵ In some cases the periodical payment is held to vest *de die in diem*;

¹ Reid v Campbell, 1728, M. 5538.

² Monro v Monro, 1735, M. 11357.

³ Wilson v Wilsons, 1808, F. C. 21.

⁴ Ersk. ii. 8. 23.

⁵ Stormont v Robertson, 24 May 1814, 15 F. C. 616. See Act of Sederunt, 19 Feb. 1680, as to Inhibition. Ersk. ii. 11.

12. [Heron v Espie, 1856, 18 D. 917, 929.]

⁶ Davidson v Kyde, *supra*.

⁷ Ross v Ross, 1793, M. 5545; Lady C. Graham v E. of Hopetoun, 1798, M. 5599. [Moncrieff v Miln, 1856, 18 D. 1286. See Nisbet v Rennie, 18 Dec. 1818, Hume 221; Heron v Espie, *supra*.]

⁸ 1661, c. 32. See Ersk. ii. 2. 12.

In the case of Ross v Ross, 4 July 1809, F. C., much valuable matter touching such bonds will be found. [The effect of the exclusion of executors, and the whole existing law with regard to it, is saved in 31 and 32 Vict. c. 101, sec. 117.]

⁹ Gray v Walker, 11 March 1859, 21 D. 709.

¹⁰ 1661, c. 32; Ersk. ii. 2. 9, 10. [See Ramsay v Goldie, 1825, 4 S. 108.]

¹¹ Monro v Monro, 1735; Elchies, Her. and Moveable, 2; M. 11357.

¹² Kennedy v Kennedy, 1747; Elchies, Her. and Moveable, 13; M. 5499, 5 B. S. 749.

¹³ Same case.

¹⁴ 1661, c. 51.

¹⁵ In the particular case of a person dying, and his heir not choosing to take up his succession, adjudication *contra hæreditatem jacentem* by his creditors, or those of the heir as the only possible diligence, has been held to carry the arrears *retro* from the ancestor's death. An adjudication on a special charge has the same effect. This was doubted at first on the bench, but there appeared no other effectual method of affecting such arrears. Dooly v Dickson, 1740, 5 B. S. 216,

in others it is understood to vest only at a particular term. In the former case, the sum due at the day is to be reckoned as being *in bonis*, and so moveable, falling to executors, and subject to confirmation: in the latter, it is only what is due at the preceding term that is considered *in bonis*; what has become due since is heritable, descends to the heir, and is carried by adjudication. The rules are: 1. That where the payment is unconnected with land, the right vests *de die in diem*, as in the liferent of a sum of money, the interests of bonds, etc. 2. That annuities run not *de die in diem*, but from term to term, unless otherwise expressed.¹ 3. That the rents of land vest not *de die in diem*, but termly, at the legal terms of Whitsunday and Martinmas. These terms, fixed by custom, rule the question as to the heritable or moveable character of rent; the rent of the first half-year being held as vested only at the term of Martinmas, in arable farms, although the entry is at Whitsunday—possession not properly beginning till Martinmas. This rule, according to the legal terms, is not altered, even should conventional terms be settled between the parties postponing the payment; the conventional term being in that case held merely a convenient delay of payment for the benefit of the tenant.² But although the character of the rent, as heritable or moveable, is not altered by *postponing* the term of payment, it may be altered by *anticipating* the legal term; for then the rent becomes actually exigible, and is moveable.³ 4. That the rents of houses are in this question regulated by the legal terms of Whitsunday and Martinmas, as well as those of land; but with this difference, that in lands the rents vest only at the term of Martinmas, when the lease properly commences; in houses, by the survivance of the term at which the possession effectually begins.⁴ 5. That the rents of grass farms follow the same rule with those of corn farms;⁵ with this difference, that the survivance of Whitsunday, at which term the possession begins, vests the rent of that half-year: and this [9] applies to lands let from April to December, for the mere purpose of reaping the grass crop; the rent being for the crop, not for the possession.⁶ 6. That all periodical payments connected with the rent of land, or payable in victual the product of land, are, like rents, not due *de die in diem*, but are regulated by the legal terms where no conventional term is fixed; so the interest of heritable bonds, or of money otherwise secured on land, is held to vest at Whitsunday and Martinmas. But where conventional terms are stipulated for the payment of interest, the question is ruled by those terms;⁷ so that, a creditor dying between those terms, the heir has the interest from the preceding term.⁸

695. Elchies, in his Reports, *voce* Adjudication, No. 24, gives the decision in the same way. In his Notes he says: 'The question was, Whether this adjudication carried the annual-rents *retro* from the predecessor's death? I thought not, because before 1672 the diligence behoved to have been by apprizing, which could not reach by-gones. However, all the rest found that the adjudication carried the by-gones.'

¹ *E. of Dalhousie v Gilmour*, 1789, M. 15915.

² *Carnegie v Carnegie*, 1668, M. 15887; *Pringle v Pringle*, 1741, M. 15907; *Elchies, Heir and Execr.* 1; *Ersk. ii.* 9. 64. [*Innes v Gordon*, 1822, 2 S. 3; *Trotter v Cunningham*, 1839, 2 D. 140; *Blackie v Farquharson*, 1849, 11 D. 1456.]

³ This doctrine held to be settled, *M. of Queensberry v Queensberry's Exrs.*, 18 Feb. 1814, F. C. The question there was chiefly, Whether an heir of entail could so anticipate payment of rents? It was found that he could in that instance, as he had followed the long-established and uniform practice of the estate, which was a fair interpretation of the entail.

This is not contradicted by *Swinton v Gawler* (below, note 6), where the rents were by stipulation anticipated.

⁴ *Binny v Binny*, 28 Jan. 1820, F. C. Here the possession commenced at Whitsunday. The proprietor died in August,

and the rent from Whitsunday to Martinmas was held executory, the entry being at Whitsunday, as in grass farms. See below. [*King v Jaffray*, 1828, 6 S. 422.]

⁵ See the argument fully given in *Campbell v Campbell*, 1745, M. 15908, *Elchies, Heir and Execr.* 3; *Sir W. Johnston v M. of Annandale*, 1727, M. 15913; *Sir F. Elliot's Trs. v Elliot*, 1792, M. 15917; *Turnbull v Kerr*, 1760, 5 B. S. 876. [*Campbell v Campbell*, 1849, 11 D. 1426.]

⁶ *Swinton v Gawler*, 20 June 1809, 15 F. C. 330.

⁷ See the above case of *Murray Kinnymond*. Clerk Home's Report states the circumstances, M. 5415, *Elch. Her. and Mov.* 10. The principle of the judgment was the same which rules the case of an anticipation of the legal term in the payment of rent. The ordinary term for payment of interest being Whitsunday and Martinmas, a conventional stipulation to pay it at Candlemas and Lammas is so far an anticipation of the term, that without such stipulation no part of the interest would be payable till the subsequent term of Whitsunday or Martinmas; so that the right to demand payment of the interest due at Candlemas or Lammas may in one sense be called an anticipation of the term. [*Daer v Hamilton*, 1740, *Elch. Her. and Mov.* 11, 5 B. S. 695.]

⁸ *Murray Kinnymond v Cathcart*, 1739, M. 15906. [In the

14. In all cases in which the PAYMENT is regulated BY TERMS, an adjudger before the legal term will carry the right which then vested; an arrester after the term will, in competition with a posterior adjudging creditor, be preferable for what then fell due. But a distinction has been so far admitted between the interest payable on an heritable bond, and falling due under an adjudication. A creditor adjudging an heritable bond is held to carry no more than the principal sum and future interests, the arrears being considered as pure moveables, to be attached by arrestment; while, on the other hand, the adjudger of an adjudication is understood to carry the whole accumulated sum in the adjudication, and interest thereof from the date of the original adjudication, to the exclusion of arrestments directed against the arrears due under the adjudication. This distinction is rested on the difference in nature between an adjudication and an heritable bond; the former being held as a sale under reversion, the latter only as a right in security; the former as substituting the lands in place of the debt, which had no longer any existence; the latter as being a mere accessory, collateral to the debt, and existing independently of it. When this distinction was first started, it was not much regarded; but the Court at last came fully and unanimously into the adoption of it.¹ This determination has since been confirmed by a [10]

case of *Bridges v Fordyce*, 7 March 1844, 6 D. 968; 1847, 6 Bell's App. 1, it was decided that the second section of the Apportionment Act of 1834 (4 and 5 Will. IV. c. 22) applies to Scotland. Some difficulty has been felt in construing this statute, from its phraseology being that of the law of England, with reference to which exclusively it was framed. It is generally said to be settled (though a question on this point was still raised in *L. Advocate v Stevenson*, 1866, 4 Macph. 322) that the statute applies only to questions between the representatives of persons having a limited interest in real or personal property, and the person succeeding to the reversion, i.e. that it is inapplicable to the competing interests of the heir and executor of a fee-simple proprietor. This seems to have been affirmed in *Baillie v Lockhart*, 1855, 2 Macq. 258. See *Brown v Amyoft*, 3 Hare 173; *Riddell's Trs. v Riddell*, 19 March 1859, 21 D. 800. It is fixed that the Act applies where either the lease or other instrument under which the money is payable, or the deed creating the limited interest, the determination of which causes the necessity for apportionment, has been executed since its date. *Knight v Boughton*, 12 Beav. 312; *Wardroper v Outfield*, 33 L. J. Ch. 605; *Plumier v Whitley*, Johns. 585; *Lock v De Burgh*, 20 L. J. Ch. 384; *Baillie v Lockhart*, *supra*; *Campbell v Campbell*, 1849, 11 D. 1427; *Blaikie v Farquharson*, 1849, 11 D. 1456. For other questions arising under the Act, see *Paul (Hard) v Anstruther*, 1862, 1 Macph. 14; aff. 15 Feb. 1864, 2 Macph. H. L. 1.]

¹ *Ramsay of Wyliecleugh v Brownlee*, 1738, M. 211, 5538; *Elchies*, Adj. 20.

Lord Elchies has these notes of Ramsay's case: 'We demurred greatly as to some points, viz. Whether the bygone rents or annualrents of the apprizer, before the apprizer's death, divide between his heir and executor; or if the whole went to the heir? 2dly, If they divide, Whether the apprizing could be declared satisfied even against the heir, unless the bygoners were also paid to the executor? They therefore remitted to the Ordinary to hear parties further, to the end they might search "into precedents." Afterwards (2 Feb. 1738): 'The point in dispute betwixt the parties, mentioned last December 7, 1736, was for the first time determined this day, after a very full hearing in presence, when it was found

unanimously that an apprizer dying within the legal, the right of the apprizing (or adjudication) and whole sums therein contained descended to his heir, and no part of it to his executor; for we consider it as a right of lands redeemable in a limited time, and not as a security for debt. And, indeed, the matter would be quite inextricable were it otherwise, especially after the legal, because by no form hitherto devised could the executor make a title to the lands. But if an apprizer were, according to our late practice, restricted to a security, so as it could never expire, I doubt the case would be different, at least as to subsequent annualrents. 2dly, After an apprizing is expired, the apprizer carries not only the property, but has also action for the bygone fruits during the legal against the tenants, and all intrumitters who cannot defend themselves by a better title, or *bona fides*. *Queritur*.—Therefore, does not that action for bygone rents go to executors; and should he die within the legal, to whom will that action for bygoners go? This does not want difficulty; for should it go to executors, these bygone rents may exceed the whole sums in the apprizings, and many inconveniences, or rather absurdities, might follow. It is strange that these questions have never been decided. 1 Dec. 1738, adhered unanimously.'

To these I shall add an opinion delivered on this point by Lord Pitfour in 1761. The case was this:—Certain creditors had adjudged for debt accumulated in common form. The original adjudgers had died; and when a prospect arose of paying off the debts, some held their predecessor's rights by service, without any confirmation of the bygone interests, others by disposition, adjudication on trust-bonds, etc.; and the questions put were: 1. Whether there was any distinction between the accumulate sums and interest thereof? 2. Whether, in case the adjudication should be restricted to a security, any distinction would be made between the principal sums in the bonds, etc., and the annualrents of them? In short, Whether in both, or in either of these cases, the principal and annualrents would go by different rules of succession, and require different titles?

'Answer.—I am humbly of opinion, that where an adjudication is preferred for the accumulate sum adjudged for, and the interest thereon, the sums drawn for the interest, as well

solemn decision,¹ and still more lately by another decision.² The solemn confirmations of the first judgment must set this question at rest; and, indeed, the only ground on which it could now be brought into discussion with any hope of success, must have been under the view of the Court in the last decision: for it was pronounced after the judgment in Scotland and Jack's case,³ in which the old opinion respecting the nature of a general adjudication was revived and established.⁴

15. A debt may be heritable as to the debtor, and moveable as to the creditor, or the reverse.⁵ Where one purchases land burdened with debt, retaining part of the price to discharge the encumbrance, the debt is a burden on his executor; the right of the creditor descends to his heir.⁶ Where the price of lands is declared a real burden, the debt is heritable, and payable by the heir, although no sasine has been taken on the disposition.⁷

The securities over the moveable estates are referable to three heads: 1. Voluntary securities; 2. Judicial securities; and, 3. Securities resulting from possession.

CHAPTER II.

OF VOLUNTARY SECURITIES OVER MOVEABLES.

[11] THESE are either, 1. Assignations in security; or, 2. Pledge; or, 3. Hypothec. In the two former securities, the real right of the creditor is constituted by delivery and possession,

as the principal, must belong to the adjudger's heir, because the annualrents of the accumulate sum are not considered as a debt due by the debtors to the adjudger, which could transmit to his executors, but rather as an eik to the reversion competent to the debtor. The adjudication is, in effect, a sale under reversion; and the original accumulate sum, and the annualrents, which are considered as an eik to it, must both descend to the adjudger's heir, who only can have right to the lands to be redeemed. This is a point which was solemnly decided by the Court of Session in the case of the creditors of Wylicleugh in the year 1738; and though it was generally otherwise understood before that time, yet, as the decision went upon solid principles, so the practice has since gone on agreeably to it, and the whole sums drawn upon adjudication, whether for accumulate sums or annualrents, have been drawn by the heirs of the adjudger.

'But if the adjudication has been opened, and restricted to a security for principal sum and annualrents, I apprehend the rule would be different; for such adjudication cannot be considered as a sale of the lands for payment of an instant price. The adjudication is found not to have been legally ordered, and therefore ought, in strict law, to be found absolutely void and null; and it is only *ex equitate* and *nobili officio* that it is at all sustained to any effect whatever. When it is sustained as a security, the debt subsists, principal and interest due by the debtor; and the adjudication is only a *pignus prætorium*, like an heritable bond, of which the principal sum ought to fall to the debtor's heir, and the annualrent to his executors. I take this to be analogous to the principles upon which the Lords proceeded to the above decision, 1738, and I

remember that it was generally so understood by the judges at that time.—J. F.'

¹ *Baile v Sinclair*, 1786, M. 5545. In a note to the report of that case, the case of *Willock v Auchterlony*, in the House of Lords (30 March 1772, M. 5539), is said to have been much pressed on the Court as a decision opposite to that of Ramsay; but the Court held it to have been decided on the ground of the destination made by the adjudging creditor, as altering the course of legal succession.

² *Ryder v Crs. of Ross*, 1794, M. 5549.

³ *Campbell v Scotland & Jack*, 1794, Bell's Oct. Ca. 11, M. 321. See above, vol. i. p. 744.

⁴ [The general doctrine stated in this paragraph as to the nature of adjudication must be held to be erroneous since the cases of *Mackenzie v Ross & Ogilvie*, 1791, M. 275; *Grindlay v Drysdale*, 1833, 11 S. 896; *Cochrane v Bogle*, 1849, 11 D. 909, aff. 7 Bell's App. 65. But in the last case, it was implied that the established rule above stated is not to be affected by the rejection of the principle on which it was originally based.]

⁵ [An example of this occurs in every heritable bond since 31 and 32 Vict. c. 101, subject to exceptions in certain respects.]

⁶ *M'Nicol v M'Nicol*, 16 June 1814, F. C. 648.

⁷ *M'Nicol & Russell v M'Nicol*, 31 Jan. 1816, F. C. 73. It was argued here unsuccessfully, that though the disposer's infertment still subsists, the price is a moveable debt, and that the declaration of a burden in the disposition only imported that the burden should be real on infertment. [See *Mead v Anderson*, *supra*; *Murray v Murray*, 1837, 16 S. 283.]

or by intimation. In hypothec, the real right is altogether independent of possession or notice. The former are the chief and most common securities on moveables; the last is admitted only in a few special and well-marked cases.

SECTION I.

OF ASSIGNATION AND DISPOSITION OF MOVEABLES IN SECURITY.

Moveables corporeal, and certain classes of debts of which the right runs with the voucher (as bank bills and notes, and bills payable to the bearer, and bills blank endorsed), are transferred, in the way either of sale or of security, by mere delivery. Ordinary debts, and generally all incorporeal rights, are transferred by written deed of conveyance; and sometimes (especially in constituting a security) even corporeal moveables are conveyed by written instrument.

SUBSECTION I.—SECURITIES ON CORPOREAL MOVEABLES.

While delivery alone, accompanied by an intention to transfer, is without any written conveyance sufficient to pass the property of ordinary corporeal moveables, the most formal and solemn written conveyance of them will confer no real right without such delivery, either actual, or at least the best which the circumstances will allow.¹ The general rule respecting moveables is, that possession presumes property. A mere instrument of possession, then, is not sufficient to transfer moveables assigned or disposed in security. There must be actual possession; but this actual possession has commonly been accompanied by a lease back to the debtor of the subjects, where they consist of furniture, etc. to be used and not disposed of; and it has generally been held that this will be enough to satisfy the legal principle. This mode of reconciling difficulties has been well, and it would seem effectually, applied to leases; but it is more doubtful whether it will be sufficient to counteract the ordinary presumption from the possession of moveables.²

Some moveables, however, require a written conveyance to transfer them, or create a security over them. And this either on account of the titles by which they are in law transferable, or on account of their situation at the time.

I.—MORTGAGE OF SHIPS.

The form which has been settled by the recent statute for the conveyance of ships in mortgage, or in trust for sale to pay debts, has already been detailed.³ Formerly a conveyance, whether in sale or security, made the vendee in effect proprietor, with the disposal [12] or beneficial interest in the ship; and the policy of the Registry Acts was, that no person should have the property or use of a ship, whose name may not be discovered by referring to some public document. It was therefore held, that no attempt to constitute a pledge or security on a ship for money lent should be effectual, where the requisites of the Navigation Acts had not been complied with;⁴ and these requisites were painfully minute, and

¹ See above, vol. i. p. 181 et seq.

² See below, Of Pledge, p. 22.

³ [Vol. i. pp. 159, 169.]

⁴ Park, the owner of a schooner, desired Heather to sell it; but there being no sale, he applied for a loan of £200 on the security of the ship. Heather made the advance on the ship's being conveyed to him, he being bound to account for the difference on a sale. The conveyance contained a power to

sell. The ship was delivered to and in possession of Heather, but the requisites of the Registry Acts were not complied with. Park became a bankrupt, and his assignees brought an action of trover against Heather for the ship. It was attempted to make this out for the defendant as a case of lien, the bankrupt renouncing his right to send the ship to sea till the loan be repaid. The Court distinguished correctly between cases of mortgage or pledge (with which this was to be

dangerous to the creditor's safety. The rule now established is simpler, and more fit for practical purposes.¹

A mortgage of a ship may be unavailable to the creditor, unless accompanied by a proper policy of insurance, of which the benefit is assigned to the creditor; or unless the creditor is by the contract empowered to keep the vessel insured at the debtor's expense. Where a ship conveyed in security is insured, and the benefit of the policy conveyed to the creditor, the creditor will, on a loss happening, be entitled to recover on the policy; his vendition in security forming a sufficient insurable interest. Whether his right may be qualified by any claim of lien which the insurers or brokers may have against the owner and insurer, is a question which it will be more proper to discuss when treating of Lien.

II.—CONSIGNMENTS OF GOODS FROM A DISTANCE.

Cargoes sent from a distance in security or satisfaction of debt may be consigned to the creditor directly or indirectly. This is a method of transference, in security or satisfaction of debt, much practised by merchants in one country who have creditors in another. It is also used as a fund of credit in the advance of money; the consignor being permitted to draw for a certain proportion of the value on the consignee, or on some correspondent of his with whom he has credit at the port where the consignor requires money.

1. When a merchant thus sends consigned to his creditor DIRECTLY a cargo to be sold, the net proceeds of which are to be applied in extinction of his debt; or when, in consequence of such consignment, the consignor is allowed to draw for part of the value, the transference of the bill of lading (although it will not divest the original owner of the property, if there should happen not to be any debt due, or not to the amount of the value consigned, or if the bills he is allowed to draw should be dishonoured) will vest a property in the consignee, to the special effect of securing whatever debt may be due, or whatever advance may have been made or undertaken on the faith of it.²

[13] Such consignee has power, as procurator *in rem suam*, to sell the commodities consigned, so as to realize a fund wherewith to extinguish the debt.³ So far this is different from pledge, in which, without a special power stipulated, or the interposition of judicial authority, the subject impledged cannot be disposed of in satisfaction of the debt.

2. Where the consignment is made not directly to the creditor, but INDIRECTLY through a general consignee or factor, the question always turns on appropriation. If the goods or funds consigned are duly appropriated to the creditor, the security will be effectual to him by completion of the consignee's title.

Where consignment is to be made for the behoof of many creditors, it would be incon-

classed) and cases of lien, which are securities for debt resulting from possession, and held that the broker could not retain the vessel until payment of the loan. *Wilson v Heather*, 1814, 5 Taunt. 642.

¹ If there should be any occasion to look back to the former state of the law, reference may be made to Trollope on Mortgage of Ships, 1823. See also the case of *Thomson v Smith*, 1 Madox 399.

² *Arthur v Hastie & Jamieson*. This case was decided in the House of Lords, on an appeal from Scotland, 10 April 1770. Dunlop in Virginia entered into a contract with Hastie & Jamieson of Glasgow; they to furnish him with goods, and he to consign tobaccos to them, to be sold to the best advantage, and the proceeds to be placed to his credit for the goods sent out. He accordingly, in his own vessel, shipped 288 hogsheads of tobacco, with 7960 staves; and these not being a full loading, he procured freight for 140 hogsheads

more belonging to other merchants. The ship and whole cargo were consigned to Hastie & Jamieson, and the bills of lading transmitted and received; and a competition arose between them and certain arresters of the cargo after its arrival in Scotland. Lord Pitfour held, 'That there appeared no sufficient evidence that Dunlop was divested of the property of the ship and cargo in favour of Hastie & Jamieson; and therefore that the same was liable to be affected by the diligence of Dunlop's creditors.' And to this judgment the Court adhered. But in the House of Lords it was held that, so far as related to the cargo, Hastie & Jamieson had a special property preferable to the arrestments. 1770, M. 14209.

The doctrine of this case was fully approved of. *Tr. for Hunter & Co.'s Crs. v Hamilton's Tr.*, 1791. See below, p. 13, note 4.

³ *Broughton v Stewart, Primrose, & Co.*, 17 Dec. 1814, 18 F. C. 112. [See above, vol. i. p. 517 et seq.]

venient to consign to each individual; and the cargo is commonly consigned to the established factor of the merchant, or to a mandatory. Or a supercargo is sent with the cargo to dispose of it, charged with special instructions to deliver the goods or pay over the proceeds to the individual creditors, the creditors being at the same time informed of the consignment. If the consignor be solvent at making the consignment, there seems to be no doubt of the efficacy of such consignments to vest a real right in the individual creditors to whom it may be appropriated. And this may be without notice, provided a previous contract has bound the consignor to make the remittance, or with notice to the creditor of such a remittance when there is no such subsisting contract.

Whether the real right be vested in the creditor, so as to bar diligence by the creditors of the consignor, depends entirely on the question of appropriation. 1. Where there has been a previous contract by the consignor to send the remittance, the consignment made conformably is held appropriated.¹ 2. Where notice of the consignment has been given to the creditor, the *jus quæsitum* attaches. 3. Where the consignee has bound himself to pay or account to the creditors, their right is completed by delivery to him.² But, 4. Where no notice is given to the creditor for whose behoof the consignment is made, and no obligation undertaken by the consignee, the consignor has power to recall his instructions. In several cases this has been decided in favour of creditors arresting the fund to which such instruction applied.³

Where the trust-consignee has become a bankrupt, or where some change has happened which precludes the consignment from being received by him for the benefit of the creditors, it has been contended that the foundation of the preference is gone, and that any possession which may be taken by the creditors themselves is not a lawful ground of security or of lien. But, on the principle that the person for whom the goods are consigned, and who has notice of such consignment for his benefit, has the radical right in the trust, it would appear that this accident of bankruptcy, or annihilation of the trustee's capacity to take the consignment, should have no effect in depriving the creditors of their preference.⁴ The right vests by the receipt of the bill of lading on the part of the general consignee, or any one coming in his room. From that moment the property of the goods is vested for the individual consignees, who have received notice of the consignment, or to whom the general

¹ *Fisher v Miller*, 1823, 1 Bing. 150. Here one had advanced money on an engagement that the person receiving it should consign to his factor a cargo of fish, so as to secure indemnification to the lender. The cargo was sent to the factor accordingly; but the borrower wrote afterwards to the consignee that the cargo was not to be responsible to the lender. But the factor remitted the proceeds to the lender; and he was found entitled to hold them against the creditors of the consignors.

² *Lady Pitmedden v Sir R. Gordon*, 1707, M. 7727; *Hodgson v Anderson*, 3 Barn. and Cres. 842.

³ *Stonehewer v Inglis*, 1697, M. 7724. Here cash sent with verbal instructions to pay particular creditors was held liable to arrestment by the creditors of the person transmitting the cash.

Gray v L. Ross, 1706, M. 7724. A person to whom a bill was endorsed, with verbal orders to apply part of the proceeds, after paying his own debt, in extinction of a debt to another, was considered as holder of the fund for the truster till applied, and so the fund arrestable by the truster's creditors.

See *Auchterlony's Crs.*, 1732, M. 7737; also *Baird v Murray's Crs.*, 1744, M. 7738.

⁴ *Hunter's Tr. v Hamilton's Tr.*, 1791, Bell's Oct. Cases 385. William Hamilton & Co. of Greenock agreed with Donald &

Co. of Virginia to supply them with British goods, and receive remittances in Virginia produce. The balance soon turned in favour of Hamilton & Co.; and Donald & Co. wrote that they were loading a vessel with tobacco as a remittance in diminution of the balance. Hamilton & Co. had written to Donald & Co. in the meanwhile of a change in their company, by the assumption of new partners and a new firm. The cargo, when completed, was consigned to the new firm, with a letter that, 'in conformity to my former letter, I now enclose a bill of lading for 100 hogsheads,' etc. Other letters were afterwards written, promising further remittances. The vessel arrived, but the new company had not taken effect, and Hamilton & Co. received the goods and took charge of the ship, which was Donald & Co.'s. Certain creditors of Donald & Co. arrested the ship and goods in Hamilton & Co.'s hands. The vessel was afterwards sold, and the proceeds of ship and cargo formed the subject of competition. The Court was clear that the consignment, though nominally and *in forma verborum* to the new firm, was plainly intended for the old company; that, in point of law, the old company, as having the real right, was entitled to take the cargo on any interruption to the acting of the nominal consignees; and therefore they preferred Hamilton & Co. to the cargo, but the arresters to the price of the ship.

consignee has undertaken to be accountable; and no creditor of the consignor can affect the cargo.

Consignments thus made for payment of debts of the consignor confer on those who have the interest, or *jus quæsitum*, a proportional right to share in the consignment or its proceeds. This is the general rule in all such cases.¹ But where certain creditors are named, and a general obligation or direction is subjoined, the creditors named have a preference.²

Should the general consignee himself become a bankrupt, his creditors cannot seize the goods as his; and all questions of identity of the property, so as to distinguish it, would of course be determined on the same principle as if the individuals for whose benefit the consignment was made had themselves entrusted the bankrupt with their goods.

Whether the consignee could himself claim over those goods a lien for his general balance, will form more properly a point in a subsequent inquiry.

III.—TRANSFER OF BILLS OF LADING.

Where goods are at sea, they may be effectually transferred, either in the way of sale or in security, by endorsing or assigning the bill of lading, and delivering it over with the [15] other documents. But after what has already been said of bills of lading, both in relation to the question of delivery in the completion of transfers of goods at sea,³ and in relation to the contract of affreightment, and the reciprocal obligation of the shipper and shipowners, and master,⁴ it is not necessary to enlarge further on the subject.

IV.—ASSIGNMENT OF INVOICES, ETC. WITHOUT THE BILL OF LADING.

If the consignee have only letters of advice sent to him, with an invoice and policy of insurance, the bill of lading not having yet arrived, can he make a transfer of the cargo, in security or otherwise, which shall be effectual? It seems to be clear: 1. That if the bill of lading come afterwards to hand, it may effectually be sold without the other documents; and that the purchaser, or lender of money on the credit of the transfer of the bill, shall be preferable to an assignee who has received only the policy and the letter of advice. 2. That such assignee will be subject to the consignor's right of stopping *in transitu*; not privileged against it, like the endorsee of a bill of lading. 3. That the property is not passed without endorsement of the bill of lading, or delivery of the goods, even as against the general creditors.⁵

¹ *Blair v Graham*, 1714, M. 7744. Here a purchaser of lands being bound to pay creditors according to a list, the creditors were held to have right to payment rateably. *Watson v Bruce*, 1672, M. 7743.

² *Kerr v Knows*, 1635, M. 7742.

King v M'Farlane's Crs. In this case there does not seem to have been any previous agreement, or even notice. M'Farlane of St Christopher's consigned to James King in Port-Glasgow a parcel of sugars, with instructions to apply the proceeds towards payment of M'Farlane's creditors, as mentioned in a list. Other creditors, whose names were not mentioned there, arrested in the hands of the shipmaster, and in those of King also. In a competition, the Court found that the goods could not legitimately be arrested in preference to those for whose behoof King held the consignment; and the creditors in the list were accordingly preferred to the arrestors.

This case was referred to, without date, in the case of *Hunter's Crs. v Hamilton's Crs.*

³ [Vol. i. p. 230 et seq. See also p. 213, note 1, and p. 214, note 2.]

⁴ [Vol. i. p. 590.]

⁵ *Lempriere, etc., Assignees of Syed, v Pasley*, 1788, 2 Term. Rep. 485. Syed received a letter of advice of a shipment to be made for his account from New Providence, and he immediately insured the consignment; and having applied to Pasley for an advance, he lent him £200 on his note, upon his assigning the goods and policy of insurance as a collateral security for this sum, and for £190 of former debt. Syed accordingly executed an instrument binding himself to assign, etc., 50 tons of braziletto wood in security for payment of £400 in his notes of hand, and binding himself to deposit the policy of insurance, and to endorse the bill of lading on its arrival; Syed to make up the deficiency of the value, and Pasley to place the excess to his credit. The policy and letters of advice were accordingly deposited. The bill of lading arrived on the 2d February, and was endorsed to Pasley. Syed had previously committed an act of bank-

V.—ASSIGNMENT OF GOODS IN ANOTHER'S CUSTODY.

Goods in the hands of another person, in custody for preservation, manufacture, etc., may be assigned. But it will not be sufficient to draw a bill on the holder of the goods. Such bill, though protested, is not equivalent to an intimated assignation. Not only is a bill for delivery of goods ineffectual to transfer the goods; but it is ineffectual even to create a money debt by the drawee in favour of the *porteur*.¹

SUBSECTION II.—TRANSFERENCE OF DEBTS.

Debts cannot, like simple moveables or cash, be corporeally delivered; but being [16] mere rights to demand payment of money at a stipulated time, the act by which they are to be transferred is such only as can convert the obligation to pay to the cedent into a debt to the assignee. This is accomplished by a mandate, empowering the assignee to demand payment, accompanied by intimation to the debtor, that henceforward he is to hold the money for behoof of the assignee.

Originally, debts were not capable of being transferred without the consent of the debtor, given either at constituting the debt or at making the transfer.² This led to indirect methods of conveying debts: 1. Bonds were taken blank, in the name of the creditor, and passed from hand to hand, like bank-notes;³ or, 2. The creditor granted a mandate or procuratory, authorizing the assignee to demand payment in his name; and as fully as he himself could, to receive the debt, and discharge it. As the assignee acted under such a power for his own behoof, he was, in the language of the law, called *procurator in rem suam*.⁴ In both of these ways of assigning debts, it still was necessary, in order to transfer the claim or *jus crediti* from the original creditor to the assignee, that the transfer should be intimated.⁵ And, at this day, the delivery of the document of debt and assignation,⁶ with intimation, form the requisites of actual delivery and transference in the case of debts due by personal bond.⁷

ruptcy, and a commission of bankruptcy issued on the 10th February. The ship arrived in April, and the master delivered the goods to Pasley, who paid freight and charges. The action was of trover by the Assignees of Syed v Pasley, to recover the value of the goods so delivered. The question was, What right passed under the assignment? and whether the assignees had a right to demand the goods, as the endorsement was subject to the act of bankruptcy? Mr. Justice Grose, at the trial, was of opinion 'that the legal property of the goods remained in the bankrupt till the endorsement; and that he could not divest himself of it, after his bankruptcy, in prejudice of the rest of his creditors.' But the Court of King's Bench (Mr. Justice Ashhurst delivering the opinion of the Court) held the verdict to be wrong, and ordered a new trial, as I understand the case, upon the ground that, by the possession attained on the part of Pasley subsequent to and in pursuance of the agreement, he had an equitable lien, which the assignees could not defeat. But this does not seem to touch the doctrine laid down by Mr. Justice Grose at the trial, so far as I have adopted it in the text. [See *Scottish Central Railway Co. v Ferguson & Co.*, 1863, 1 Macph. 750.]

¹ *Stewart v Ewing*, 1744, M. 1493. Here it was held, 1. That a draft is no assignation of moveables. 2. That it is not an assignation even of money coming into the drawee's hand after protest. 3. That if the goods are sold after protest, the order to pay will continue in force so as to give the

porteur of the bill a right to demand payment when the money comes into the drawee's hand, provided there has been no mid-impediment by diligence, etc.

See the reverse in the case of money, *M'Leod v Crichton*, 1779, M. 16469. [As to the transference of such goods by the endorsement of delivery orders, see vol. i. pp. 194–8, and editor's notes.]

² Debts which are choses in action, are by the law of England incapable of transference by assignment. The necessities of a commercial country have required transference of such right; but the transference is in the nature of a trust, with an agreement to permit the assignee to use the name of the assignor for recovering the debt. 2 Blackst. 442.

³ Blank deeds were prohibited by 1696, c. 25, as covers to fraud. The notes of bankers and endorsements of bills form exceptions to this Act.

⁴ Stair iii. 1. 2, 3, etc.; Ersk. iii. 5. 2.

At present assignations are regarded as proper conveyances, not as procuratories.

⁵ Stair iii. 1. 6.

⁶ *Lady Hissleside*, Jan. 1685, M. 11496, Sup. Vol. 52. Harcarse intimates some doubt of the doctrine, p. 22, No. 113. But see Ersk. iii. 5. 3, and Bankt. iii. 1. 46.

⁷ A second assignee, or the trustee for the general creditors of the assignor, may complete his right by intimation so as to exclude the first assignor, neglecting this precaution. Stair iii. 1. 6; Ersk. iii. 5. 3. *Buchan v Farquharson*, 1797, M. 2905.

1. The ASSIGNATION¹ is made in words clearly expressive of the present transfer from the cedent to the assignee; such as assign, transfer, dispoise, make over, the debt; described as a certain sum contained in a bond, bill, etc., together with the bond, etc., and all that has followed or may competently follow thereon.² The assignee is made the cessioner of the cedent; he is surrogated in the cedent's place; with power to ask, uplift, and discharge the debt.³

It sometimes comes to be questioned whether particular debts may thus be assigned.

1. A legacy is not capable of assignation during the testator's life. The bequest, at whatever time originally made, is held to be incessantly renewed till the last rational moment of the testator's life. An assignation intimated to the person named executor, while the testator was yet alive, was, in competition with a creditor of the legatee arresting after the testator's death, held inept.⁴ 2. Rents are assigned by an heritable bond followed by sasine, [17] as well as by deed of assignation intimated;⁵ and the assignation of an heritable bond of annuity in security on advance to the annuitant has been held, where intimated to the tenants, to interpel payment to the annuitant.⁶ 3. Rents due by a subtenant to the principal, as well as the rents due to the landlord, may be assigned; but it has been doubted whether a prohibition in a lease to assign will bar an assignment of subrents where subtenants are admitted by the lease. It would seem that the assignation of the subrents is in such cases unexceptionable.

2. INTIMATION is the completion of the transference. From that point the passing of the right is dated; and in bankruptcy this makes the *terminus a quo* in reckoning the 60 days.⁷

The regular intimation of an assignation is by a notary, in presence of witnesses, and evidenced by a notarial instrument (Ersk. iii. 5. 3). 1. Where such mode of intimation has been adopted, the instrument must be regular and formal: and therefore, if the same person act both as procurator and notary, it is null;⁸ and where the instrument is so general as to apply to any sum, it is null in competition.⁹ It is enough that intimation be made to one of several debtors in a bond;¹⁰ to the treasurer of an hospital,¹¹ or to the clerks and managers of a trading company, who enter it in their books.¹² It has been said (though there was no occasion to determine the point) that, in the debtor's absence from the country, intimation to his ordinary and confidential agent having the management of his affairs is sufficient.¹³ But this now stands on the footing of the Act 6 Geo. iv. c. 120, sec. 51. 2. A formal instrument is not indispensable in proof of the notice. The fact of intima-

¹ [On this subject, see the provisions of 25 and 26 Vict. c. 85, prescribing abridged forms of personal bonds, assignations, and translations.]

² Stair iii. 1. 4.

³ How far the form and authentication of a Scottish deed will be necessary in England to transfer a Scottish personal bond heritable *destinatione*, but not by sasine, will demand attention hereafter.

⁴ *Bedwells & Yates v Tod*, 2 Dec. 1819, Fac. Coll. Miller, by will, named White his residuary legatee, and placed his will in neutral custody, with directions to be shown both to White and to the executor. On the faith of this residuary bequest Tod advanced money to White, who assigned to him his right under the will; and this was intimated to the executor. The testator afterwards died without altering his will. Tod was opposed by a creditor of White's, who arrested in the executor's hands after the testator's death; and the arrester was preferred.

⁵ See vol. i. p. 792. It appears at one time to have been held, that the right of the annualrenter and holder of a real burden had no effect till poinding of the ground. But after-

wards such rights were held sufficient against all intromitters with the rents, and the heritable security is now to be considered as an intimated assignation. See Ersk. Prin. ii. 8. 15, as contrasted with the larger Institute, Ersk. ii. 8. 33; Stair ii. 6. 13; *Douglas of Kelhead*, 1748, M. 2901; *Hay v Marshall*, H. L., 22 March 1826, 3 W. and S. 71.

⁶ *Hope & M'Caa v Waugh*, 12 June 1816, Fac. Coll.

⁷ 54 Geo. III. c. 137, sec. 13.

⁸ *Scott v L. Drumlanrig*, 1628, M. 846.

⁹ *Lawrie v Hay*, 1696, M. 849.

¹⁰ Ersk. iii. 5. 5. [Erskine says that such intimation is not effectual for interpellating those to whom no intimation was made from making payment to the cedent. See Stair iii. 1. 10. It has since been held that intimation is not sufficient when made to one partner or trustee for behoof of the body of which he is a member. *Hill v Lindsay*, 1846, 8 D. 918.]

¹¹ *Keir v Menzies*, 1739, M. 850, 5 Br. Sup. 656.

¹² *Watson v Murdoch*, 1755, M. 850.

¹³ *Dougal's Crs.*, 11 June 1794, Bell Fol. Ca. 41. Same case, 17 Nov. 1795, Fac. Coll. 439.

tion by the notary, in presence of witnesses, may be proved by the attestation of the debtor, authenticated by witnesses, or even by the holograph acknowledgment of the debtor, without witnesses.¹ 3. But even a notarial intimation is not precisely requisite. The interposition of a notary is not in this case, as in sasine, an essential solemnity: equivalents are admitted. It is sufficient if there be any judicial intimation, or any act of the debtor undertaking to pay, and corroborating the debt. Thus, (1.) The production of [18] the assignation in an action to which the debtor is a party is sufficient.² (2.) Where the debtor is a party to the deed of conveyance, no intimation is necessary.³ Or, (3.) Where he acknowledges by letter the assignee's right.⁴ (4.) It has been said that even a verbal promise, upon a communing with the assignee, is sufficient;⁵ which, however, must be proved by written evidence.⁶ (5.) The payment of interest, or of part of the principal, to the assignee, is held equivalent to an intimation, to the full effect of completing the assignation. (6.) It seems to be equivalent to intimation, if the debtor has accepted a draft in favour of the assignee for the sum in the bond, or even if such draft be presented and protested. But, (7.) Private knowledge is not enough.⁷ It will not be sufficient that the debtor is a subscribing witness to the deed of assignation; nor that a letter has been written to him, to which no reply is made undertaking to pay.

Where the debtor is not in the country, intimation is made under the authority of letters under the signet. This warrant is called Letters of Supplement; and it is issued at the Bill Chamber on production of the bond and assignation. It authorizes messengers-at-arms to give the notice; formerly by the ceremony of a protest at the market-cross of Edinburgh and pier and shore of Leith, now by recording the intimation and protest in the record appointed for such citations and notices by the Act 6 Geo. iv. c. 120, secs. 51, 52.

There are certain assignations which require no intimation; and others, respecting which it has been questioned whether this ceremony be required.

1. The assignation which, by the BANKRUPT LAWS both of Scotland and of England, is required to be made by a bankrupt under sequestration or commission of bankruptcy, is held as a public act, and requires no intimation. 54 Geo. iii. c. 137, sec. 30.

2. All JUDICIAL ASSIGNATIONS are effectual without intimation; as adjudication, or arrestment and forthcoming, and the decree vesting the estate under sequestration in the trustee. Ersk. iii. 5. 7.

3. Assignation by MARRIAGE, as a legal conveyance, requires no intimation.⁸

The husband's right will not entitle him to compete with an assignee of the wife, though the assignation by her is not completed by intimation before marriage.⁹ And so the law is laid down by Erskine (iii. 5. 7). But it is necessary to mark the principle of such preference. The husband is excluded by a personal exception as liable in warrandice.

¹ *Newton & Co. v Collogan & Co.*, 1785, M. 850, where the objection was strongly urged that such acknowledgment does not prove its date, and so gives the debtor the power of secretly preferring one creditor to another. But the Court yielded to the common practice in support of such evidence, though some of the judges were against giving sanction to it.

May the intimation be proved by the debtor's oath? I should incline to the negative: for the practice does not go this length; and the debtor is not here disposing by his acknowledgment of any right of his own, but acting as the arbiter of a competition, which it may be his interest to decide in favour of the assignee.

² This held in *Dougal v Gordon*, 1795, M. 851. A charge of horning would seem to be equivalent to intimation.

³ *Turnbull v Sir John Stewart*, 1751, M. 868. [Paul v Boyd's Trs., 13 S. 818.]

⁴ *M'Gill v Hutchison*, 1630, M. 860. See also the case of VOL. II.

Sir James Gray v D. of Hamilton, 10 March 1708, Roberts. App. Cases 1. [Hill v Lindsay, *supra*; Wallace v Davies, 1853, 15 D. 688. By 25 and 26 Vict. c. 85, sec. 2, intimation by post letter is declared to be legal intimation, written acknowledgment being made sufficient evidence (but not the only competent evidence) of such intimation.]

⁵ *Fac. of Advocates v Dickson*, 1718, M. 866. This doctrine, however, may be questioned.

⁶ *Elphinston v Hume and the Laird of Stanhope*, 1674, M. 863.

⁷ *Dicksons v Trotter*, 1776, M. 873. See also 1 Pr. of Equity 59; Ersk. ii. 1. 28; Bankt. i. 193. 12.

⁸ *Stair* iii. 1. 13; *Ersk.* iii. 5. 7. But observe the distinction as to interpellation. The debtor is not necessarily aware of the transfer, and payment *in bona fide* will be effectual.

⁹ *Robertson v Halkerston*, 1673, M. 5776; *Stracey v Jamieson*, 1763, M. 2858.

But the same plea would not exclude his creditors attaching the fund assigned by the marriage, or having right by sequestration. The assignee, without intimation, would be there postponed, in respect of the real right; reserving his claim of warrandice as a personal debt.

4. An assignation made in ENGLAND requires not the ceremony of intimation to complete [19] the transfer of a debt due there. But such an assignation of a debt due in Scotland, produced in a competition with creditors arresting the fund, will be ineffectual without intimation, or something equivalent.¹

Although debts may be conveyed otherwise than by assignation (as by drafts, or by endorsement of bills, or by the debtor giving a new document of debt payable to the assignee),² the form of assignation is necessary to transfer any DECREE or DILIGENCE which may have been issued on the claim. This is a distinction not sufficiently attended to by our authors.³ No decree is transmissible otherwise than by assignation; but the document of debt itself may be transmitted by endorsement, to the effect of enabling the endorsee to make a valid claim in bankruptcy, or to follow forth a new course of diligence.⁴

6. Assignation carries right not only to the debt, but to the diligence used upon it.⁵ It was once held that the assignee could not prosecute in his own name the diligence begun by the cedent, and to a certain extent this is still held as law; namely, where diligence in the name of the cedent is to be put to execution, the messenger has no authority to execute the warrant but in the name of him in whose favour it is conceived, having no judicial powers to take cognizance of the assignation as a conveyance to the right.⁶ But the subsequent warrants of diligence may proceed in name of the assignee, although the

¹ The case of *Sir J. Gray v the D. of Hamilton and E. of Selkirk*, Robertson's Rep. in House of Lords, p. 1, is stated by the respectable author of these Reports as a judgment of reversal of the doctrine in the next. I see no evidence of a judgment to this extent. The true judgment in that case seems to have been that pronounced by the Lord Ordinary, finding that the Duke's letters were equivalent to intimation (see above, p. 17, note 4); and the judgment of reversal by the House of Lords seems to have been nothing more than an affirmation of this judgment, which gave the preference to the assignee on quite a different principle from the want of necessity of intimation in an English assignation. Had there in that case been no letter by the Duke of Hamilton promising payment of the debt, but merely a letter from the assignee to his Grace giving notice of the conveyance, the House of Lords must have been called on to decide the question of international law; and I cannot doubt that they would have decided it according to the doctrine in the text.

I may mention that an opinion which I had delivered in a private case to the above effect, was also given by Mr. Clerk (Lord Eldin), while at the bar, on the same case. We had been separately consulted, and came to know this only in the course of private conversation on this point of law. [See *Carrick v Dickie's Assig.*, 1822, 1 S. 447, N. E. 414.]

² [*Watt's Trs. v Pinkney*, 1853, 16 D. 279; *Carter v Macintosh*, 1862, 24 D. 925. The lodging a claim in an action of multiplepinding is equivalent to intimation, and completes the creditor's right. *Campbell v Campbell*, 1860, 23 D. 159.]

³ Erskine (iii. 2. 31) delivers the doctrine without due discrimination. His *principle* is good, but the *rule* 'that a protested bill after registration must be transmitted to others, not by endorsement, but by assignation,' is not correct. Bankton (vol. i. p. 363, sec. 17) lays down the rule in the same way.

⁴ Gordon, 19 Feb. 1806, F. C. A bill accepted by J. Duncan and D. Gordon was dishonoured and protested, and the protest registered. Afterwards it was endorsed by the holder to J. Richardson & Co., and the question was raised whether this was a legitimate transmission of the bill? Lord Glenlee held it effectual. The Court had some doubt, but were satisfied with the observation of one of the judges, that assignation is necessary to convey the protest and decree of registration; but a simple endorsement alone is necessary to transfer the right to the bill.

Afterwards, on the question coming back in another shape, the distinction was approved of between the transfer of the debt and of the decree, and the inaccuracy of the doctrine as delivered by Erskine and Bankton taken notice of. Lord Robertson's Sess. Papers and Notes.

Frier v Richardson & Co., 1806, M. Bill, App. 24. See vol. i. p. 428.

⁵ *Inest de jure*. See Stair iii. 1. 17; 1 Prin. of Equity 240.

⁶ In *Hay v Stewart*, 1745, arrestment was used in the name of an assignee and executor on letters of horning raised by the cedent. On inquiry into the practice, it was found to be the unanimous opinion of the writers to the signet, that neither arrestment nor pinding could validly be executed in name of an assignee, or of an executor, on a horning in name of the cedent. And so the Court decreed. Elchies, Assig. No. 6, notes, p. 43.

In the subsequent case of *Foggo & Galloway v Scott & Oliver*, 1769, M. 3693, the Court confirmed the above judgment, and apparently on the ground that the messenger has no judicial power to take cognizance of the assignation. It was a case of pinding in name of the assignee, the charge having been given in name of the cedent.

preceding writs have been in name of the cedent; for they are issued by warrant of [20] the Lord Ordinary on the Bills, who has judicial powers to take cognizance of the assignation.¹

7. It would appear that where a BILL-HOLDER has entered a claim on the sequestrated estate of the acceptor or endorser of a bill, or in a ranking and sale of their estates; or has produced an interest, and made his claim in a multiplepoinding; the subsequent endorsement of that bill will not transmit the right to the dividends. This right depends not so much on the original document, as on the new constitution of the debt against the bankrupt estate; and therefore, if a competition be supposed between such endorsee and a creditor of the original bill-holder arresting the dividends, or another creditor having obtained an assignation to the debt and claim in the sequestration, or generally to the debt, with all diligence and execution that has followed or may be competent to follow on it, there seems to be ground for preferring the arrester or assignee.²

Perhaps the same rule should hold where the bill-holder has made claim under a private trust, and afterwards endorsed the bill: for there the trust-fund may be considered as vested in the trustee, and the claim as constituted anew; the notice to that trustee by the lodging of the claim making him debtor to the claimant, or rather custodier (or trustee for him), of the share of the funds that correspond to his debt.

Money due by OPEN ACCOUNT may either be conveyed, as above, by assignation, or by draft, or order, or bill of exchange. In the former case the transfer is completed as already explained. In the latter, if the draft or order be accepted, such acceptance of course completes the transfer. If not accepted, the intimation is made by the presenting of the bill or draft, and the instrument of protest is the proper evidence of the completed transfer.³ Book debts may be conveyed by endorsement, to the effect of authorizing the assignee to bring an action; the endorsement in such a case being held as a mandate or letter directing payment to one's factor or servant, and it does not require a stamp.⁴

SECTION II.

OF SECURITIES BY MEANS OF PLEDGE.

In the contract of pledge, a moveable subject, or the title-deeds, vouchers or muniments of a *jus incorporale* or debt, are delivered to the creditor, in security of debt, to remain with him, and be detained in his possession, till the debtor shall redeem them; and, if necessary, to be sold by judicial authority for satisfaction of the debt; the creditor engaging, on the other hand, to restore the thing pledged when the debt shall be paid. The right acquired by the creditor is called in England a special qualified property, in contradistinction to the absolute property of an owner of goods. It differs in nature from property on the [21] one hand, and from lien on the other. It is in the law of Scotland a real right, but not attended with any other effect than the power to retain the pledge, and to apply judicially for a warrant to have it sold for the debt. The creditors of the pledgor can attach only the reversionary right of their debtor.⁵

¹ So in *Young v Buchanan*, 1799, M. 8137. Sir W. Forbes & Co. having horned in their own name, and having denounced and registered it, they assigned the debt to Young, who presented a bill for letters of caption in his own name, on the ground of his right acquired by the assignation. The Lord Ordinary on the Bills having reported the case to the Court, they decreed the diligence to be issued in the assignee's name.

² This confirmed by a case decided since the publication of the fourth edition—*Wallace, Hamilton, & Co. v Campbell*, 1821, 1 S. 53, aff. 23 June 1824.

³ See the case of *Stewart v Ewing*, 1744, M. 1493, where, although the Court found a draft protested for non-acceptance, ineffectual as an assignation, it was upon this ground alone that the drawee had not *money*, but only *goods*, in his hand. See also *Pentress & Roberts v Thorold*, 1768, Hailes 228, particularly the opinions of Lords Kennet and Alemore.

⁴ *Lawrie v R. Perry Ogilvie*, 6 Feb. 1810, 15 F. C. 561.

⁵ *Stair i. 13. 11.*

This is a contract of frequent recurrence, and of extensive use in a trading country. In the usual course of trade, a merchant's commodities ought to be so well fitted to the market, and to his own ability of awaiting their sale, that he should have little temptation to raise money by the impledging of his goods. But there are occasions on which this correct adjustment is impossible, or may be disappointed. Exuberant harvests in our foreign possessions, embargoes proceeding from the state of our political relations with other countries, the sudden stoppage of the usual channel by which particular commodities have been disposed of, may occasion an accumulation of raw materials or of manufactured goods; while the bills for the price, or the current wages of labour, and expense of a great manufacturing establishment, must be provided for. At one time, the most extraordinary measures of commercial policy excluded British merchants from the whole continental market, and occasioned an accumulation of commodities, which was not more distressing in the effects of the restraint, than overwhelming in the sudden rush of commercial enterprise on the reopening of the markets. The impledging of goods in situations like these frequently requires to be encouraged by legislative provision. One of the most salutary of such provisions is the system of bonding for the duties. It proceeds strictly on the principles of the law of pledge. The duties payable to Government on importation of goods form a heavy burden on the price, and which, if required to be advanced on importation, would prove a great inconvenience to merchants. A power of impledging particular goods for the duties has therefore been granted by Parliament, the goods being deposited in the king's cellars, at once open to inspection, and under secure custody and pledge for the duties.¹

Other occasions also accidentally arise in the course of extensive commerce, against which some relief, on the principles of the law of pledge, is offered by private speculators, or by the Legislature, giving time for the removal of the obstruction, or the opening of a new market. Private banks of deposit are sometimes opened for discounting of bills, on the impignoration of goods to double or triple the amount, according to the risks which seem to threaten that branch of trade. Sometimes the Legislature has interfered in the same way, giving loans to merchants on depositions of goods, to be redeemed within a stated period. In 1793, in consequence of many concurring causes of despondency which marked that eventful period, there was throughout Great Britain a general distrust. A number of country banks stopped payment; discounts were entirely at an end; the Bank of England refused to go further in supporting the mercantile classes; and many eminent manufacturers suspended their works, and were utterly unable to resume them, or afford employment to their labourers. At this crisis Government interfered: Parliament authorized five millions to be lent on exchequer bills, on the deposits of goods; and in a very short time, credit was restored as by a miracle. Not more, perhaps, than one-fifth of the whole sum ever was called for. The mere knowledge of the relief restored confidence; and the commissioners on the Act reported that 'the advantages of this measure were evinced by a speedy restoration of confidence in mercantile transactions, etc.; and that the whole sums advanced on loans were paid, a considerable part before it was due, and the remainder regularly at the stated periods, without apparent difficulty or distress.'

There is an institution very frequent on the Continent, called '*Montes Pietatis*,' or '*Monts de Piété*,' for lending money upon the pledge of goods. They are frequent in Italy [22] and in Germany; they were also frequent in Holland, and had begun to be introduced into France before the Revolution. In these establishments a fund is provided, with warehouses, and all necessary accommodations, and the directors meet regularly to decide upon applications, and authorize loans on deposit. The goods are kept carefully warehoused till the appointed time expires, when, if not redeemed, they are publicly sold.

¹ See above, vol. i. p. 199.

SUBSECTION. I.—PLEDGE OF COMMODITIES.

Goods, wares, or commodities, are the proper subjects of pledge. The contract may be by parole or in writing. The real right of the creditor is completed by delivery, and continued by possession.¹ Pledge was one of the real contracts of the Roman law; and it is so in Scottish law also. Possession of the subject is the proof of the creditor's right: for possession of moveables is in law held to infer property, unless in so far as the right is limited by evidence, either written or parole;² but usually the terms of the contract of

¹ [In the case of *Hamilton v Western Bank* (1856, 19 D. 150), opinions were distinctly expressed to the effect that the contract of pledge cannot be constituted without transference of *actual* possession of the subject to the pledgee; that it cannot be constituted by a change of the constructive possession of the subject in the hands of a custodian by intimation of an order of the owner to deliver to or hold possession for the pledgee. And again, in *Mackinnon v Hanson & Co.* (1868, 40 Sc. Jur. 560), opinions were expressed that it was not sound law that pledge could be constituted by *either* actual or constructive delivery of the subject pledged. The profession has never clearly understood why the corporeal possession of the creditor should have been considered specifically necessary. It is clear enough that the special contract of pledge—creating the right to detain a thing until the performance of some obligation due by its owner—cannot subsist while the creditor has not the power of detaining it, on account of the owner not having as yet given him anything but a promise to put it under his power. It is clear enough why pledge is to be considered a real contract from the point of view, that a creditor cannot detain the thing while he holds only the mere words of an obligation by the owners to pledge it instead of the thing itself. But that throws no light on the question why the creditor must hold the thing precisely with his own hands instead of by an agent's. And whatever be the nature of the power of detention the *creditor pignoratitius—non domini animo possidens*—has; whether his *animus sibi habendi* is or is not—*ex subtilitate juris*—possession (as to which, see Savigny on the one hand, and Warnkoenig, Archiv. für civil. Praxis, t. xii. p. 169, on the other), the determination of this question either way can make no difference on the question whether that *POSSESSIO* or *jus singulare*, whatever it be, over the goods cannot be exercised by the agent of the creditor as efficiently as by the creditor himself. If it be true that the *possessio* remains with the proprietor, though the physical custody is with the pledgee for the protection of the pledgee's adverse rights, this physical custody may as well, for anything that appears to an ordinary reasoner, be held for the purpose of protecting the creditor's rights by the creditor's agent, as by the creditor himself; and the legal *possessio* of the owner will be able to reconcile itself as easily with the adverse detention by the creditor's agent, as it is to reconcile itself with that of the creditor himself. In *Young v Lambert*, 1870, 39 L. J. P. C. C. 21, goods lay in warehouse at Quebec under control of the custom-house authorities. The owners got an advance on them. They gave the lenders an acknowledgment, clearly expressing the transaction to be a loan against the security of the goods; in other words, a loan on pledge, with power to the creditor, in the event of non-payment at maturity of the bills, to sell for reimbursement. They gave also an order on the customs officer to 'hold to

the order of' the creditor, he paying duty and storage charge before removal, which order was presented and accepted by the officer. The goods were afterwards arrested or seized in execution in the custom-house by creditors of the owners, on a judgment obtained against them. In the competition the original judge (Stuart, J.) granted *mainlevée* of the seizure, declaring the creditor who had made the advances on the goods a *pledgee* thereof. On appeal, the majority of the judges held that he had not obtained possession of the goods so as to give effect to the contract of pledge. On appeal to the Privy Council, it was pleaded that at the time of the seizure the owners had no legal right or actual power to take possession of or interfere with or sell the goods without first paying to the creditor the sum due to him, and that the goods had been validly pledged to him, and were in *his constructive possession* at the date of seizure. The Privy Council (Lord Westbury, Sir J. Colville, and Sir J. Napier) held that there was a valid constructive delivery, and that the goods were sufficiently transferred for the purposes of the pledge, and reversed the judgments which were to the prejudice of the appellant as pledgee. The French lawyers seem to find no difficulty in sustaining a pledge as complete, whether the possession is held by or for the creditor. (Pardessus, Cours de Droit Comm. vol. ii. p. 8 et seq.) The law of England, as well as that of Scotland—*ex necessitate*—requires delivery to constitute a perfect contract of pledge. (*Ross v Bramstead*; *Ryall v Bowles*, 2 White and Tudor L. C. 629.) And, indeed, the English law on the subject is drawn through *Coggs v Barnard* (Ld. Raymond 909; Smith, L. C. vol. i. and notes) from the same source as our own. But it does not require actual delivery; on the contrary, it is settled that 'the possession necessary in order to the enforcement of a pledgee's lien may be either actual or constructive.' (*Falkner v Case*, 1 Bro. C. C. 125; *Reeves v Capper*, 5 Bingh. N. C. 136; Story on Bailments; Parsons' Contr. iii. 272; and see *Meyerstein v Barber*, in H. L., 39 L. J. C. P. 187, where an effectual pledge of goods was constituted by transfer of an endorsed bill of lading, without any actual possession in the pledgee.) And as there seems to be no legal necessity for the opinion that a pledge may not be constituted by constructive delivery, so there is not only no mercantile convenience, but much mercantile inconvenience in it, as there always is wherever the law from mere theoretic subtleties needlessly sets itself to deny effect to the real intention of contracting parties. It is mischievous to trade and commerce to say that no real right less than *dominium* can be acquired or held through an agent, because it prevents merchants from dealing with their goods in warehouses according to their real intention, and forces on them a fictitious form of transaction they do not mean to enter into.]

² *Harriot v Cunningham*, 1791, M. 12405, was decided on

pledge are established by writing. If the precise limits of the security, and special appropriation to a particular debt, are not established by the clearest evidence, the pledge will continue as an effectual security for all the debt due by the person who pledges, on the principle explained already.¹

By the Roman law, it was lawful for the creditor, after the constitution of pledge by delivery, to restore the subject to the possession of the debtor on the footing of location, or any other legitimate contract. Paulus lays down this doctrine very explicitly.² But Voet very justly observes, in criticising this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to moveables; and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession presumes property.³ It is true that, in the course of many contracts, there is a necessity for separating property and possession; and that the mere circumstance of goods being in the hands of another on a temporary contract, will not deprive the real proprietor of his right, in favour of the creditors of the temporary possessor.⁴ And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession, in the course of necessary operations on it; the manufacturer or other holder being custodier for the pledgee, without injury to the real security. But the doctrine delivered by Voet is sound, where the possession is given up without necessity to the owner of the goods.⁵

Moveables pledged might by the Roman law be sold after certain valuations.⁶ But by the law and custom of Scotland, a pledge cannot be sold without judicial authority. The old method of proceeding was by poinding, or by assigning the debt, and so arresting the [23] pledge in the pledgee's hand, and then pursuing a forthcoming.⁷ But the modern method of proceeding is to apply to the Judge Ordinary, by a petition, for a warrant to sell the goods by public sale; the pledgor being called as a party. In the law of England, if the debt be not paid, the pledgee has a right to sell.⁸

SUBSECTION II.—PLEDGE OF DEBTS.

The proper subjects of pledge, as already observed, are corporeal moveables; and, strictly speaking, no incorporeal right can be the subject of this contract. Debts and other incorporeal rights may indeed be assigned in security; and such assignation sufficiently answers all the purposes of commerce, while it may in one sense be called a pledge. But as pledge is a real right of detention merely, not of property, and as it is vested by actual delivery and possession alone, there seems to be a legal impracticability of making debts the proper subject of pledge, unless in those cases where the debt is inseparable from the document, as in bills of exchange. In the Roman law, accordingly, debts could not be

this ground by the Court of Session, where one suing another for delivery of some articles of clothes, the defence was grounded on pledge, the articles having been impledged for a shop account. The Court held that the defender's possession presumed property, that it was competent for the pursuer to prove his property, and the *modus quo desiit possidere*; but that if he had no other proof but the defender's admission, he must take it with its condition.

¹ See above, vol. i. p. 725. [See *Rintoul & Co. v Bannatyne*, 1862, 1 Macph. 137.]

² Dig. lib. 20, tit. 1, De Pign. Action. l. 37.

³ Voet ad Pandect. lib. 20, tit. 1, sec. 12.

⁴ See above, vol. i. p. 274. [See *Moore v Gledden*, 1869, 7 Macph. 1016.]

⁵ [As to the powers of agents to impignorate the goods of their principals, and the construction of the Factors Acts, see vol. i. p. 521, note 2. As to the title requisite to enable a possessor to pledge goods, see also *Stuart v Macgregor*, 1829, 7 S. 622; *Paton v Wyllie*, 1833, 11 S. 703; *Barron v National Bank*, 1852, 14 D. 565; *Athya & Co. v Rowell*, 1856, 18 D. 1299; *Smith v Allan & Poynter*, 1859, 22 D. 208.]

⁶ Dig. lib. 13, tit. 7, De Pign. Act. l. 4. The principle is traceable to mandate; such a power implied as is expressly conferred by the clauses of sale in our modern heritable securities. See *Stair i. 13. 11.*

⁷ *Stair i. 13. 11.*

⁸ *Pothonier v Dawson*, Holt's Rep. 383.

pledged, as being incapable of actual delivery, the essential badge of the real right;¹ and all that seems practicable, on the strict and proper principle of pledge, is to impignorate, and deliver into the hands of the creditor, the documents of the incorporeal right, to the effect that, in so far as the documents may be necessary to the pledgor, or those in his right, this may afford a kind of security. But against third parties or creditors this will not constitute a real right in the debt, nor entitle the pledgee to a preference.²

When the debt, however, is inseparable from the voucher, as in bills and notes, pledge is competent and effectual. Accordingly it is a frequent transaction in trade to pledge bills and notes. On such occasions, the bill or note is sometimes endorsed in full to the pledgee, sometimes blank endorsed; and when it is so, the pledgee does not seem to require judicial aid to enable him to recover his money. On the contrary, in transactions with bankers, in which this arrangement generally takes place, there is, from the blank endorsement, that implied authority (which, by the original nature of pledge, is implied to make effectual the debt out of the pledge) that the money shall be recovered when the pledged bill falls due; and the pledgee has all the privileges of an onerous endorsee. Sometimes, however, a bill is more correctly pledged without being endorsed; and a question may be raised, What is the nature of the right acquired by the creditor? It appears to be merely the right of detaining the document, such as it is, and so of indirectly operating payment of the debt intended to be secured.³

SUBSECTION III.—PLEDGE OF TITLES.

Where title-deeds and documents of debt are placed with a creditor as a security, [24] it is not, strictly speaking, the contract of pledge, but a mere deposit. The right that is conferred on the creditor is not that of making his debt effectual out of the subject pledged, but a right of retention merely. It is a lien by express constitution. The proper effect of it is to enable the creditor to keep possession of the titles, etc., to the great inconvenience of the proprietor or of his creditors; and, indirectly, this may operate as an inducement with them to redeem them, by paying the debt for which they are implicated.⁴ But as to heritable property, the real right to the estate may be carried without the titles by adjudication, and the lands may be brought to market (though less advantageously) by judicial sale. In England the original rule was the same. But it has been ruled that, independently altogether of assignment or transference of the estate or debt itself, the deposition of titles and muniments in security of a debt gives an equitable lien, effectual against the creditors. This doctrine was not introduced till Lord Thurlow's time. The mere possession of the title-deeds of an estate gave no interest in the estate, except collaterally, as compelling the owner, when he had use for the title-deeds, to satisfy the debt in order

¹ 'Pignus appellatum a pugno (says Gaius in the 238th law, sec. 2, De Verborum Signif. Dig. lib. 50, tit. 16), quia res quæ pignori dantur manu traduntur.' But he also lays it down, 'Incorporalis res traditionem et usucapionem non recipere manifestum est' (Dig. lib. 41, tit. 1, De Acquir. Rer. Dom. l. 43). These are the laws on which this doctrine of Roman jurisprudence is in general rested by the commentators, though the matter has undergone much controversy.

² This principle regulated the decision of Lord Pitmilley in *Innes v Craig*, 22 June 1821, Fac. Coll., and was not touched by the alteration on that judgment in the Inner House. The Court gave no effect to the deposit of the bond as a pledge, or conferring a real right; but regarding Innes as a creditor of Home, and Craig as only a creditor of Home's executor, they recalled the preference given to Craig, and, ranking Innes as a creditor, sent the case back for inquiry whether Craig was also a creditor. [See page 21, above, note.]

³ On this ground, it may be doubted whether a decision in the following circumstances is strictly reconcilable with legal principle:—Muir, Wood, & Co. accepted a draught of Muir's, one of their partners, for £400, accounts not being settled between them. This note was deposited or implicated by Muir with a person from whom he borrowed money on his own promissory note; but the company's acceptance was not endorsed to the lender. Muir died insolvent, and greatly indebted to the company. And the question was, Whether the holder of the note could claim more from the company than was truly due to Muir by the company? The Court held him entitled to recover from the company, as an endorsee would have been entitled to do, the whole contents of the note. *Hogg v Muir, Wood, & Co.*, 18 May 1820, n. r.

⁴ [The title-deeds of an estate in Scotland cannot be made the subject of pledge. *Christie v Ruxton*, 1862, 24 D. 1182.]

to obtain them.¹ It came then to be considered, that when title-deeds were as a security deposited, an obligation to execute a legal conveyance to the estate, whenever it should be required, was to be implied; and on this footing the equitable mortgage was constructed.² But strong regret has been expressed by Lord Chancellor Eldon that this equitable mortgage was ever introduced.³ To sanction the constitution of those qualifications on property, independently of a real right or actual possession of the property itself, is inconsistent with the genius of the Scottish law; and the deposition or pledge of the titles of feudal subjects confers no *jus in re*, and forms no burden on the right of the feudal proprietor, or of his creditors or assignees.

It seems, in the same way, inconsistent with the true principles of law to sanction a burden on the real right even to moveables or debts, without an act of permanent or temporary transference of the right itself; unless in the case already mentioned, of the debts and vouchers being inseparable. And it is not necessary, in order to transfer a debt, that the instrument or bond should be delivered to the assignee; but the debt itself may be attached by arrestment, in whose hands soever the bond may happen to be: so that the possession of the documents gives no apparent property. An assignation completed by intimation will be effectual to carry the debt, whatever may have become of the bond; and after intimation the cedent cannot, in consequence of the possession of the document, without a retrocession, be reinstated in the right of the debt; nor can any person to whom that bond is delivered claim any better right than he has to bestow. Even a second assignee, with delivery of the bond, will not be preferred over a first with prior notice. This shows the right of the debt to be quite independent of the document; and the pledge of the document cannot therefore be the regular way of constituting a security over such a subject.

SECTION III.

OF HYPOTHEC.

[25] Hypothec is distinguished from Pledge, by not requiring to its constitution that delivery and continued possession in which the real security of pledge consists.⁴

In the Roman law, hypothecs were distinguished into three kinds: 1. The conventional; 2. The judicial; and, 3. The legal or tacit. To the constitution of none of those securities was delivery necessary. In the first, a simple convention; in the second, a judgment of a court; in the third, the mere implied assent of the parties,—gave complete efficacy to the right of the creditor. In the progress of Europe from the middle times, the principal states, whose laws are the best known to us, and the most worthy of being studied, were led to the encouragement of commerce. This produced a considerable alteration of the old Roman law respecting hypothecs, and the use of this kind of security was more or less proscribed.⁵

SUBSECTION I—CONVENTIONAL HYPOTHECS.

CONVENTIONAL HYPOTHECS have, in almost all the commercial states of Europe, been either banished entirely, or subjected to such restrictions as may prevent material injury.

¹ *Head v Egerton*, 3 P. Williams 279.

² In the case of *Russell v Russell*, 1 Brown's Chan. Ca. 269, and in subsequent cases, the doctrine of a mortgage on an estate, from delivery of the title-deeds, has been sustained. *Ex parte Coming*, 9 Vesey 115; *ex parte Wetherell*, 11 Vesey 398; *ex parte Haigh*, *ib.* 403.

³ *Ex parte Coombe*, 17 Ves. 371; *ex parte Whitbread*, 1 Rose's Ca. 299; *ex parte Hooper*, 1 Merivale 7.

⁴ *Pignoris appellatione eam propriè rem contineri dicimus quæ simul etiam traditur creditori. At eam quæ sine traditione nuda conventionione tenetur propriè hypothecæ appellatione contineri dicimus. Instit. l. 4, lib. 6, sec. 7.*

⁵ See the subject of hypothecs very comprehensively considered by the Chevalier Ferdinand dal Pozzo, in *Observations sur le Regime Hypothécaire établi dans le Royaume de Sardaigne*, 1823.

On the Continent, it is a rule, almost universal with respect to hypothecs on immoveables, that they have no efficacy unless entered into by solemn deed, and recorded: *Ne, si eadem res pluribus semel obligetur, homines decipiantur*.¹ In Holland and the Low Countries, in Germany, in the Italian states, in France, and in Spain, this law was adopted both with respect to general and to special hypothecs on immoveables.² As to moveables, conventional hypothecs are in none of those countries allowed to affect a *bona fide* purchaser. And in some countries on the Continent (particularly by the customs of Paris and Orleans³), in England,⁴ and in this country, conventional hypothecs on moveables have no force even against personal creditors.

In this country the common law verily early declared itself against conventional [26] hypothecs. This repugnance may be traced back to the days of Sir James Balfour (p. 194), and even to the Regiam Majestatem (lib. 3, c. 3); but it is sufficient to refer to Lord Stair, who (in the end of the seventeenth century) lays it down, that 'our customs have taken away express hypothecations of all or part of the debtor's goods without delivery.' And the principle, as he represents it, is 'that commerce may be more sure, and that every one may more easily know the condition of him with whom he contracts.'⁵ So strongly has this doctrine been established during all that period to which our printed reports reach, that though many questions are to be found relative to tacit hypothecs, there does not appear a single case in which it was attempted to give effect to a conventional hypothec; and the law, as delivered by Lord Stair, is almost *verbatim* repeated by Erskine.⁶

One species of conventional hypothec has been held to exist as a portion or effect of the superior's [creditor's] right of security stipulated in rights of annualrent, and even in modern heritable bonds and real burdens on land. It is said that in those cases there is not only a real right in the land, but a real preference also over the moveables found on the land.⁷ But whether this preference be referred to the principle of hypothec, or supposed to be a portion of the right of property included in the annualrent right, and so in other real securities, the doctrine of such a preference, independently of poinding of the ground, has been rejected in the House of Lords.⁸ See afterwards, on this subject, Poinding of the Ground.

¹ I use the words of the Imperial Constitution, because they express shortly the principle acknowledged by all commentators on the various laws of the Continent. Carpz. Juris Roman. Sax. part ii. const. 23.

² For information on this subject, read, for the law of Germany, Carpzov. *ut supra*: of Holland and the Low Countries, Van Leewin, lib. 4, c. 7, secs. 8, 9, 10; Voet, lib. 20, tit. 1, sec. 9; and Sande, Dec. Fris. lib. 3, tit. 12, def. 15: of Spain, Rodriguez and d'Acosta: of France, Pothier, Œuv. Posth. vol. i. p. 426.

³ Valin, in his Commentary on the Ordonnance de la Marine (vol. i. p. 341), represents this as the general law of France: 'En effet les navires étant meubles, ils ne peuvent pas plus être sujets à hypothèque que les autres meubles, que par le droit commun du royaume n'en sont pas susceptibles. Si le contraire a lieu en pays de droit écrit et quelques coutumes, c'est par exception à la règle générale; et encore dans ces mêmes pays, l'hypothèque n'opere-t-elle qu'autant que les meubles sont trouvés dans la possession du débiteur, sans droit de suite lorsqu'ils sont en tierce main.' What he says here, however, of ships, is applicable only to common hypothec, not to bottomry, or prêt à la grosse aventure.

John Baptiste Card. de Luca (who wrote in the end of the seventeenth century), in his *Confictus Legis et Rationis*, censures with great freedom the opposite doctrine, which in his time prevailed in Italy; and justifies, with great force of

reason, the principles of the law which we have followed, denying effect to conventional hypothecs, even against personal creditors. 'It is by no means inconsistent,' says he, 'with the liberal spirit of equity required in the mercantile law, that a proper pledge, which is truly deserving of the name, considered in its etymology as being constituted by a true and proper delivery of the subject to the creditor, should bestow a preference over personal creditors, since the commodities, not being left in the debtor's hand, do not serve to swell his apparent stock or extend his credit. But for that fictitious and ideal pledge which is constituted by the mere force and form of words, without any visible alteration taking place on the state of the debtor's funds, and which leaves him in full possession of his property and stock-in-trade, it is little better than a legal knavery, an authorized Jew's trick.' Obs. 132. See also Obs. 134.

⁴ [Transfers of property in personal chattels raised in England a question of fraud or no fraud for a jury, where the transferror continued in possession, until 17 and 18 Vict. c. 36, which invalidates secret bills of sale of personal chattels, unless registered in the Queen's Bench within twenty-one days after making. See Smith's L. C. vol. i. pp. 1-29.]

⁵ B. 1, tit. 13, sec. 14.

⁶ B. 3, tit. 2, sec. 34.

⁷ So it was held in *Tullis v White*, 18 June 1817, F. C.

⁸ *Hay v Marshall*, 1826, 2 W. and S. 71.

But though this be the general rule of law, the favour of trade has introduced one exception, viz. *Bottomry* and *Respondentia*, which have already been treated at large.¹

SUBSECTION II.—TACIT HYPOTHECS.

TACIT HYPOTHECS take place only in a few cases, which the law regards as peculiarly entitled to favour, and which do not vary with the changing agreements of parties, with which creditors can have no method of becoming acquainted. These circumstances make this sort of security, relatively to general credit, less inexpedient than it might otherwise have been. When fully established, creditors are aware of these hypothecs, and suit the credit they give the debtor to their probable extent: so that while, on the one hand, the necessity of circumstances, or public expediency, calls for the encouragement which this security bestows upon a creditor; on the other, the danger of being met by such preferences is easily calculated and provided against. Accordingly we find, that in those of the continental states which required most strictly the registration of hypothecs upon immoveables, it was not necessary to record a tacit hypothec. This could proceed only from the notion that, from the circumstance of being established in definite and specified cases, such hypothecs were easily accessible to the observation of creditors.²

[27] In the Roman law the following tacit hypothecs were recognised: 1. Upon the principle of signal benefit conferred upon the debtor, and of a kind of necessity for the advance of the money—*Ne urbs ruinis deformatur*—a person who repaired a house, or lent money for that purpose, had a tacit hypothec over it.³ 2. On the same principle of expediency, the public treasury, or fisc, had an universal tacit hypothec over the debtor's property. 3. On the principle of inability properly to protect themselves, and provide for their own security, a hypothec was given to wives for their dower, and to pupils for the balance due to them by their tutors. And, 4. On the principle of a presumed convention, landlords and proprietors had a hypothec over the *invecta et illata* of their tenants.

But, as Lord Stair has delivered it, 'Of the tacit legal hypothecations our custom hath only allowed a few; allowing parties ordinarily to be preferred according to the priority of their legal diligence, that commerce may be the more sure, and every one may more easily know his condition with whom he contracts.'⁴

The tacit hypothecs which subsist in Scotland, besides the maritime hypothecs already discussed,⁵ are these: 1. Superiors for feu-duty. 2. The hypothec of the landlord for rent, over the fruits and over *invecta et illata*. 3. Hypothec of law agents on the costs awarded in a suit. 4. Hypothec to freighters, on ships for their goods. 5. Hypothec on ship and goods for average. 6. Hypothec for certain excise duties.

I.—SUPERIOR'S HYPOTHEC FOR FEU-DUTIES.

The superior has the very effectual remedy of Poinding of the Ground for his feu-duties (see vol. i. p. 724); but he is held also to have a hypothec on the fruits of his feu for security of the duties payable by the vassal.⁶ It prevails over the landlord's hypothec; for

¹ Vol. i. p. 578.

² This, for example, was the law in Friesland, where Sandè informs us that conventional hypothecs were required to be registered, 'that, by inspection of the public records, those intending to lend might discover how many hypothecs already existed upon the borrower's property, to whom the debts were due, and what the extent of the hypothec was;' but that tacit hypothecs require no registration, and are preferable in competition with recorded conventional hypothecs, if prior in time. Lib. 1, tit. 12, def. 15, p. 203.

³ We still give this security or indemnification, but it is not by tacit hypothec. It is given only by judicial authority. See, Of Jedge and Warrant, vol. i. p. 784.

⁴ B. 1, tit. 13, sec. 14.

⁵ See above, vol. i. pp. 562, 573.

⁶ 1 M'Kenzie, tit. 6, sec. 12; Ersk. ii. 6. 63; Stair ii. 4. 7. See Ross' observations on this subject, vol. ii. p. 392 et seq.

the vassal cannot let his land otherwise than under the burden of the feu-duties payable to the superior, whose right the vassal cannot injure. In the former edition of this work, it was said that there seemed to be no authority for giving to the superior a hypothec over stocking, or over the *invecta et illata* in urban subjects. But in a late case the superior has been held entitled to such hypothec.¹

It may be observed, that a creditor by heritable bond or real burden has no such right of hypothec. His remedy is limited to the poinding of the ground.²

II.—LANDLORD'S HYPOTHEC FOR RENTS.

In the Roman law, the landlord of a rural subject had a tacit hypothec for his rent over the fruits; but not over the tenant's furniture, or stock, or cattle. The proprietor of a house, or shop, or warehouse, had a similar hypothec over the moveables brought into [28] them by the tenant.³

As established in the law of Scotland, the right of the landlord has been sometimes called a right of property; sometimes a mere hypothec, originating from a tacit contract. But without pretending to determine precisely whether the origin of the right is to be referred to the one or to the other principle (neither, perhaps, being fully adequate to account for all the effects), it may be represented as a right of hypothec, convertible by a certain legal process into a real right of pledge.⁴

The landlord's right, as established in England, seems to have been formerly, and at common law, a right of hypothec, reducible (by distraining and impounding the subject of distress) into a right of pledge. This pledge, however, was a right of mere retention; except in Crown debts, in which the goods distrained were always saleable at common law. It was only by statute that distress for rent was made saleable, after five days' impounding of the distress.⁵ In Scotland, during the currency of the rent, and before the removal of the subject, or any proceedings on the part of the landlord, his right is of the nature of hypothec. This right may be said to be converted into pledge by sequestration, which may be applied for even *currente termino*.⁶ And (at common law, and without requiring the aid of statute, as in England) the pledge may be sold, and applied in satisfaction of the rent, by authority of the judge who issued the warrant of sequestration.

I. SUBJECTS OF LANDLORD'S HYPOTHEC.—All landlords, whether of lands, or of houses for habitation, or for depositions, or for carrying on of manufactures, have a hypothec for security of their rent. But this hypothec has been held not to apply to a contract of wood-cutting; for although this was said to partake of the nature of a lease, the Court held that it is not within the principle of the cases in which there is a hypothec.⁷ This right of

¹ *Yuille v Lawrie*, 24 Jan. 1823, F. C., 2 S. 155, N. E. 140. Here a quantity of timber, and materials of carpenter's work, with tools and furniture, were on the premises of an urban subject. These were prepared, sold, taken away, and paid for, when the superior applied to the sheriff to have them brought back, as subject to his hypothec. The whole Court agreed that the superior in urban subjects possesses a right of hypothec over *invecta et illata*, not to be defeated by a sale.

² See below, Of Poinding of the Ground.

³ Dig. lib. 20, tit. 2 (in quib. Caus. Pign. vel Hypoth.), l. 3, 4, 7.

⁴ For the history of this right, consult Kames' Law Tracts, No. 4, Elucidations, art. 10; Ersk. ii. 6. 56; *Fowler v Cant*, 1630, M. 6219; Dig. lib. 47, tit. 2 (De Furtis), l. 61, sec. 8; Voet, lib. 20, tit. 2, sec. 7; 2 Ross 392.

⁵ 2 Will. and Mary, c. 5; 8 Anne, c. 14; 4 Geo. II. c. 28;

11 Geo. II. c. 19; 2 Blackst. Com. 6-15. [Stephen's Com. iii. 356 sqq.]

⁶ *Grant v Sherrie*, 10 March 1784, M. 6201. [But where sequestration has been applied for *currente termino*, the landlord must pay the expenses if the rent be paid at the proper time, even although he had at the time reasonable ground for using it. *Gordon v Suttie*, 1836, 14 S. 954.]

⁷ *Muirhead v Drummond*, 16 May 1792, Baron Hume's Sess. Pap. The woods on the estate of Perth were disposed of by public auction to Buchanans, who were by contract to cut it in the space of ten years, and to pay the sum of £2400 in ten equal annual proportions. The Buchanans conveyed their right for the three last years to Grahams, who failed; and a question arose with their creditors, Whether the proprietor had any hypothec in such a case? Lord Justice-Clerk M'Queen held this not to be a lease, but a sale: that there

hypothec differs, of course, according to the nature of the subjects over which it extends. It may be proper, in particular, to distinguish cases in which there is a sublease from those in which there is none.

1. *Where there is no Sublease.*—The exercise of the right lies between the two contracting parties in the lease, undisturbed by the interest of a third person.

[29] (1.) In AGRICULTURAL FARMS, the landlord's right extends over the produce of the land, and over the cattle fed upon the farm.¹ The Roman law refused a hypothec over anything but what strictly was the produce of the field; neither cattle, nor implements of husbandry, nor furniture, were included. In this country the hypothec includes cattle; but there seems hitherto to be no *direct* authority for comprehending the implements of husbandry, or the tenant's furniture, though it is generally understood to extend to both. 1. The chief subjects of hypothec to the landlord are the fruits of the ground. These may almost be regarded as the property of the landlord; and he has not only the power of retaining them on the ground, but of recovering them from third parties.² 2. He has also a right of hypothec over the tenant's cattle. This right of hypothec, strictly and properly, ought to apply to that subject only out of which in former times the rent was paid in kind, as now from its price. But in the former state of our agriculture, the farm produce consisted of nearly equal divisions of cattle and of corn; herds of half-starved cattle wandered over one part of the farm, while the tenant's efforts were employed in raising corn upon the remainder. To extend the hypothec over the cattle thus fed was natural and just: they were the produce of the farm; and they stood the landlord, as well as the tenant, in the stead of the corn that might have been raised on the remainder.³ 3. It is doubted whether the tenant's furniture and implements of husbandry, etc., are included under the hypothec. In the Reports the expression 'Tenant's stocking' occurs;⁴ and it has been questioned what properly falls within that description. The cattle of the tenant, reared or fed on the farm, unquestionably fall under this description. The horses used in husbandry have been held also to fall under it, and to be liable to hypothec.⁵ Whether the furniture and implements are also included, has not been decided. The same principle which led to the extension of the hypothec over cattle, sanctions in no degree an extension of it over

was therefore no hypothec: that though, if a buyer be *vergens ad inopiam*, the seller has retention; yet here, by cutting, barking, etc., the possession is delivered, and no room for retention. Lord President Campbell thought the decisions on the heir of entail's right to stop cutting proceeded on the principle that such a contract is a lease. The Lord Justice-Clerk said, that if it was a lease, the instalments would as rents go to heirs, but they have been found to belong to executors: that the heir of entail may stop the cutting, as at the day of the predecessor's death; whereas, if this is a lease, the cutting might be continued as long as the tailzie permitted leases to be granted: that tenants get the use *salvo rei*, etc., but here nothing to hinder the whole wood to be cut down in one year. Suppose a landlord to sell the crop of any year, could he claim hypothec as a landlord? The Court rejected the claim of hypothec. 16 May 1792.

[So a consideration payable for the use of steam power and water has been held not to be secured by the landlord's hypothec, where it is separate in the contract from the rent for the land and buildings where it is used. *Catthers v Tennent*, 1834, 12 S. 686; *revd.* 1835, 1 S. and M'L. 695. It is not decided whether pactional rent, payable in respect of violation of the conditions of the lease, is secured by hypothec. *Witham v White & Young*, 12 June 1866, 38 Jur. 586.]

¹ [Also over the produce of the cattle, such as cheeses,

although made by a 'bower,' or tenant of the cows under a 'bowing contract.' *Goldie v Oswald*, 25 Jan. 1839, 1 D. 426.]

² Ersk. ii. 6. 58, 59, 60. [It was held that the landlord might vindicate the corn grown on the farm, even against *bona fide* purchasers, unless sold in bulk in public market (*Smart v Ogilvy*, 1796, 3 Pat. 490; *Dalhousie v Dunlop & Co.*, 1828, 6 S. 626, *aff.* 4 W. and S. 420); and even after change of the *species* (*Barns v Allan & Co.*, 1864, 2 Macph. 1119). But the last noted decision was the cause of an inquiry by a Royal Commission, which resulted in the passing of the Act 30 and 31 Vict. c. 42, whereby it is enacted (sec. 1) that agricultural produce purchased *bona fide*, delivered, removed from the farm, and paid for, or purchased *bona fide* at an auction, after seven days' notice given to the landlord or those representing him, without sequestration having been obtained and registered, shall be free from this hypothec. But this exemption does not apply to produce which the tenant is legally or conventionally prohibited from selling or carrying off the land, or which has been sequestrated after the notice above required.]

³ Ersk. ii. 6. 56, 57, 61.

⁴ *Hepburn v Richardson*, 1726, M. 6205.

⁵ *Napier v Kissock*, 1825, 4 S. 304, N. E. 307. [But where the other effects are sufficient to satisfy the rent, the sale of work horses would probably be prevented by the interference of the Court. *Henderson v Dunbar*, 1 March 1845, 17 Jur. 271.]

the furniture or implements of husbandry. But at the end of the lease the landlord may perhaps be considered as having a right, in the nature of lien, to detain upon the farm, and in the houses, the furniture and implements till the rent be paid.¹

(2.) In GRASS FARMS the landlord has no other hypothec than over the cattle.² But this hypothec does not extend over the cattle of others put into the fields to graze.³ Hence a tenant has been removed, merely on the ground that his farm was grazed entirely by the cattle of others, so that the landlord had no hypothec to secure the rent.⁴ The only right of preference, as to such cattle, is over the grass-mail, or sums payable for grazing, with the benefit of the tenant's right of lien over those cattle in security of it.⁵ Whether the owner of the cattle would be justified in paying beforehand grass-mail, and so be acquitted at the hands of the landlord seeking his rent by hypothec, may well be doubted.

In the neighbourhood of great towns, grass farms are frequently cut in small patches, and the grass carried daily to market, by which enormous rents are derived from such [30] fields. But the nature of the subject so far deprives the landlord of the exercise of his hypothec, that he will not be entitled to insist on keeping the produce on the land. He must trust chiefly to cautioners for the security of his rent, and to the effect of his right in competition for what may remain on the land. In a competition between creditors in bankruptcy, or doing diligence individually, the hypothec would, of course, be effectual.

(3.) In a PRÆDIUM URBANUM, comprehending dwelling-houses in town or in country, mills, shops, breweries, etc., in which there are no fruits to be the subject of hypothec, the hypothec is over the *invecta et illata*. Under this description are included household furniture, plate, paintings, and books.⁶ It seems to have been understood, in the only case which touches the point, that everything is comprehended which belongs to the tenant and his family, even to their wearing apparel.⁷ But it may well be doubted whether the right can be extended so far. In the Roman law, from which we borrowed this urban hypothec, it seems only to have comprehended those moveables which were meant to remain permanently in the house.⁸ The credit is placed upon the furniture usual and proper to a house fit for habitation, not on the clothes and personal ornaments of the occasional inhabitants.⁹

¹ *Alison v Crs. of Campbell*, 1748, M. 6246. Here the question was moved, whether the hypothec extended over the furniture, where the lease was of an agricultural subject. No judgment was given by the Court. The judges seemed to think there was rather a right of retention than of hypothec; and they seemed to have more difficulty as to furniture than as to instruments of husbandry. See Elchies' Notes, 197.

[*Hunter v N. of England Bank*, 13 Nov. 1849, 12 D. 65; *M'Clymont v Cathcart*, 1848, 10 D. 1489. The question is set at rest by 30 and 31 Vict. c. 42, sec. 6, which enacts that it shall not be competent to include in any sequestration for rent of agricultural subjects, 'any household furniture or furnishings, or any agricultural implements,' nor any 'imported manure, lime, drain tiles, feeding stuffs, or other material not being the produce of or made upon the farm or lands, and not at the time incorporated with the soil, or consumed or otherwise applied to the purposes for which such material may have been procured.' But sequestration is still competent, if such materials have been brought upon the lands for the purpose of being used in fulfilment of a specific obligation imposed by the lease.]

² *Ross v Williamson*, 1817, Hume 232. [But see *M'Clymont v Cathcart*, *supra*.]

³ *Brown v Sinclair*, 1724, M. 6205.

⁴ *Ross M'Kye v Nabony*, 1780, M. 6215.

⁵ Ersk. ii. 6. 63. Bankton has erroneously stated the right to extend over the cattle themselves, as if they were hypothecated for the tenant's rent. Bankt. i. 17. 10.

[It is enacted by 30 and 31 Vict. c. 42, sec. 5, that the live stock of third parties, taken upon a farm to be grazed or fed, are liable to the landlord's hypothec only to the extent of the grazing rent; but this liability continues to the full extent of the payment originally agreed upon, or what remains unpaid, so long as any portion of such live stock remains on the lands.]

⁶ Ersk. ii. 6. 64.

⁷ *C. of Callander v Campbell*, 1703, M. 6244. Here it was doubted whether even the clothes of Mrs. Campbell's daughter, Mrs. Gordon, who happened at the time of the sequestration of the furniture to be on a visit to her mother, were not legitimately included in the hypothec. 'In regard it was thought hard to detain the daughter's wearing clothes,' the Court deferred judging on that point till it was seen whether there was not enough besides. Surely no countenance could be given now to so extravagant a doctrine as that here hinted at.

⁸ *Videndum ne non omnia illata vel inducta, sed ea sola quæ, ut ibi sint, illata fuerint, pignori sint? quod magis est.* Dig. lib. 20, tit. 2 (In quib. Caus. Pign.), l. 7. 1.

⁹ *Quid juris*, as to lodgers or boarders in a house? See argument in *Dick v Lands*, M. 6243.

In other countries it seems to be settled, upon general principles,¹ that neither cash, nor bonds and other documents of debt, are proper subjects of the landlord's hypothec.

Doubts have long been entertained concerning HIRED FURNITURE placed in a rented house, where it is intended to serve the permanent use of the tenant, and to be the standing furniture of the house. It has been said, that any circumstances which amount to a collusive and fraudulent possession, and apparent ownership, should forfeit to the owner of the furniture his right; but that as the person who lets furniture or anything else means not to alienate the property, but to have it restored when the contract is at an end, and as the right of the landlord is referable to a tacit contract of pledge, it may be doubted whether the tenant can be held tacitly to impignorate what was not his own. It is admitted that, if there were a very strong and positive rule established, extending the hypothec over all property, whether belonging to the tenant or to others, the legal inference would be, that a person letting out furniture exposed it to that risk, and tacitly agreed to the landlord's preference; but independently of such rule, the landlord's hypothec should not comprehend the furniture of a broker, any more than in a grazing farm the cattle of third parties. But although these considerations might formerly have suggested doubts of the landlord's title to hypothecate hired furniture, it has lately been decided that such furniture is liable to hypothec.² This seems to proceed on the ground that the person who lets furniture has [31] this risk in contemplation, and charges hire accordingly, while the tenant of the house is trusted on his apparent stock of furniture.

Furniture which is not let out, but merely deposited in the house, or lent to the tenant without a rent, raises a question of greater difficulty, which is not comprehended under the same principle with the above. This question is discussed in a note of Lord Fountainhall, without any definite conclusion being drawn, or decision quoted.³ But in a modern case the Court held that the hypothec does not extend over such property.⁴

¹ Pothier, Tr. du Cont. de Louage, Nos. 250, 251.

² The following cases establish this:—

In a case to be immediately quoted, a broker having let out furniture to a tenant, it was sequestrated for the rent. The broker seems never to have dreamt of opposing the landlord in sequestrating it; and it was sold, and applied towards payment of the rent. This is no decision on the point, though it indicates the understanding of people in that line. *Cowan v Perry*, 1804. See below, note 4.

Wauchope v Gall & Ross, 1805, Hume 227. Mr. Wauchope let a house to Ruffine for £20, who furnished it from a broker's stock, at a rent of half a guinea a week for the articles furnished. The landlord applied for sequestration, and (the broker having actually got back his furniture) contended that this furniture must be restored to the operation of the hypothec. The sheriff ordered the furniture to be restored, as liable to the hypothec. The cause was brought into the Court of Session by advocacy, when Lord Bannatyne passed the bill, intimating thereby his disapproval of the sheriff's judgment. The Court (I believe unanimously) altered that judgment, and affirmed that of the sheriff. I understand the ground of the judgment to have been, that in letting out furniture, the owner of it is bound to have this risk in contemplation, and that the hire is in practice proportioned to the risk. The Court remitted to the Lord Ordinary to refuse the bill. Lord Bankton (i. 17. 10) lays down the law as it was applied in this judgment.

In *Stewart v Bell*, 31 May 1814, this doctrine was fully confirmed; a cautioner for rent being found entitled to an assignation to the hypothec over furniture hired from an

upholsterer. This case is imperfectly reported in 17 F. C. 638; but corrected in appendix to same reports, vol. 18.

Penson and Robertson, 6 June 1820, F. C.

³ July 1672, 2. B. S. 670.

⁴ *Cowan v Perry*. Wilson hired a country-house, which he furnished partly with his own furniture; partly with furniture from a broker; and partly with furniture lent to him without hire by Miss Perry, who had no use for it at the time. Wilson's own and the broker's furniture were sold under the landlord's sequestration, the broker having made no appearance nor opposition; but Miss Perry claimed the furniture deposited or lent, as not liable to hypothec. Lord Cullen held that this furniture could not be sequestrated, and ordered it to be delivered back to Miss Perry, without caution or consignment. And to this judgment the Court adhered, 31 Jan. 1804, Sess. Pap. of Baron Hume.

In *Wilson v Spankie*, 17 Dec. 1813, 17 F. C. 494, 695, 18 F. C. 3, the Court held the hypothec good over furniture belonging to the tenant, and which, the tenant having become bankrupt, his creditors allowed to remain in the house. But although Lord Robertson, Ordinary, doubted Cowan's case, this decision is not to be taken as a denial of that case. It is more of an exception to it, on the ground that the credit for rent was prolonged on the continued possession of the furniture, as under a hypothec assented to by the creditors. [Still less does the hypothec apply to the furniture of a third party, wrongfully and against the owner's wish retained on the premises by the lessee. *Jaffray v Carrick*, 1836, 15 S. 43. And furniture sold under Crown diligence, preferable to landlord's hypothec, and left in the premises by the purchaser, is

(4.) In the leases of SHOPS, WAREHOUSES, MANUFACTORIES, CELLARS, etc., a hypothec over the *invecta et illata* is enjoyed by the landlords. 1. The goods in a shop, though intended for sale, are subject to hypothec; but the landlord's right never can prevent them from being sold in the course of trade, whatever effect it may have in competition with other creditors doing diligence.¹ 2. Goods of third parties in a warehouse will not be subject to hypothec; though, like cattle in a grazing farm, the hire (secured by lien) will be subject to it. The rules seem to be: *First*, That the commodities of others in a manufacturer's hand, though found in his house, or workshop, or warehouse, are not included in the hypothec. *Secondly*, That the goods in which a shopman deals, though they may be sequestrated, are, till sequestrated, vendible.² *Thirdly*, That the effects belonging to travellers in an inn or hotel are not subject to hypothec for rent of the inn. *Fourthly*, That goods deposited or put in pledge in the house of a tenant, are not thereby exposed to the landlord's hypothec.³ Of all these it may fairly be said that they in no shape can be regarded as subjects intended permanently to remain.

2. *Where there is a Sublease.*—There is some ground for distinction between the case where the sublease has been constituted with the express or implied consent of the landlord himself, and that in which a sublease has been granted without his permission.

(1.) In an AGRICULTURAL or GRAZING FARM, where no power to sublet is given, the tenant cannot, without his consent, deprive the landlord of his right of hypothec. No sublease, which the landlord does not recognise by taking rent, etc., can destroy his right of sequestrating the produce and stocking of the farm; but although the stocking and [32] produce may belong to the subtenant, it will be subject to hypothec, as if it were the property of the principal tenant.⁴ Even the payment by the subtenant of his subrent to the principal tenant will afford him no security against this real right of the landlord. The landlord is not bound to recognise him at all in any other character than as intromitter with the fruits of the farm; while the subtenant makes such payment at his own risk, aware as he must be of the landlord's right. Where the subrents are unpaid, the landlord may, of course, have his remedy either against them, or against the crop and stocking. It has been questioned whether the subtenant of a part is thus exposed to the hypothec for the whole of the principal tenant's rent. Much may be urged on both sides. But I see no clear principle on which the subtenant can oppose the exercise of the universal right of the landlord; or demand more than an assignment of that right in equity, that he may operate his relief against the principal tenant, or against other subtenants.⁵

Where the landlord, although he has not recognised the subtenant, has in his lease given a power to subset, it is held as a tacit permission to the subtenant to pay his rent to the principal tenant, if not interrupted by the landlord. The unpaid rents will of course be available to the landlord; but those which are *bona fide* paid, and at the regular term, are held to be effectually discharged.⁶ It would seem that where the power to subset is granted conditionally on the subtenant being responsible to the landlord for the rent, the hypothec will be entire.⁷

relieved from the hypothec, and does not, at least without a long delay or a bargain express or tacit with the lessee, become again liable to it. *Adam v Sutherland*, 1863, 2 Macph. 6. The author, in the Pr. 1276, says, on the authority of *Wilson v Spankie*, and the case in *Fountainhall*, 2 B. S. 670, 'where furniture is with the tenant on gratuitous loan, it seems now to be held that it is to be classed with hired furniture, and liable to hypothec.' In *Adam v Sutherland* the Court refused to decide the general point, but the case is not easily distinguishable from *Cowan v Perry*.]

¹ Ersk. ii. 6. 64.

² [It is a question whether shrubs and plants in a nursery

are *invecta et illata*, or fruits, or are *pars soli*, like trees. *Begbie v Boyd*, 1837, 15 S. 232.]

³ *Cowan v Perry*, *supra*.

⁴ *L. Saltoun v Club*, 1700, M. 1821.

⁵ This seems to be confirmed by the view taken in the above case of *L. Saltoun's*, in the preceding note.

⁶ *Blane v Morrison*, 1785, M. 6232; Bankt. ii. 9. 17, vol. ii. p. 99.

⁷ ['The principal tenant,' says the author in the Princ. sec. 1237, 'is primarily liable to the landlord, not a mere cautioner for the subtenant. If the landlord have proceeded to sequester the effects of the subtenant, he may abandon that pro-

(2.) In an URBAN TENEMENT, the power to sublet for the same kind of occupation is implied.¹ The subtenant of a house or shop, therefore, paying his rent to the person under whom he, as subtenant, holds possession, will, on the precedent of *Blane v Morrison*,² be protected against any claim by the landlord, if the payment is made *bona fide* and at the proper term.

(3.) It is a question which may be said to go deep into the principles of this doctrine, whether a tenant has a hypothec on the fruits, or on the *investa et illata*, against his subtenant? But as the power to sublet, whether express or implied, may be considered as an assignation to the tenant of all the landlord's rights and remedies for payment of rent, this seems to be a sufficient ground on which to admit hypothec to the tenant. Nay, on this ground a hypothec has been allowed to a tenant over the *investa et illata* of his subtenant, within the three months after the term, in competition with the landlord, who had, after the expiration of the lease and sublease, let the house to the subtenant.³

II. NATURE AND EXTENT OF LANDLORD'S HYPOTHEC.—Previous to any judicial process, the landlord has a right to insist that the subject of his security shall remain upon the ground till the rent be paid. If the rent be due, he may insist on detaining on the ground the full value of that rent: if not yet payable, he may insist that the whole crop and stock shall remain subject to his claim.⁴

[33] The extent of this right may be stated in the following propositions:—

1. In agricultural or grass farms, the produce of the farm is hypothecated for the rent of the year whereof it is the crop, and for none else;⁵ the right remaining to the landlord as long as the crop is extant in the possession of the tenant.⁶ The principle of this doctrine seems to be, that the hypothec is over the fruits, as property reserved, to the extent of the rent; and that the reserved right attaches as long as they continue on the farm, and while that rent is due.⁷

2. Cattle and stocking are subject to hypothec for each year's rent successively; the general right expiring as to each year's rent, if not made effectual against the stock by judicial process within three months after the last term of payment of the rent.⁸

3. The hypothec over furniture, etc., is for each year's rent successively (as in the case of cattle), and for no more;⁹ and the same term of three months is in practice given to the landlord to make it effectual. And,

4. The hypothec endures for three months, not only against ordinary creditors, but

ceeding without discharging the principal, who has it in his power to sequester, or, on paying the rent, to take up the landlord's sequestration. But if the landlord should not only abandon his diligence, but give time to the subtenant, the principal tenant will be freed.' *Williamson v Forbes*, 1830, 8 S. 405.]

¹ *Alexander v Alexander*, 10 July 1811, F. C. See also *Aitchison*, 1748, M. 10405; *Elchies*, Tack 13, Notes 444; *Gordon v Crawford*, 1825, 4 S. 95.

² See above, p. 31, note 6.

³ *Christie v M'Pherson*, 1814, Fac. Coll. 95, where Christie, being tenant of a shop till Whitsunday 1812, sublet it to Halket. He paid his rent to the landlord, but had not got it from Halket when the landlord let the house to Halket. A few weeks after the term, Christie applied for sequestration, and was opposed by the landlord. Christie's sequestration was found effectual. [*Stevenson v Cooper*, 1822, 1 S. 312.]

⁴ *Pringle v Scott*, 1736, M. 6216. The landlord has right, where the rent is due, to insist that its full value shall be left; where not yet due, that the whole crop and stocking shall remain. [This is qualified in the Princ. 1239 by the words 'at least to the full amount of the rent.' The landlord may

interdict the sale and removal of the crop till the tenant finds caution for the current year's rent. *Preston v Gregor*, 1845, 7 D. 942.

⁵ Ersk. Prin. ii. 6. 26; *Hay v Keith*, 1623, M. 6188; *Crawford v Stewart*, M. 6193, Elch. Hypothec 6. Correct, by these authorities, Ersk. Inst. ii. 6. 58, where he makes hypothec competent for the current rent, over the produce of a former year. [*E. of Cassillis v Ramsay*, 1816, Hume 230; *Horn v M'Lean*, 1830, 8 S. 454; *Young v Welsh*, 1833, 12 S. 233. See *M'Clymont v Cathcart*, 1848, 10 D. 1489.]

⁶ Kilk. p. 273. [Since 30 and 31 Vict. c. 42, sec. 4, the right of hypothec ceases, if proceedings by sequestration are not taken within three months after last portion of the year's rent is payable.]

⁷ *Hay v Keith*, 1623, M. 6188.

⁸ *Hepburn v Richardson*, 1726, M. 6205; *Rorison v Schaw*, 1766, M. 6211; *Cathcart v Mitchell*, 1775, M. 6212.

⁹ *Dick v Lands*, 1630, M. 6243. Here it was found that 'the landlord of the house might stay a poinding until he were satisfied of a year's mail arising for the house;' but that he could not stay the poinding upon pretence that any more terms were owing to him.

against other landlords; or to a principal tenant (if there be a sublease, and the principal tenant have paid the rent to the landlord), to the defeating of the landlord's hypothec for a new term.¹

Where one is bound to guarantee the payment of rent to the landlord, either as a cautioner or as principal tenant, he is entitled, on paying the rent, to have the benefit of the landlord's hypothec;² and where the effects have been sequestrated, he is entitled to the proceeds in competition with the landlord's hypothec for the subsequent term.³

III. PROCESS OF SEQUESTRATION.—The landlord's right is converted from a general hypothec into a real right of pledge, and the subject of it turned into money for the landlord's satisfaction, not by private authority, as in England, but by the warrant of the judge ordinary in a process of sequestration.

Three points of this process may be marked as essential in competition:—

1. The sheriff, on the landlord's petition, whether the rent is actually due or only current, issues a warrant to take inventories, and sequester;⁴ which is done by the officer,—his execution of the warrant, as proved by the return, being the completion of the sequestration. The inventory is the only criterion of what is sequestrated.⁵

2. A warrant to sell is granted sometimes to the landlord himself; generally to a neutral person, as sequestrator; conferring the full power and right over the subjects, for the [34] purpose of being sold.⁶

3. In correct proceeding, a return of the sale should be made to the judge, and a final warrant for payment granted; but generally this is neglected, and the sequestrator sells to the amount of the demand, and pays the rent.⁶

Growing crops so sequestrated remain at the risk of the tenant. If, after sequestration, the tenant cannot afford to cut down his crop, or is careless about it, the landlord may insist on carrying on the necessary operations for the benefit of both, without being liable for any loss that may have occurred between reaping and thrashing the grain.⁷

IV. CRITERION OF PREFERENCE.—1. The real right of hypothec is vested by the law itself; and, even previously to any judicial steps, it gives a decided preference over all the tenant's creditors on the subject of the hypothec.

2. The general right of hypothec attaches to cattle (and in urban tenements to furniture, etc.), so as to give preference to the landlord over all the creditors of the tenant till the expiration of three months after the term of payment.⁸

3. Where a competition arises as to cattle or furniture, after the three months, the landlord is entitled to no preference, unless within that term his general privilege has been made effectual on the particular subjects by sequestration. It is by the execution of the

¹ *Christie v M'Pherson*, *supra*, p. 32, note 3.

² *Stewart v Bell*, 31 May 1814, F. C. See also *Christie v M'Pherson*, 14 Dec. 1814, F. C. Above, p. 32, note 3. [A third party paying the rent is entitled to an assignation by the landlord of a sequestration. *Graham v Gordon*, 1842, 4 D. 903.]

³ *Stevenson v M'Culloch*, 1824, 1 S. 30.

⁴ [The petition may also contain a conclusion for decree for payment of the rent. 16 and 17 Vict. c. 80, sec. 27.]

⁵ *Horsburgh v Morton*, 1825, 3 S. 596, N. E. 409. Here, in an action by the landlord for carrying off part of a sequestrated crop, the defenders were assolizied, 'in respect the hay in question was not contained in the inventory, or sequestrated at the instance of the pursuer.'

⁶ [Every warrant to sell is carried into execution at the sight of the clerk of Court, or other person authorized by the sheriff. Every sale must be reported within fourteen days, and the roup rolls, or certified copies, lodged in process, with an account of expenses and state of debt. A. of S. 10 July

1839, sec. 150. The sheriff approves, after taxation, and any balance is paid to the tenant or his creditors. When the sequestration is granted, the particulars are entered in the Register of Sequestrations kept by the sheriff-clerk, who is bound to exhibit the register on payment of a fee of 1s. 30 and 31 Vict. c. 42, sec. 7. The tenant is entitled to object to the sequestration by lodging a caveat or applying for interdict.]

⁷ On this principle was determined *Brims v Ferrier*, 31 May 1815, 18 F. C. 384. [In the case of sequestration in security, warrant to sell may be granted if the effects are perishable, and the tenant is bankrupt, and careless or making away with them. *Dow v Hay*, 1784, M. 6202; *Wells v Proudfoot*, 1800, Hume 225. In any sequestration, the landlord may appoint a person to take charge of the sequestrated effects if the tenant does not give security to make them forthcoming. A. of S. 1839, sec. 152.]

⁸ *M'Dowall v Jamieson*, 15 Feb. 1781, M. 6215.

warrant of sequestration that the hypothec is made effectual, and converted from a general privilege into a specific security on particular subjects. The landlord's security, after his right is once realized by execution of the warrant of sequestration, remains effectual without a warrant of sale, until, on the principles of common law, he lose his privilege *ex mora*.¹

4. The landlord is entitled to restitution from those who have carried off the subjects during the subsistence of the hypothec (unless purchasers in market), and consequently to a preference over creditors arresting in the hands of persons to whom the subjects may have been delivered by the tenant.²

5. In competition with the prerogative process of the Crown, neither the general right of hypothec,³ nor even the issuing of a warrant to sell,⁴ is held to give preference to the landlord.⁵

6. In competition with the general creditors under a sequestration, it will be observed, *first*, That the sequestration statute 'saves the landlord's right of hypothec, which shall be [35] nowise hurt or impaired by anything contained in this Act;'⁶ and, *secondly*, That another security arises to the landlord for arrears: an indirect security indeed, but sometimes a very effectual one. It proceeds from the obligation under which all assignees of a lease, whether voluntary or judicial, lie to fulfil the cedent's obligation,⁷ and the power which the landlord has to enforce such fulfilment by an action of removing on the Act of Sederunt 1756.⁸ In one case, this indirect mode of attaining a preference over the general creditors received the sanction of the Court.⁹

7. It has been solemnly settled, that farm-servants have a preferable claim for their term or year's wages over the landlord's hypothec.¹⁰

III.—HYPOTHEC OF LAW AGENT.

Law agents have two remedies for recovery of their professional debts: one by LIEN on the papers placed in their custody,¹¹ and another in the nature of HYPOTHEC or preference on the costs to be recovered from the adverse party in a suit. The last of these securities,

¹ *M'Leod v Crs. of Thomson*, 24 May 1805, Hume 226. The proprietors of the Saracen's Head Inn, Glasgow, on the failure of Thomson, the tenant, applied for sequestration. Warrant was granted, and within three months from the term of payment it was executed by the messenger taking inventories, and declaring the articles therein contained sequestered in common form. Matters then lay over for many months, during which proposals of various kinds were made for a settlement. At last, at the distance of six months, the landlords applied for a warrant to sell, and were opposed by the other creditors, who contended that the privilege was expired, and forfeited. The Magistrates of Glasgow, under the direction of their learned assessor, James Reddie, Esq., decided: 'That the landlords having within three months after the last term of payment of the rent made their hypothec over the tenant's furniture effectual by sequestration, they are still entitled to their privilege, as it appears from the whole circumstances that no delay took place.' To this judgment the Court of Session unanimously adhered, on a petition from the Bill Chamber.

² See above, p. 28, note 2.

³ *Ogilvie v Wingate*, 1791, M. 7884, revd. 3 Pat. 273.

⁴ *Robertson v Jardine*, 1802, M. 7891.

⁵ See below, p. 40.

⁶ 54 Geo. III. c. 177, sec. 5. [19 and 20 Vict. c. 79, sec. 119. *E. Wemyss v Hewat*, 1818, Hume 233.]

⁷ *Turnbull v Scott*, 1626, M. 15273; *Ross v Monteith*, 1786, M. 15290; *Cuthil v Jeffrey*, 21 Nov. 1818, F. C. [*Fairlie v Neilson*, 1821, 1 S. 211. *Kirkland & Sharpe v Gibson*, 1831, 9 S. 596; aff. 25 March 1833, 6 W. and S. 346. *Strathmore's Trs. v Kirkaldy's Trs.*, 1853, 15 D. 752.]

⁸ By this Act of Sederunt, 'where a tenant has irritated (forfeited) his tack, by suffering two years' rent to be in arrear, it shall be lawful to the heritor to declare the irritancy before the judge ordinary, and to insist on a summary removing before him.' Act of Sederunt, 14 Dec. 1756, sec. 4.

⁹ *Reid v Cameron*, 14 Jan. 1802. On the tenant's bankruptcy the rent was in arrear; the whole subjects of the hypothec were swept away by a writ of extent; and the trustee for the creditors, being anxious to retain the lease, offered to pay the rents subsequent to the sequestration, under the 33d of the king, but to pay only a dividend on the arrears. The judges were unanimously of opinion that the landlord was entitled to a decree of forfeiture and removing unless the arrears were paid.

See *Nisbet's Tr.*, pet., 13 F. C. 160, M. 15268.

¹⁰ *M'Lashan v D. of Athole*, 29 June 1819, F. C. [Funeral expenses are also preferable. *Rowan v Bar*, 1742, M. 11852.]

¹¹ See below, Lien of Law Agent.

by hypothec, seems to proceed on the idea of a tacit agreement or understanding between the agent and his client, founded on equity, that the client shall not receive payment of the costs awarded against the opposite party without paying his agent. And it is recommended by the great motive of public justice and expediency, that the doors of a court of justice shall not be barred against a poor man on account of his inability to advance to his agent the necessary expense of the proceedings. It rests not upon the mere utility of the agent's operations; neither does it depend on the possession of the documents of debt, or of the decree or diligence on which the party is to proceed: for these may be in the hands of the Court, or even of the client. It requires only a notice from the agent to the adverse party not to pay the costs, in order to give the agent a real preference over every person claiming in the client's right.

In England this right has been long established to a greater extent than is recognised in this country. It is not confined to the costs due by the adverse party, but extends to any fund which the attorney may have been employed to recover, and which his client is found entitled to. Lord Hardwicke decided that a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the debt decreed for the plaintiff, and has a lien upon it before the bond creditor.¹ Lord Mansfield, on occasion of a collateral argument used in a question of hypothec on a ship for repairs, said, 'that it was established on general principles of justice, that attorneys should not be compelled to deliver up the deeds and papers of their clients till they are paid; and that courts, both of law and equity, had now carried it so far, that an attorney or solicitor may obtain an [36] order to stop his client from receiving money recovered in a suit in which he had been employed for him, till his bill is paid.'² In another case, the Court of King's Bench held that a defendant is liable to the costs of the plaintiff's attorney, even after he had compromised the debt with the plaintiff, where notice is given that the attorney was not paid;³ and this rule was applied to decide a later case, where a defendant, or his attorney, paying to the plaintiff after such notice, was ordered to pay over again.⁴ And it was even so far extended as to make the lien, after notice given, applicable to an award by arbitrators, the parties having taken the case out of Court by a reference.⁵ This is indeed, on the whole, a much favoured hypothec in England. And, by a settled rule of the Court of King's Bench (though in the Common Pleas the practice seems to stand otherwise), the attorney is on his application first satisfied, before the opposite party is permitted to set off another judgment against that which his antagonist has obtained.⁶

The hypothec on costs has in several cases been recognised in this country.

1. An agent for a litigant to whom costs are found due, is held entitled, on a motion to the Court, to have the DECREE FOR EXPENSES issued in his own name against the adverse party.⁷ This proceeds on the principle, that the client is bound to assign the claim to his agent; and that what he could not refuse, the Court is entitled even without his consent, or in his absence, to grant by decree.

¹ *Turwin v Gibson*, 1749, 3 Atk. 720.

² In *Wilkins v Carmichael*, in 1779, Doug. p. 100.

³ *Welsh v Hole*, 1779, Doug. 226, 3d ed. 238. Lord Mansfield thus laid down the law: 'An attorney has a lien on the money recovered by his client for his bill of costs. If the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the Court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still further, and to hold that if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. But I think we cannot go beyond these

limits. And as no notice was given, the compromise was held good.'

⁴ *Reid v Dupper*, 1795, 6 Term. Rep. 361.

⁵ *Ormerod v Tait*, 1801, 6 Term. Rep. 361, 1 East 464.

⁶ *Mitchell v Oldfield*, 4 Term. Rep. 123; *Randle v Fuller*, 6 Term. Rep. 456; *Glaister v Hewer*, 8 Term. Rep. 69.

In the Common Pleas, Lord Eldon much disapproved of a rule different from that of the King's Bench. See *Hall v Odey*, 2 Bos. and Pull. 28.

⁷ This is matter of daily practice. See also Act of Sedes-runt, 6 Feb. 1806, and the case of *Mill* quoted below. Recognised also in the First Division, *Alison's Trs. v Johnston Wylie*, 20 Nov. 1808.

Taaffe v Taaffe and Moffat, 1822, 1 S. 341, N. E. 319.

2. The adverse party, against whom decree for expenses has thus been given in name of the agent, cannot SET OFF against the agent's claim a debt due by the client.¹ As the agent is nothing more than the judicial assignee of his client, there can be no doubt that, in strict law, such compensation would be good. But the great principle of expediency has in this case supported the agent's right against the mere subtilty of law. The poor might find it impossible to procure an agent for a cause the most manifestly just, if, when it were gained with costs, the adverse party might defeat the agent's remedy for the large expense he may have been forced to advance.²

[37] It will not even be relevant to plead against the agent's hypothec, that his client being solvent, he ought not to interfere to defeat the compensation.³

But if expenses be found due reciprocally for different parts of the litigation, the right of the agent will not prevent compensation of the one against the other.⁴

3. Although the agent shall not have taken the precaution to obtain decree in his own name, he will be entitled to interpose, and forbid the party against whom the decree has issued to pay the expenses to the client, without satisfying him for his costs. And legitimate NOTICE to this effect is held to give to the agent a preference over other creditors of the client acquiring right to or attaching the expenses, whether by assignation, arrestment, or under sequestration, while the agent is unpaid. This has no regard to the custody of the documents, or the value and usefulness of those which may happen to be in the agent's hands.⁵

4. The Court, in two cases, went the full length of the English doctrine, by sustaining an agent's claim of hypothec over the *fund decerned* for in the decree pronounced in his client's favour.⁶ But more lately, the doctrine carried to this extent has been discounte-

¹ *Smyth v Gemmill, etc.*, 9 July 1802. Robertson having prevailed in an action against Gemmill and Herbertson, his agent was allowed decree for the expenses in his own name. This was objected to, as tending to preclude the losing party from a claim of compensation. The Court, 'upon the principle that the sum recovered was not properly the client's till the agent's expenses in making it effectual were defrayed; and that if compensation could be pleaded, so as to exclude the writer's hypothec, there would be an end of this right, which is also admitted in the English law, though but lately introduced;' confirmed the decree in the agent's name.

[*Munro v Bothwell*, 1846, Arkley's Rep. 118; *Miller v Geils*, 1848, 10 D. 1384.]

² This rule, and on these views, was admitted in France. 2 Poth. 903 et seq. Nay, compensation was denied of the adverse party's claim for one part of the expense found due to him against that which had been awarded to the other, and for which the *procureur* had got decree. *Ib.* p. 905, note.

³ *Russell v Greig & Peddie*, 1826, 4 S. 403, N. E. 406.

⁴ *Warburton v Hamilton*, 1826, 4 S. 631, N. E. 639. [*Graham v Arthur*, 1826, 5 S. 46. The fact that the agent-disburser is an agent for the poor does not affect the general rule. *Gordon v Davidson*, 1865, 3 Macph. 938.]

⁵ *Mill v Wright*, 12 Jan. 1802, n. r. Mill was employed by Wright as his law agent, to defend him in an action brought against him by Yool. A decree was pronounced in Wright's favour, dismissing the claim, and finding him entitled to costs. Wright, in order to make these expenses effectual, arrested Yool's property; and Yool, in order to clear off the arrestments, endorsed two bills to Wright. Wright endorsed them to Mill, and immediately after failed. Had Mill been

an ordinary creditor, this endorsement would have fallen under the statute 1696, c. 5; and the question came to be, Whether he was not, as an agent, entitled to a hypothec, independent of the endorsements? Lord Armadale decided that Mill was and is entitled to have it found, that the award of expense of process in the original question should go out in his name for indemnifying him of his account of expense in process; and as the expenses awarded by the Court in said process have not yet been paid by Yool to Wright, that Mill must be considered as preferable upon that fund to the extent of his account relative thereto; and that the benefit of the arrestment used by Wright for recovering the said expenses of process must accrue to Mill.

M'Kenzie v Ross, 1823, 2 S. 401, N. E. 356.

M'Tavish v Peddie, 1826, 4 S. 704, N. E. 710, where the decree having gone out for expenses in the client's name, and a suspension having been raised, the agent was held entitled to appear in the suspension and claim the expenses. [See the observations of the Lord Justice-Clerk Boyle in *Stephen v Smith*, 1830, 8 S. 847.]

⁶ *Johnstone v Crs. of the York Building Co.*, n. r. Johnstone was law agent for the York Building Co. in an action for restitution of the estate of Seaton. He advanced much money in conducting the cause, and the action was eventually successful. The company having disagreed with their agent, got their papers out of his hands, and afterwards recovered the estate, sold it, and received the price. Johnstone claimed a preference over the creditors of the company for his expenses; and the Court found him entitled to it, and not bound to rest contented with a mere dividend.

In a subsequent case, *Clapperton v MacLachlan*, 8 June 1802, n. r., the same principle was followed out. M'Ara was a creditor of M'Culloch for £132, and employed Clapperton,

nanced; and while, so far as they gave the agent a preference over the expenses unpaid to his client, former judgments have been approved of, the extension of this doctrine to a hypothec over the fund has been entirely rejected.¹ The question at issue between the [38] former and the latter judgments seems to be, Whether there is not, from the first employment of an agent, an implied assignation in equity of the fund to be recovered, to the extent of the expense employed in recovering it? and whether this fund, as a *jus incorporale*, must not be taken by all creditors and assignees, subject to the same equitable burden which affects it as between the claimant and his agent? There does not appear, however, to be any ground in law on which such assignation can be either presumed or made effectual; and no hypothec of this sort is established by ancient precedent or immemorial custom, the sole grounds on which it can effectually rest; and accordingly, the above judgment against the hypothec seems now to be held as settled law.²

5. It seemed to admit of much doubt, Whether the hypothec of an agent was in its nature TRANSMISSIBLE, so that any friend of the client who might advance money in payment, or in aid of the agent, should be entitled to the benefit of it? The great principle on which this hypothec proceeds seemed to afford strong support to such a claim, since this extension of the right facilitates the progress of a poor man engaged in a just litigation; while, on the other hand, the danger of collusion which might cover with the appearance of a loan what the party himself had advanced, and so bar the adverse party of his just claim of compensation, was much against it. Unhappily, the question arose in a case where there was every appearance of this sort of collusion, and the right of the lender was denied.³ But this

a writer, to recover the debt. A small heritable subject of M'Culloch's had already been adjudged by the other creditors; but the year and day were not nearly expired, and Clapperton adjudged for M'Ara's debt. In this situation M'Culloch proposed a composition, and his creditors (and M'Ara among them) accepted of it. A trustee was appointed by M'Culloch to sell his estate, and pay the composition; when M'Ara having become bankrupt, and his estate having been sequestrated under the 33d of the king, Clapperton, as a creditor for £12 as the expense of the adjudication, and for £56 on account of other business, claimed retention of the adjudication still in his hand, and a hypothec on the fund adjudged as in some measure realized by him; and, by way of notice, he arrested in the hands of M'Culloch's trustee. The Court of Session found that Clapperton was entitled to a preference on the money still unpaid, which he had been employed to recover, for the expense of the proceedings respecting it; but found him entitled to no hypothec for the rest of the account.

In the above case also of Smyth (p. 36, note 1), the opinion of the Court went to support the just claim against the fund; but there was no occasion to decide the point.

¹ *Alison's Trs. v Johnston Wylie*, 29 Nov. 1808, Fac. Coll. An agent in the Court of Session was employed to recover the balance of a debt. He prevailed, and decree was pronounced for £60, but not for expenses. His client had in the meanwhile left Scotland in embarrassed circumstances, and the sum found due was arrested by his creditors. The agent claimed hypothec or privilege over the funds, on the principle intimated in Smyth's case; but the Court refused it. The Lord President Blair entered a strong protest against the doctrine which had begun to prevail, contrary to the settled principles and analogy of the law of Scotland; and although he approved of the decisions by which agents had been allowed a preference over the expenses unpaid, he not only saw no

legal principle for extending it over the principal fund, but dreaded the unseen consequences of giving admission to such loose doctrine.

² So stated by Lord Meadowbank in the case of *Rennie & Playfair*. Below, next note.

³ *Rennie & Playfair v Aitken*, 8 June 1811, Fac. Coll. In this case there was a great deal of discussion on the bench: Lord Meadowbank holding it as settled law, 1. That an agent is entitled to a decree for expenses in his own name, which gives him a preference; and, 2. That he has no preference upon the subject of the lawsuit. He stated it as the only undecided point, whether a person advancing money to the agent is entitled to have the agent's privilege? He did not see a reason against this. If one has so good an opinion of a suit as to relieve the party from the evil of not being able to carry it on, by advancing money to his agent, he may be said to become the agent *quoad hoc*. And there seems no distinction in law or equity between such advances in aid and the direct advances of the agent. Lord Newton held a different opinion. He thought that the rule was introduced merely for the benefit and relief of the agent; and that, where he is already indemnified, the privilege does not exist. He was afraid of the bad consequences of allowing this matter to go further. A bankrupt, himself indebted to the party, might, in advancing money to his agent, have it put in the name of another, so as to cover it from compensation. Lord President Hope, then Lord Justice-Clerk, held this privilege to be now settled in law, on the great principle of preventing injustice, there being many persons not entitled to the benefit of the Poor's Roll, and yet unable to advance money in litigation so as to be excluded from justice but for this privilege in favour of agents. But he held that wherever an agent is safe, either by an advance or cautionry on the part of the bankrupt's friends, the necessity for this extraordinary privilege is taken away. It was also stated by one of the judges, but I have

determination probably would not be held to rule a case where a stranger should advance money for carrying on a suit.

6. The chief difficulty in this doctrine relates to the *JUS QUÆSITUM* of the agent, and the right of the client to discharge the claim, or settle without a judgment, to the disappointment of his agent. Several cases of this kind have occurred, the result of which seems to be: 1. That where expenses have been found due, the agent has a *jus quæsitum* which [39] the client cannot without his consent disappoint. 2. That where expenses follow as a necessary consequence of a judgment, or where damages are found due, no compromise by the principal can defeat the agent's right to insist for them.¹ 3. That in such cases, in general, the agent may insist on proceeding to have the expenses decerned for.² But it does not follow, that in all cases where expenses have once been found due, or are likely to be found due, the agent can insist on going on with the cause.³ 4. That where an agent supercedes another, and pays his account, he succeeds to his right, and may claim decree, in his own name, to cover both his own and the former account.

IV.—MARITIME HYPOTHECS.

Besides the maritime hypothecs already considered, there are two others which ought not to be passed over unnoticed, viz. the hypothec to freighters for their goods, and hypothec for average loss.

1. *HYPOTHEC TO FREIGHTERS ON THE SHIP FOR THEIR GOODS.*—There are two situations which require and afford real security to the owners of goods. One is, where the goods are on board in execution of a charter-party, and the voyage is interrupted on the part of the master or owner of the ship, or of the creditors; another is, where the goods have been sold, lost, or injured during the voyage. In these cases, recourse upon the property of the vessel, in guarantee of the personal obligation to indemnify, is sanctioned by the general law of mercantile states.

So early as *Il Consolato del Mare*, it was established, not only that the master and owners should be liable for damage, but that, if they were insolvent, the ship should be sold to pay it.⁴ 'Le batel est obligé à la marchandise, et la marchandise au batel,' is the rule delivered in the ancient treatise, entitled *Les Us et Coutumes de la Mer*. This rule is adopted as the general maritime law of France, in the 11th article, concerning charter-parties.⁵

In England this is not followed as a general rule; and the principle of the deviation seems to be traceable to the peculiar doctrines of Admiralty jurisdiction in England. The Admiralty, in which alone proceedings can be taken against the body of the ship, has no jurisdiction in such a case;⁶ and for this reason, the remedy against the body of the ship seems to be precluded.

omitted to note by whom, that wherever an agent is kept full-handed, whether by the party or his friends, there is no room for the privilege; and it cannot be sustained, unless perhaps a special assignation to the privilege should be shown as the ground of the advances.

¹ *Sloss & Gemmil v Kennedy*, 1827, 2 S. 344, N. E. 302; *M'Lean v Auchinvoile & Cuthbertson*, 1824, 3 S. 190, N. E. 129; *Hamilton v Bryson*, 17 June 1813, 17 F. C. 378.

² *Hamilton's case*, preceding note.

³ See dict. of Lord Glenlee and Lord Justice-Clerk Boyle in *Hamilton's case*. See *Rex v Stewart*, 3 July 1818, Fac. Coll. [The parties seem to have the power to compromise, provided they do not exercise it fraudulently to defeat the rights of the successful party's agent. Compare *Macqueen v*

Hay, 1854, 17 D. 107, with *Barr v Wotherspoon*, 1850, 13 D. 305, and *Cheyne v Cheyne*, 1832, 10 S. 202.]

⁴ 'Se non (il padrone) è sufficiente, debbasi vendere la nave, perche compagno, ne prestatore non possono niente avere, salvo li marinari, che non perdono li salari loro.' C. 61. Casaregi's *Spiegazione* is, 'E s'egli non è solvendo, si dovra vender la nave, e pagarli con prelazione a qualunque compagno, e mutuante, salvi prima i salari de marinari.'

⁵ 'Le navire, ses agrets et apparaux, le fret et les marchandises chargées, seront respectivement affectées aux conventions de la charte-partie.' See 1 Valin 629, also 363; 2 Pothier 387, No. 52; 2 Emerigon 571.

⁶ *Abbot's Law of Merchant Ships*, 38, 151, 199. [See the case of *Cargo ex Galam*, 2 Moore P. C. C. N. S. 216.]

In Scotland there is no such obstruction to the operation of the general principle, though there is no authority or precedent establishing it as admitted with us. Perhaps it may be said, that the necessity for such a hypothec is not great, since a person whose goods are on board must seldom be exposed to loss (except in cases of general average); while, on the other hand, for any loss which may arise of a nature to found a claim of restitution or damage, action lies against the owners and against the master; and there is easy [40] access to diligence against the ship. But there seems to be no reason to deny the privilege which the maritime law gives for all losses and injuries done to the cargo; and probably, in our Court of Admiralty, the remedy would accordingly be given.

2. HYPOTHEC FOR AVERAGE LOSS.—The claim of average is secured more by lien than by hypothec.¹ There is nowhere, in the writings of our lawyers, any indication of a hypothec for average loss; though there seems to be good ground for a preference or hypothec. The Consolato del Mare gives to the owners of goods sold for the necessity of the ship a preference over all the mariners.² The laws of Wisbuy also give them 'special hypothèque et suite sur le navire' (c. 45). The foreign lawyers place the preference on this account, under the very same principles with money lent for the necessary use of the ship.³

V.—HYPOTHEC FOR PUBLIC DUTIES, AND TAXES, AND EXCHEQUER BILLS.

For securing the duties in certain branches of manufactures, for making effectual assessed taxes, and for giving credit and effect to exchequer bills, a preference, on the principle of hypothec, is given over all ordinary creditors.

1. Several of the excise statutes declared, that the duties in arrear, and penalties, should be a charge upon certain manufactures, and the materials and utensils used therein, into whose hands soever they might come.⁴

2. By the Act of 43 Geo. III. c. 150, for consolidating certain provisions relative to public taxes, it is provided, 'That no moveable goods or effects whatever, belonging to any person, at the time any of the said duties assessed under the regulations of this Act become in arrear, shall be liable to be taken, in virtue of any arrestment, poinding, sequestration, or diligence whatsoever, or by virtue of any assignation, on any account or pretence whatever, unless the party at whose instance the said diligence shall be used, or to whom such assignation shall be made, shall, before the sale or removal of such goods or effects, pay, or cause to be paid, to the collector of the said duties so due, all arrears of said duties which shall be due at the time of arresting, etc., or which shall be payable for the year in which such diligence shall be used; provided the duties shall not be claimed for more than one year;'—'with power to the collector, in case of refusal to pay the past duties, to proceed for the whole arrears.'

3. By the Acts for the issuing of exchequer bills (57 Geo. III. c. 34, sec. 44, and c. 124, sec. 7; and 1 Geo. IV. c. 60, sec. 21), all the estate and effects, real and personal, of bankrupts, which would be liable to satisfy the demands of the creditors seeking relief under sequestration, shall be liable and subject, and made chargeable with the payment of the principal and interest due upon such obligations, with all costs of recovery; and that the claims of the commissioners for exchequer bills shall be payable in preference to the claim of any other creditor; but without prejudice to preferences duly obtained according

¹ Malin's *Lex Mercatoria*, p. 113, where he lays it down, that goods are impledged not only for the freight, but also to answer all averages and contributions. Marshall, pp. 466, 467.

² After giving power to sell goods for the necessity of the ship, the 105th chapter proceeds thus: 'E nessuno prestatore, nè compagno non possono dire niente, nè contrastare,

insino che que' mercante sieno pagati, salvo che gli salari de' marinari.'

³ 1 Valin 343; 2 Emerigon 571.

⁴ See several statutes of this description in the reigns of Charles II., and William and Anne. Also 28 Geo. III. c. 37, sec. 21.

to the law of Scotland, upon the real estates of persons who shall become bankrupts; and it is declared that, on a summary petition, this preference shall be made effectual.¹

CHAPTER III.

OF JUDICIAL SECURITIES OVER MOVEABLES.

[41] THE ordinary judicial securities over moveables are : 1. POINDING ; 2. ARRESTMENT AND FORTHCOMING; and, 3. CONFIRMATION AS EXECUTOR CREDITOR: the two former being provided for the attachment of the debtor's moveables during his life; the latter, for attaching them after death. But there is another judicial proceeding, which deserves very particular consideration, viz. the Process of EXTENT, by which the Crown has preference over all the general creditors of its debtor. It may be proper to consider, 1. The Crown's diligence; 2. The diligence of the subject during the debtor's life, with the equalizing laws introduced with a view to insolvency; and, 3. The subject's diligence after the death of the debtor.

SECTION I.

OF THE CROWN'S PREFERENCE BY WRIT OF EXTENT.²

In Scotland, before the Union, the importers of certain goods were ordered to find caution for the custom; and this custom formed a debt which the king might recover, by letters charging the importer and his sureties to pay, under the pain of rebellion; from which no relaxation took place but on payment of double duties.³ The king had also a hypothec over the wares while extant.⁴

By the treaty of Union, the revenue laws of England were extended to Scotland; and instead of the Scottish Court of Exchequer, a new Court of Exchequer was instituted for deciding questions concerning the revenues of customs and excise, and having the same power and authority in all such cases as the Court of Exchequer in England.⁵ In this new Court, the forms of recognisance and other securities for the king's debt, and of suits and prosecu-

¹ There is an awkward mistake in the printed Act of 57 Geo. III. c. 34, of 'Reference' for 'Preference.' If this be in the record, it seems to be sufficiently corrected in the Act of 57 Geo. III. c. 124, sec. 7.

² [Writs of Extent are impliedly abolished by the Court of Exchequer Act 1856 (19 and 20 Vict. c. 56), and a new form of Crown diligence based upon that of the common law of Scotland is substituted for it. See the provisions of secs. 29-36, as to execution by arrestment, poinding, imprisonment, etc., for Crown debts. By sec. 42 it is enacted, that 'nothing in this Act contained shall impair, injure, or affect any preference of the Crown in competition with other creditors; and in all questions of preference or competition, the execution of any charge at the instance, or on the behalf, or for behoof of the Crown, and in the case of deceased Crown debtors, to whom no such charge has been given in their lifetime, the execution of any arrestment or poinding at the instance, or on the behalf, or for behoof of the Crown, shall

be deemed and taken to be equivalent in all respects to the teste of a Writ of Extent, according to the existing law and practice.']

³ 1594, c. 210.

⁴ *Peebles v Scott*, 1631, M. 11824. It was found that the buyer of wines, the price whereof was resting unpaid by the buyer, might be sought by the king's officers for satisfying of the custom, wherein they were preferred to the creditors who had arrested the same in the buyer's hands, and that the king by his privilege might seek his custom, 1. From the merchant or any other intromitters who were full-handed with the wares; or, 2. From the sureties engaging for the duties at the expiration of the time; or, 3. From the wares, where they were extant and paid for.

⁵ Art. of Union, art. 19; 6 Anne, c. 25. See Historical View of the Forms and Powers of the Court of Exchequer in Scotland, by Sir John Clerk, Bart., and Mr. Baron Scrope. Printed by Sir Henry Jardine, 1820.

tions thereon, were ordered to be regulated according to the forms of England, and the true intent and meaning of the statute of Henry VIII., introducing the extent of the Crown, and other existing laws. In this way the prerogative and preference of Crown debts was established according to Henry VIII.'s statute, and the usage, course, and practice of the English Court of Exchequer. In this adoption of English law, however, an exception of great importance has been introduced as to real estates in Scotland, which are declared not to be affected further or otherwise than such real estate may be subject by the laws of Scotland to the debts of the Crown.¹

In England the preference of the Crown was not introduced by statute, but existed [42] at common law, even to a greater extent than it now does. It is traced back even to the Roman law, and justified on grounds of public expediency, as a preference granted not to the Crown against the people, but to the public in general as represented by the Crown, against the creditors of an individual, for securing and rendering efficacious the public taxes. It is unnecessary to enter into the historical deduction, or to dwell upon the justification from expediency. But it may be remarked, that were this a rule of preference now to be established, it might be a consideration worthy of some attention from the Legislature, whether it does not savour of injustice, that arrears, which the officers of the revenue ought to have recovered, instead of allowing them to accumulate, should continue a preferable burden against all the creditors? whether it is not to bestow a privilege upon the officer and his sureties, rather than upon the public? whether, at all events, it is not throwing oppressively on a few, what would otherwise fall lightly on the general mass of the people? The duties which are current, or which have fallen due, without having been improperly left to accumulate, ought indeed to form a preferable burden: for no property can be considered by creditors as free from such burden; and so they are not deceived into a false credit. But duties may accumulate to an enormous and incalculable amount, and sweep away by preference the bulk of the fund.

But leaving these speculations, the doctrine of the Crown's preference, and of writs of extent, shall here be explained, with the aid of those English cases and books which are the ruling authorities in the Scottish as well as in the English Court of Exchequer.

SUBSECTION I.—OF EXTENTS IN CHIEF IN SEVERAL DEGREES.

The process of extent is a speedy remedy given to the Crown on behalf of the public, for recovering moneys due to the revenue, and which without such speedy means of recovery might be lost. Originally it referred to land only; but by 33 Henry VIII. c. 39 it was authorized to be given to the Crown, 1. For attaching at once the body, lands, goods, and debts of the king's debtor; and, 2. As a remedy on all sorts of debts due to the Crown; whether debts by judgment, recognizance, or bond; or by simple contract, recorded by inquisition.

I.—EXTENTS IN CHIEF IN THE FIRST DEGREE.

The points which require attention are: 1. The debt; 2. The affidavit; 3. The fiat; 4. The form of the extent; and, 5. The execution of it by the sheriff.

I. DEBT.—Where the debt to the king is by bond, a writ of extent may, on the showing of the bond,² with an affidavit, be issued, without any other preliminary step, to take the moveables and debts of the king's debtor. The BOND may be either in the form of an English bond, or in the Scottish form. Those bonds are generally given prospectively, sometimes without a term of payment expressed. The debt truly arises from the receipt of moneys on account of the revenue; so that the debtor is both *ex facie* a bond debtor to the

¹ See above, vol. i. p. 781.

² Now absolutely required by the determination of the Barons. West 50, note.

Crown, and really debtor as a receiver for the Crown. The amount of the debt is ascertained, in the first place, by affidavit. It is afterwards subject to scrutiny, on an appearance and claim, at the return of the extent; or on a plea to the extent; or on a motion in Exchequer that the king's hands should be amoved from the property; or on a motion to have the money produced by the *venditioni exponas*, and in the hands of the sheriff, paid over to the person claiming it.¹

[43] If the debt be by SIMPLE CONTRACT, that is to say, other than by record or bond, no extent can issue till the debt be made matter of record. For this purpose a commission is issued, on affidavit of the debt, for commissioners to take inquisition of the debt by the oaths of good and lawful men, etc., and by the testimony on oath of other credible persons. No notice is given to the defendant; and affidavit is the sole proof on which, in practice, the inquisition proceeds, though that certainly is exceptionable evidence.²

Where the debt is due by a partnership, extent may issue against the several partners. Where it is by an individual, extent may issue against the company goods; but the Crown can sell only the interest of the partner against whom the extent issues,—namely, his share of the surplus after payment of the partnership debts.³

The finding of the debt by the inquisition is still more clearly subject to scrutiny, in the way of pleading to the extent, etc., than the debt in a bond to the king.

II. AFFIDAVIT.—The application for the extent is accompanied by an affidavit which must state, *first*, the debt; and, *secondly*, that there is danger of the debt being lost to the king, unless the remedy sought be granted.

1. In stating the debt under bond, the condition and breach, if an English bond, must be set forth; and if the bond be a prospective one, the amount of the sums received, and in the hands of the receiver, must be stated. In the scrutiny of the debt it will not be sufficient to justify the affidavit, that the king's debtor stands chargeable with particular sums; for this charge is diminished by the payments, poundage, officer's salary, irrecoverable duties, etc.

2. In stating the debt by simple contract—that is, where there is no bond—the return of the inquisition, dictated from the affidavit on which it proceeds, is the rule; but in a scrutiny, the objector to the extent will be entitled to show, by evidence of the excise returns, and other documents in Exchequer (for which the Court will give an order), what the true amount of the balance was.

3. The affidavit of danger ought to contain not only an allegation of insolvency, but also the statement of a particular fact of insolvency; as 'the stoppage of payments,' the issuing of a sequestration, the granting of a trust-deed,⁴ etc.

III. FIAT.—This may be obtained at any time, either in vacation or term, on application to a Baron. It bears the reading of the affidavit and bond, or affidavit and commission and inquisition, and the amount of the debt, and proceeds thus: 'Let a writ or writs of immediate extent issue against the said A, for the recovery thereof, with the usual proviso.' The date of the fiat is the date of the testing of the writ.⁵

IV. EXTENT.—The writ directs the sheriff to enter and take the defendant, and to inquire what goods and chattels, and of what sorts and prices, and what debts, credits, specialties, and sums of money, the defendant, or any person to his use, has in his bailiwick; and to appraise and extend the said goods and chattels, and to take and seize the same into the king's hands; and there is a direction that he shall not sell till he shall be otherwise commanded.

The writ is tested by the Chief Baron, signed by the King's Remembrancer, and sealed

¹ West's Law and Practice of Extents, 45 and 30. He questions, however, the existence of a rule of Court, said to have been passed in 1786, that no extent shall issue till the bond is due. 1 Anstruther's Rep. 191.

² West 22, 23.

³ King v Sanderson, 1 Wightwick 51.

⁴ West 53, 54.

⁵ See below, p. 43.

with the Exchequer seal.¹ The teste may always be of the date of the fiat, for the [44] goods are bound from the award of execution, which is the fiat. So all the extents required to be issued into different counties, at whatever time issued for the same debt, may be tested of the same date; all taking effect from the same day. So an extent set aside for irregularity not affecting the fiat, may be renewed as of the same date, and with the same effect. So an extent may issue after death, if the fiat be before.² It seems, however, a dangerous doctrine which has been laid down, and seems to be held as law, that even at the distance of many (eight) years an extent may be issued on a fiat once granted.³ This does appear inconsistent with the policy of the law by which extent is given as a speedy remedy; while it is contrary to the rule, which requires an affidavit of special circumstances to warrant the issue of the writ. And there seems to be reason for expecting, were the question to occur again, that the Court would require at least an affidavit of continued insolvency.

V. EXECUTION OF EXTENT.—In considering what may be taken under the writ of extent, the first point to be observed is, that the sheriff cannot in Scotland take the real estate,⁴ but only moveables. In this respect, it has already been pointed out as a very important and difficult point to determine, respecting machinery, what is moveable.⁵

Although no notice is given to the defendant of the execution of the writ, the sheriff summons witnesses; and these witnesses must answer all questions, even though against their own interest, provided they do not tend to criminate them.⁶ And although it once was doubted, it is now settled, that a stranger has a right to put questions to the witnesses summoned by the sheriff, in order to prove his property in goods seized as the property of the defender.⁷ The practice in Scotland in the execution of poinding is quite consistent with this proceeding; and it would have been felt as very opposite to the rule of the common law of Scotland, if such a thing had been denied in the execution of the Crown's diligence. Nay, according to the course of practice in Scotland, it would be held that the stranger may not only put questions to witnesses, but himself call witnesses to prove his property. This is said to have been once held in England; and though disapproved of by one of the learned judges in the case just referred to, was approved of by the Lord Chief Baron.⁸

The general rules as to the effect of the writ of extent, and the power of execution, are:

1. That all goods and chattels, the absolute property of the king's debtor at the date of the teste of the extent, may be taken under it, and are bound by the writ, into whose [45] hands soever they may since have come;⁹ and that the extent can be traversed only by one

¹ 33 Henry VIII. c. 39.

² West 59, 60.

³ *Rex v Mallet*, 1 Price 395, West 60, 66. See *King v Harvey*, 1819, 7 Price 238.

⁴ See vol. i. p. 781.

⁵ See above, vol. i. p. 786.

⁶ Parker 270; West 67; 46 Geo. III. c. 37.

⁷ *The King v Bickley*, 1817, West, Appendix, 330. This was a case under an extent in aid. Several hogsheads of sugar had been seized, and returned as the property of the Bickleys. Maze and Rickets moved to set aside the inquisition, on an affidavit that the Bickleys had endorsed the bills of lading of these sugars, which had arrived at Bristol from Trinidad, for value; that they had been discharged from the ship into the warehouse of a cooper appointed by Maze and Rickets to receive them in their names, and had never been in the defendant's possession; that the pursuers of the extent had attended by counsel at taking the inquisition, and proved by one of the defendants that the sugars had been consigned to the defendants, and that the under-sheriff would not allow Maze and Rickets, producing the bill of lading, to put a ques-

tion tending to show that the sugars never were with the defendants, and were the property of Maze and Rickets. Lord Chief Baron Thomson held the sheriff to have done wrong; that it would be hard to put the parties to the expense and trouble of traversing the inquisition, that irreparable injury may be done, when, if the evidence had been suffered to proceed, the truth of the matter would have been shown. Mr. Baron Graham agreed that the sheriff did wrong, in either not propounding the question, or suffering it to be put; but he did not agree that a party may examine witnesses to prove his property. The rule to show cause why the inquisition should not be quashed was made absolute.

⁸ *Rex v Bulley & Blommart*, 1727, Bunbury 233. See the above case of *Rex v Bickley*, in preceding note.

⁹ Doubts seem to be entertained in England as to the effect of a sale in market overt; for though it will alter the property after delivery of the subjects *feri facias* to the sheriff (Equity Cases abridged, 381), the point as to the king seems never to have been decided, and authorities seem to point in the Crown's favour. 2 Inst. 713; Year Book, 35 Henry VI. p. 29; West 96.

claiming property, either absolute, as exclusive proprietor, or special, as by lien.¹ 2. That money may be seized, and all debts due to the king's debtor, whether by bond, by bill, by simple contract, or by open account. 3. But it is fit to be observed on this point: *First*, That although money is to be seized, and the extent binds from the teste of the writ, it seems not to bind money, so as to recall *bona fide* cash payments made by the Crown debtor.² *Secondly*, That the payment of a debt to the Crown debtor *in bona fide* after the teste of the writ, but before the caption of the inquisition, will be effectual; but the assignment of the debt after the teste will not defeat the king's right.³ *Thirdly*, That although bills and promissory notes to the king's debtor may be taken, they must be due in order to give the Crown immediate extent against them; and if accepted to the Crown debtor, and endorsed over by him, or accepted to a third party, the debt cannot be found under the inquisition.

Although in England there is no remedy to the subject against the subject for future or contingent debts; and the only relaxation of this general rule is by recent statutes, which have admitted creditors in future debts (*debita in presenti solvenda in futuro*) to petition in bankruptcy; it was contended that future debts might be taken in execution under an extent—that the king has a prerogative, by which he shall not, in cases of insolvency, be excluded from the funds of his debtor, merely because the term of payment has not arrived. This question was very solemnly discussed in the English Court of Exchequer, where the Lord Chief Baron M'Donald and Mr. Baron Thomson decided against the opinion of Mr. Baron Graham, that no such prerogative exists. And this judgment was affirmed by the Lord Chancellor Eldon, on the certificate of the two Chief Justices, Lord Ellenborough and Sir James Mansfield, before whom the case was argued in Exchequer Chamber. Whether there be any ground for distinguishing in Scotland between the operation of the writ of extent in the case of future debts, in consideration of the right which the subject has, as creditor at common law, to adjudge or arrest in security, may admit of doubt. It seems to have weighed much with the English judges in the above discussion, that the subject had no such remedy; but in Scotland the creditor in a future or contingent debt has his remedy; and if the writ of extent have no such operation, the Crown may seem, instead of having a privilege, to be dealt with unjustly. The answer, however, seems to be, that the Crown may proceed at common law; and that the only effect of denying the use of the extent in such a case is, that the king cannot have his privilege over the subject in such cases, but must rank *pari passu* with the subject's execution. And the only difficulty that can occur, is in running the analogy between the judgment and execution of the English law, and the diligence of this country, as sufficient to divest the king's debt, and so defeat the king's process.

The sheriff is not, in execution of the writ of extent, to proceed to sell or make money of the goods and chattels. This is done under the writ of *Venditioni Exponas*, which formerly never was issued without a motion in Court, but now issues without any motion. It is an authority to the sheriff to sell the goods for the best price he can obtain (at least for [46] the appraised price), to the true amount of the debt; and to have the proceeds of the sale before the Barons, to be paid to them for the use of the Crown. When so returned, the Court will order the amount of the debt to be paid over, deducting poundage, and any extra allowance to which, on motion, the sheriff may be found entitled.

It may happen that the sheriff may be under the necessity of levying a larger sum than may be necessary, by reason of the indivisible nature of the articles sold. The sheriff, while he holds the fund, is debtor to the person against whom the extent has issued, and as such is accountable to him in Exchequer as well as to the Crown. It would seem, then, 1. That arrestment may be competent in the hands of the sheriff; 2. That if he has

¹ But of this more hereafter, in treating of competitions between the Crown and the ordinary creditors. Below, p. 51 et seq.

² West 173. This is especially important on the supposition that extent may issue on an old fiat.

³ West 164.

accounted in Exchequer for the king's debt, only forthcoming in the ordinary Courts may be competent; 3. That if he has not yet accounted in Exchequer, or if he has there accounted for the whole fund, application may be made in Exchequer for an order that the same should be paid.

The sheriff has no power on an extent to levy or collect the debts; he is merely to seize them; and payment is afterwards to be compelled, by an immediate extent against the debtor of the Crown debtor. This leads to the consideration of extent in the second degree.

II.—EXTENTS IN CHIEF IN THE SECOND, THIRD, AND FOURTH DEGREES.

This is the process by which debts seized and found under the inquisition against the king's debtor are made effectual to the Crown. On the return of the extent under which a debt is found due to the Crown's debtor, an affidavit of insolvency, and consequent danger, is made; on which a Baron's fiat is granted for an immediate writ of extent against the debtor to the king's debtor. This is called an extent in chief in the second degree; it differs from an extent in aid, in being sued out by the Crown, not merely as nominal, but as real plaintiff, for the direct recovery of its debt; whereas the extent in aid is sued out nominally by the Crown; but the Crown debtor is the real plaintiff, for recovery of a debt due to him, and for his own benefit. Under this extent, just as if it were directed against the Crown debtor himself, the goods, chattels, and debts of the Crown debtor's debtor may be taken.

This process may be repeated in a third, or even a fourth degree.

SUBSECTION II.—OF EXTENTS IN AID.

The extent in aid proceeds not at the real instance of the Crown, but truly for the benefit of the Crown's debtor; grounded, however, on the fact, or fiction, that the Crown's debtor is less able to pay on the extent taken against him by the Crown, in consequence of not receiving payment of the debts due to himself. It is thus obtained as in aid of a previous extent of the Crown against the person who applies for it. But that extent is only *pro forma*: it is taken out by the Crown's debtor against himself. That sort of extent differs, as already observed, from an extent in chief of the second, third, or fourth degree, in being not really taken by the Crown, but for the benefit of the Crown's debtor: it accords with an extent of that description, in being directed not against the Crown's debtor, but against the debtor to the Crown's debtor.

I. HISTORY AND ABUSE OF EXTENTS IN AID.—Since first the privilege of the Crown was recognised, there has been a continual struggle, on the part of the subject, to get the advantage of the king's process.

This was first attempted, by assigning to the Crown debts due to the king's receiver [47] or accountant; a more legitimate course than some that were afterwards followed. This was plainly liable to gross abuses; as, for example, by purchasing up debts for inconsiderable sums, and making them effectual by assigning them to the Crown. A remedy was provided for this by 7 James I. c. 15, prohibiting the assignment of any debts but those originally due to the king's debtor.

This Act led to various evasions. Creditors at one time took their bonds and contracts in the name of the king's debtors or accountants, so as to give them the appearance of debts originally due to the king's debtor. Another device was, that dealers got some nominal or inconsiderable appointment as bailiffs or collectors, so that their debts were privileged to be assigned to the Crown in terms of the statute.

By a Privy Seal in the time of James I. (laid before Parliament, on occasion of the inquiries which terminated in the statute of 57 Geo. III. c. 117), these devices were counter-

acted, by forbidding debts of record or others to be assigned to the Crown, and prohibiting the debtors of the king's debtors from being molested, etc., by any process or suit for the king; and, finally, by enjoining such moderation in recovering debts falling to the king by forfeiture, etc., as should give no preference over the diligence of the subject.

This Privy Seal terminated with the death of the king; but certain rules of Court were laid down in the time of Charles I., by which, 1. Any one assigning debts to the king was obliged to swear that the debts are his own proper, just, and due debts, not formerly put in suit, and not held in trust. 2. He was also obliged to swear that he is justly indebted unto A, one of the farmers of the king's customs, etc., and that the same is a just and true debt, originally due to A, *bona fide*, without trust;—and that B is justly due to him originally and *bona fide* without trust; and that B is much decayed in his estate; so that unless a speedy course be taken against B, the said debt by him owing is in great danger to be lost. 3. That no further inquisition for debts in aid shall be taken than to inquire and seize the lands, debts, and personal estate of him that is due to the king's debtor or accountant, unless by special order made in open court. 4. That no debts, without specialty, shall be assigned to the king for debts in aid, nor found by inquisition for debts in aid, without order on motion in open court. 5. That no immediate process of extent be awarded for debts in aid, but in cases of extremity and on oath. 6. That on bonds taken in the king's name, payable to the king's receivers, etc., no extent should go forth without oath that they are, and at the time of taking were, for just and true debts originally owing to themselves *bona fide*, and not in trust.

The extent in aid, in its present form, was as much abused as of old the power of assigning had been. Not only persons in the character of king's receivers took benefit by it, though not at the time indebted to the Crown; but they included under it debts infinitely beyond the amount of the king's debt against themselves. Some very flagrant instances of this abuse, on occasion of bankruptcies in London, raised so great a complaint against the abuse of this remedy, and, indeed, against the process of extent in aid altogether, that the Legislature attempted a remedy by the statute of 57 Geo. III. c. 117.¹

It appeared to the Legislature, in the first place, that the remedy of an extent in aid could not be conveniently abolished, notwithstanding the apparent injustice which is directly produced by its operation, and the clamour, not without cause, which has been raised against it. It had been found, and was strongly represented, that reliance on this remedy enables [48] the collectors of the revenue to give indulgence to dealers which otherwise they would not give. Whether this consideration ought to prevail in legislating on this matter—whether the severe and correct exaction of duties which are absolute, is not the most salutary proceeding on the whole, may, on a large view of the subject, be doubted. But without entering on any such speculation, and taking the law as it is, the remedy was directed to two objects: 1. That no extent in aid should issue for a sum larger than is actually due to the Crown; and, 2. That the overplus, after paying poundage, etc., should be paid into court for satisfaction of the king's debt. The preamble of the Act bears, '1. That extents in aid have in many cases been issued for the levying and recovering of larger sums of money than were due to His Majesty by the debtors on whose behalf such extents were issued,² and it is expedient to prevent such extents in future;' and, '2. That extents in aid have been issued at the instance and for the benefit of persons indebted to His Majesty by simple contract only.'

To remedy the first of these evils, it is enacted, 1. That the debt due or claimed to be due to His Majesty, shall be stated in the fiat. 2. That where the sum found due to the

¹ Bruce & Co. were indebted to the Crown in £61,000; and being creditors of Boldero & Co. for £150,000, they, though quite solvent themselves, and fully able to pay their debt to the Crown, obtained an extent in aid for the amount of their

debt against Boldero & Co., and by means of it swept away the whole funds of the bankrupts.

² This was suggested by Boldero's case.

king's debtor is equal to, or exceeds, the king's debt as in the fiat, the amount of the debt in the fiat shall be endorsed on the writ of extent in aid, and shall be deemed the authority as to the amount to be levied. 3. That where the debt to the king's debtor is less than the debt in the fiat, the amount of such debt due to the king shall be endorsed on the writ, as the authority in executing the writ, as to the amount to be levied; the money levied and recovered by virtue of such extent in aid to be by order of the Court paid over to and for His Majesty's use, towards satisfaction of the debt so due to His Majesty. 4. That in cases where, in levying a debt, an overplus should be levied or received over the sum endorsed, in consequence of the necessity otherwise of splitting the debt, and so more money should be in hand than should be sufficient to pay the sum so endorsed, the overplus shall be paid into the Court of Exchequer, together with the amount of the sum endorsed; the Court, on summary application, to make order for the return, disposal, or distribution of such surplus as shall be proper. 5. That the king's debtor shall not be prejudiced of other means of recovering his debt.

The second evil pointed out in the preamble of the Act was the issuing of extents in aid by individuals, for debts due to the Crown by simple contract; not as receivers or accountants to the Crown, but for duties, etc., in the common course of their trade and dealings.¹ The statute declares, that no extents in aid should be given to debtors by simple contract, for debts arising to the Crown in the course of trade, or by bond for duties so arising, saving always the right of debtors becoming so by simple contract in the collection or receipt of money arising from His Majesty's revenue for his use.

Under this Act few questions hitherto have occurred.

In one case decided by our Court of Exchequer, the point was, Whether, under the provision of the Act intended to prevent the issuing of extents in aid for more than the actual debt due to the Crown, it be competent to execute such an extent after the debt to the Crown has been paid; or whether the process should not be stayed? The Court determined that the writ could not be stayed.²

¹ *King (in aid of Hughes) v Milton*, 2 Price 368. This was a debt to the Crown of £75 of post-horse duty and income-tax. The Crown disclaimed it. And the Court held it not a debt on which extent in aid could issue, as being only a debt caused by the party's own neglect in not paying his taxes.

King (in aid of Magnay) v Williams. This was a debt for £1000 of duties of excise in the paper manufacture, and a case in which, by practice of the Court, extents in aid have always been given. The extent was sustained, referring to future regulations to be made. 3 Price 75.

² *King (in aid of Malcolm) v Lindsay & Gilbert*, June 1820. Here, at the time of applying the extent in aid, Malcolm was indebted to the Crown; but by the regulations of Excise his payments were periodical, and the debt was said to have been paid to the Crown before the writ was executed. The motion was to stay the writ, on the construction of the recent statute. Lord Chief Baron Shepherd delivered the opinion of the Court to this effect: That it is held that the payment of the Crown's debt does not avoid the proceeding (see a case in Bunbury 221, *King v Clerk*, and observe the protest): That, without asserting whether an extent in aid would lie for the purpose of reimbursing the king's debtor, at least in Magnay's case the point now in question was assumed; and the Court saying nothing when that point was argued, says a great deal: That unquestionably the statute contains no positive enactment on the point; and after Magnay's case, and Boldero's, and Lushington's, had it been the intention of the Legislature to say that extents in aid should not proceed after the king's debt

were paid, it would have been expressly enacted: That Boldero's case suggested the first preamble,—the second was to prevent extents for simple contract debts, not arising in the levying of revenues: That, in directing the debt only to be levied, the difficulty was, What should become of the surplus, when you would, in levying, be otherwise obliged to split a debt? and this was the object of the third section: That the order to pay over to His Majesty was to prevent the king's debtor from getting into his hands the money levied for the relief of the Crown, and, by failing, leave the Crown unpaid; and that the point is, Whether it be sufficient to ground an inference which the Legislature has not declared? That there are many cases in which, for the Crown's interest, it is useful to allow execution of extent after payment to the Crown; for otherwise the Crown's debtor would delay his payment to the Crown to the very last, that he might preserve the benefit of his extent: That the Court cannot give a judgment by construction which would lead to these consequences: That, therefore, the payment of the debt to the Crown, after extent issued in aid, is no ground for staying the execution. If it were not presumptuous to hint a doubt of a determination supported by the great authority of Lord Chief Baron Shepherd, it might be suggested on this occasion that the point will perhaps not be considered as settled until it shall have undergone the discussion of the English bar. And in any such discussion, it may perhaps be thought important to the question—1. That the whole spirit and principle of the Act was to confine extents in aid to remedies for behoof of the

[49] II. PERSONS ENTITLED TO EXTENT IN AID.—Any debtor of the Crown against whom an extent in chief may issue, is entitled to have an extent in aid. An extent in aid is also given to persons who are sureties to the Crown for debt due by a king's accountant or receiver. It proceeds on the ground that by Magna Charta the sureties of the king's debtor shall not be distrained as long as the principal debtor is sufficient for payment of the debt; and that if the sureties pay the debt, they shall have the debtor's lands and rents till they be satisfied. In challenging an extent in aid granted to the king's debtor, the first question is, Whether there be truly a debt due to the Crown? And if the circumstances be such as would entitle the person applying for the extent in aid to resist an extent in chief, they will be available to the defendant in the extent in aid.

1. A receiver of money for the Crown is entitled to an extent in aid; as a collector of duties, or of taxes, a receiver-general, etc.

2. A person bound by bond to the king, as a distributor of stamps, a collector of assessed taxes, etc., may have an extent in aid, provided either the bond be forfeited, or the collector have actually received moneys belonging to the Crown.¹

3. A person receiving Crown money, though not entrusted by the Crown as collector or otherwise, as a banker who has money deposited with him, arising from duties or taxes, or placed with him by a receiver-general, may sue out an extent in aid.²

4. Traders dealing in excisable articles, and liable to account at stated periods for the accruing duties, whether bound by bond or not, may have the remedy of a writ of extent in aid.³

5. Farmers of duties may have such extent. But it is not enough that one is indebted [50] to the Crown for duties as an individual, otherwise extents in aid would be at the command of all the public.⁴

6. The remedy of an extent in aid is given on the principle of insolvency towards the king, unless the debt in the extent in chief be paid. Is it not, then, a good answer to the prosecutor of the extent in aid, that he has no need of this aid; that he is completely solvent, independently of the recovery of this debt? On the ground that the facilities for payment of the revenues are not to be dealt out with too stinted a hand, and that inquiries into solvency must always be difficult, sometimes a grievous hardship, this does not seem a sufficient ground for traversing an extent in aid.

III. NATURE OF THE DEBT DUE TO THE CROWN'S DEBTOR ON EXTENT IN AID.—The debt to the Crown's debtor must, in order to ground an extent in aid, be a debt originally due to the Crown's debtor, and not in trust;⁵ and this the affidavit must assert wherever the debt is of a nature which by possibility may be a trust debt.⁶ But this furnishes no objection against an extent in aid, where the king's debtor acquires a debt not originally due to him, provided he was a party to the original constitution of that debt, as cautioner, guarantee, or otherwise; for thus being debtor for the money from the first, he, on paying it, and taking assignation, holds it by a right equal to that of the original creditor.⁷ A bill or note

Crown, and to sanction their use only as instruments for enabling the Crown's receivers to do justice to the public; and, 2. That Magnay's case, as decided before the statute, can give no aid to the determination.

¹ *King v Mainwaring*, 1 Price 202, West 270 et seq.

² Mr. West has given examples of such extents for money deposited with bankers by the receiver-general, by collectors of excise, from distributor of stamps. See p. 266, and App. 33-48.

³ See, in West, examples of affidavit in such cases, 49-91. See pp. 268, 269.

⁴ West, p. 270.

⁵ Rules of Procedure in Court of Exchequer in Scotland, art. 25; Hist. of Exchequer, p. 305.

⁶ *King v Mainwaring*, 1 Price Rep. 202, West 278.

⁷ *King (in aid of Malcolm) v Lindsay & Gilbert*, in the Scottish Court of Exchequer, June 1820. Here an extent in aid was obtained by Malcolm on a debt due to him by the Perth Foundry Co., and Charles Archer & Sons, in these circumstances:—For the accommodation of one of those companies, a bill for £1023, 6s. was drawn by the one and accepted by the other; and to give it additional credit, endorsed by Malcolm, collector of excise at Perth. Those two companies failed, and Malcolm, as liable to the bank at which the bill had been discounted, paid it, and received from the bank an assignation in the Scottish form; and on this debt he sued out his writ of extent in aid. One objection taken was, that this being a chose in action, according to the English

coming in course of trade, by endorsement to the Crown debtor, is held to be an original debt, not in trust in the sense of the Act.¹ An assignation *jure mariti* by marriage, is held not to be within the prohibition; and although in England a chose in action cannot be assigned,² yet in Scotland the assignation of a debt is effectual, and the assignee (unless under the rules of Charles I.'s time) has a good title to obtain an extent in aid.³

IV. AFFIDAVIT, FIAT, AND FORM OF EXTENT IN AID.—The affidavit for an extent in aid states, 1. The debt due to the Crown from the Crown debtor, prosecutor of the extent in aid; setting forth the penal part of the bond, if there be a bond, or at least the receipt of [51] money for the Crown: 2. The debt due to the Crown debtor by him against whom the extent in aid is to be directed, and that the debt is originally and *bona fide* due to him without trust, and not put in suit in any other court: 3. That the debt is in danger of being lost by the insolvency of the defendant: and, *lastly*, That 'unless the process of extent for the debt due to him from his debtor be forthwith issued, the debt due to the Crown from the party applying will be in danger of being lost to the Crown.'⁴ The preferences which, on the ground of hypothec, have been conferred on creditors for particular branches of public revenue, have already been considered.⁵ The process by which the right is made effectual is regulated by the particular statutes which introduced the preference. But, in general, it is of the nature of a summary application to have the preference declared, and the fund applied in discharge of the claim.⁶ On this affidavit, accompanied by the bond (or, on a simple contract debt to the Crown, a commission and inquisition), an extent *pro forma* is issued against the Crown debtor; and this extent, with an inquisition thereupon, and the affidavit, are the grounds of a Baron's fiat for a writ of extent against the debtor to the Crown debtor, for recovering the sum which, in the inquisition to find debts, following on the extent *pro forma*, has been found due to the Crown. On this fiat the extent issues.

V. EXTENT IN AID IN DIFFERENT DEGREES.—Debts due to the debtor in the third degree may be seized under an extent in aid. Thus, under successive extents sued out by Austin & Co., the debtors to the Crown, a debt due by Miss Delancy to Messrs. Lushingtons, who were indebted to Boldero & Co., who again were indebted to Austin & Co., was allowed to be seized; the Crown debtor not being counted in the degrees.⁷

SUBSECTION III.—PROCESS FOR MAKING EFFECTUAL HYPOTHEC FOR CERTAIN EXCISE DUTIES.

It has been decided under the Acts referred to, that it is not lawful to take the goods of third parties; and if, by mistake, or in consequence of such commixture or confusion that the properties cannot be separated, the goods of a third party have been taken along with those of the manufacturer, such third party will be admitted to stand in the place of the Crown, and to have the aid of the Court of Exchequer to recover the whole from the

law, it could not validly stand in Malcolm's person by assignment to be the legitimate ground of an extent in aid; the other, that it was not an original debt in Malcolm's person. The judgment of the Court was delivered by Lord Chief Baron Shepherd, that Malcolm's guarantee for the use of Archer & Co. made him an original debtor to the bank, and creditor to Archer & Co. and the Perth Foundry Co.; and therefore, on paying in consequence of that guarantee, his original right as creditor was purified, and not so much a new right to the debt established in him by the Perth bank assigning to him, as a transfer made to him of their security for the debt: that this satisfied the principle of the law against debts in trust being included under the extent; and as to the form, the king's writ takes debts as established or conveyed by the forms established in Scotland. The Court

therefore held the extent in aid against the two companies effectual.

¹ It is accordingly the constant practice to grant extents on bills and notes in aid of the endorsee a Crown debtor. West 282.

² 1 Com. Digest 553; *King v Bowling*, Bunbury 225.

³ See above, *King v Lindsay & Gilbert*, p. 48, note 7.

⁴ General Order in Exchequer in England, 22 June 1822, 11 Price 160.

Additional Regulations in Exchequer in Scotland, 5 July 1822, Hist of Exch. 343.

⁵ See above, p. 40, note.

⁶ *Holden v M'Farlan*, 1821, 1 S. 62.

⁷ *King v Lushington*, 1 Price 95.

proper debtor.¹ In practice, where there is no sequestration, the preference is in general made effectual by the Crown process of a writ of extent; it may also be recovered by a decree of the justices.

SUBSECTION IV.—OF THE KING'S REMEDY AFTER THE DEBTOR'S DEATH.

If the debtor to the Crown have died before any proceedings by extent or otherwise have taken place against him, a writ may be issued, called *DIEM CLAUSIT EXTREMUM*, by which the sheriff is directed to inquire when and where the Crown debtor died, and what goods and chattels, debts, credits, and sums of money he had at the time of his death, and carefully to appraise and extend the same, and take and seize the same into the king's hands, that they may be retained until the Crown be fully satisfied of the debt; and that [52] the sheriff do carefully keep what he shall so seize, until he shall receive further command.

This writ may issue, 1. For a debt of record, if the party die indebted to the king; 2. For a simple contract debt, if found by inquisition after the debtor's death.²

This writ cannot issue in a second degree, in case of the death of the debtor of the king's debtor, unless during that debtor's life his debt to the king's debtor be found by inquisition.³ And on the same principle, it cannot proceed in a third degree, unless the debt from the deceased be found by inquisition during his life.⁴

SUBSECTION V.—FORM OF OPPOSITION TO WRITS OF EXTENT.

Extent being a speedy remedy against the loss threatened to the public through the Crown by the insolvency of its debtors, or of those indebted to them, it on this account proceeds on the *prima facie* evidence of affidavits. But the process is not absolutely exclusive, nor are the proceedings under it irreversible. Those who may be injured by the operation of the writ have several opportunities of appearing to oppose and traverse the proceedings; and the form and substance of such opposition shall here be shortly explained.

1. *APPEARING AND CLAIMING*.—An order is given on the return of the writ of extent, that if no one shall appear and claim within a certain time, there shall be issued a *venditioni exponas* to sell the goods levied. Under this order, 1. Appearance may be made by the defendant, or those in his right, to dispute the debt; or, 2. Appearance may be made by third parties to claim the goods, on showing by affidavit or otherwise a property absolute or special; the rule being, that no one can traverse the king's title without showing title in himself. And on such appearance a rule to plead is entered, and the parties enter on their pleas accordingly, and the case is brought to trial on such issues as may be formed. The judgment against the extent is, that the king's hands be removed from the possession of the goods and chattels, when the sheriff must restore everything. If judgment be in favour of the extent, it is that the king's hands be not removed, but that the goods, etc., do remain in His Majesty's possession.

2. *MOTIONS TO SET ASIDE EXTENTS*.—Such motions may be made either on some irregularity or defect on the face of the proceedings, or on account of some objection, to be verified by affidavit. I do not mean to enter into the niceties of Exchequer practice, or to point out the advantages of one sort of proceeding over another, as of motion over pleading, or even the order in which these may be taken. This is not necessary to the general view which it is my object to present of the subject.

3. *RELIEF IN EQUITY*.—Besides the remedy by writ of error, relief may be claimed in

¹ This is settled by the case of *The King v Barnet*, 1 Wightwick's Cases 1.

² See *Rex v Curtis*, Parker's Rep. 98 and 100.

³ *Rex v Cross*, Parker 19.

⁴ *Rex v Estate of Boon*, deceased, Parker 19.

equity. But a clear case in equity must be made out. Thus it has been held, that there is no equity for the assignees of a bankrupt against whom an extent in aid has been issued, that the prosecutor of the writ has property sufficient to satisfy the king, without having recourse to an extent in aid.¹

SUBSECTION VI.—RULES OF PREFERENCE BETWEEN THE KING AND THE SUBJECT.

1. Where an extent in chief comes into competition with an extent in aid, the former is preferable.²

2. Where there are more extents in chief than one, for different duties, they are [53] ranked according to the testes of the writs.³

3. In competition with the diligence of the subject, the king's execution in England carries all moveables against which the subject's execution has not been so far completed that judgment is given for the subject before the commencement of the king's process. It has been doubted whether the Crown is preferable where the subject's judgment is prior to the commencement of the king's suit or process, and the subject's writ is also delivered to the sheriff before the extent. It was enacted in Henry VIII.'s time, that a judgment obtained by the subject in a court of law before the suit of the Crown is commenced, or process for the king's debt awarded, should exclude the Crown.⁴ But it appears to have been held in the English Court of Exchequer, that goods taken under a *fiery facias* for the subject, but not sold, may be seized under an extent, of which the teste is subsequent to such seizure. The delivery of the writ to the sheriff being equivalent to seizure, the question is, Whether the subject's execution is not so completed from the delivery of the writ as to exclude the king? The reasoning in a late treatise on extents⁵ seems very satisfactorily to establish it as the fair construction of the Act of Henry VIII., that the sheriff is bound to execute first the writ which shall first be delivered to him; but that the Crown has a privilege, wherever the process was commenced before judgment obtained by the subject, to seize goods, even after they have been taken on the subject's prior execution.

In stating the analogy of Scottish diligence, much doubt is occasioned in the correct adaptation of the terms of English law. But taking the construction now explained to be just, and observing that the property of goods seized in execution in England remains with the defendant till sale,⁶ there seems to be little reason to doubt, 1. That a pouncing from the moment of adjudication by the messenger would exclude the extent; and, 2. That though an arrestment in execution may be supposed to exclude the Crown from the date of the execution of arrestment being delivered, perhaps the true analogy would point out the decree of forthcoming as the only exclusion of the Crown.

4. A seizure under any other process of the Crown (as on a warrant of the land-tax commissioners against the collector) has the same preference with the writ of extent in competition with the diligence of the subject, but only from the date of the seizure, without any relation back (as in the extent) to the teste of the writ.⁶

5. The Crown's execution in England is in bankruptcy preferable to all the other creditors, unless actual assignment has preceded the teste of the writ: for the operation of the bankrupt laws, by relation back to the Act of Bankruptcy, has no effect against the Crown, and the commissioners have only a *power*. If the assignment and teste be of the

¹ *Phillips v Shaw*, 8 Ves. jun. 241.

² *The Queen v Quash*, Parker 281.

³ 23 Henry VIII. c. 39, sec. 74. 'If any suit be commenced or taken, or any process hereafter awarded for the king, for recovery of any of the king's debts, then the same suit and process shall be preferred before any person or persons, and the king shall have first execution against any defendants,

and for his said effects, before any other person; so always that the king's said suit should be taken and commenced, or a process awarded for the said debt at the suit of the king, before judgment given for the said person or persons.'

⁴ West 102-112.

⁵ West 104.

⁶ *Brassey v Dawson*, 2 Strange 978.

same date, the extent is preferable.¹ A provisional assignment is the natural remedy; and when completed, it is effectual to disappoint the Crown, if so completed before the teste of the writ.² The Lord Chancellor considers himself bound to hold the balance even between [54] the king and the subject, expediting the commission of bankrupt instantaneously, so as to give an opportunity for making a provisional assignment, though aware of the intention to defeat the king's remedy.³ A trust assignment for creditors is held to exclude the extent in England, if not fraudulent, even though as an act of bankruptcy void against the assignees.⁴ In Scotland, the adjudication in favour of the trustee, being a judicial assignment, complete without delivery or intimation, will be sufficient to exclude the Crown's right of preference. But the mere recording of sequestration is not enough, as by relation back to the date of the first deliverance. Whether there can be an accelerated adjudication or assignment to the interim factor or sheriff-clerk, under the law as it now stands, may well be doubted.⁵ Whether, if in such a case the bankrupt should voluntarily give a conveyance for the benefit of his creditors, it would be considered as effectual, whatever objection might be stated against it by the trustee in sequestration, may also be doubted, though it would rather seem that the Crown might challenge it on the Act 1696, c. 5. In the same way, a trust-deed for creditors within sixty days of bankruptcy would appear to be liable to objection by the Crown on the Act 1696, on the same ground on which other creditors may object to it.

6. In certain cases already noticed, it is provided by statute that the materials and utensils employed in manufactures shall be charged with the duties, into whose hands soever they may have come, or by whatever conveyance. In these cases, the effects remain under a lien to the Crown for duties unpaid at the time of bankruptcy, even after actual assignment by the commissioners;⁶ and the lien even covers double duties, where they are made the penalty for being in arrear.⁷

7. The king's process is excluded by a transference completed in favour of the subject. Under this proposition some very nice and critical questions may arise, in which all the difficulties relative to the transference of moveables may be involved. It came, for example, to be questioned, whether a parcel of bank-notes, checks, and bills, made up in the course of trade by one banking-house to be sent to another for the settlement of their balance, and sealed, addressed, and delivered to a servant to be given to the postman, could be seized under an extent in aid? The distinction was taken between the delivery of the parcel to the persons for whom it was intended, or their agent, or the postman, conferring a right of property; and delivery to a servant in trust for the person sending the parcel, and subject to his control:⁸ and the extent prevailed.

8. In England the Crown's writ has preference over the landlord's right, even after distress and appraisement, if issued before sale of the goods.⁹ In Scotland two cases have been solemnly tried, respecting the preference of the king to the hypothec of the landlord for rent. In the first case¹⁰ no very strict attention seems to have been paid in the Court of Session to the steps of the proceedings, either on the part of the Crown or on that of the [55] landlord; so clearly was even the general right of the landlord held in Scotland to be

¹ So adjudged by Lord Hale in Charles II.'s time, *Parker* 126. *King v Earl, Bunbury* 33.

² *King v Crump & Hanbury*, *Parker* 126.

³ Lord Chancellor Eldon said on one occasion, 'that in the bankruptcy of Castell, the commission was brought to him in the middle of the night to be sealed, with the avowed object of preventing an extent; and that, considering it to be his duty to hold an even hand between the Crown and the subject, he, without reference to the object, got out of bed, and sealed the commission.' 14 Vesey 88.

⁴ *King v Watson*, 1816, West 115.

⁵ See below, Of Sequestration.

⁶ This settled in the case of malt for single duties. *Attorney-General v Senior*, and *The King v Fowler*, Doug. 400, notes 1 and 2.

⁷ In the case of candles for the double duties, in *Stracey v Hulse*, Doug. 395. But see *Austin v Whitehead*, 6 Term. Rep. 437.

⁸ *The King v Lambton*, 1818, 5 Price 428. In this determination Lord Chief Baron Richards, with Graham, Wood, and Garrow, Barons, concurred.

⁹ *The King v Cotton*, *Parker* 112.

¹⁰ *Ogilvie v Wingate*, 1791, M. 7884.

a real pledge, indefeasible by the prerogative process of the Crown. But in the House of Lords a very different opinion prevailed, and the judgment was reversed.¹ There was not, it is believed, any argument delivered at pronouncing this judgment of reversal; but the eminent judge who then presided in the House of Lords made very full and minute inquiry into the condition of landlords, and the nature of their right, in the two countries. And although, perhaps, a distinction might have been found between them, it was held that the great and governing principles which regulated the decision of the case of Gordon of Park, on the effect of the treason laws of England, as extended to this country,² ought to dictate the decision in such a case; and that, taking the analogy of the landlord's right in both countries, the point was to be so decided as, without attention to lesser distinctions, to place them upon the same footing, and to give to landlords in Scotland no superiority over those of England. In the next case, the question was taken up where the above decision of the House of Lords had left it. The general right was now held ineffectual against the Crown's process, but it was still to be determined what should be the effect of proceedings on the part of the landlord; and the decision of the case of the King v Cotton, in England, was followed, in which the landlord was not held to exclude the Crown by any proceedings short of absolute sale of the goods for rent.³

The result of these cases is to fix, 1. That this general right of the landlord, however preferable to the diligence of subjects, is of no avail against the Crown; and, 2. That even after sequestration of the tenant's effects, and a warrant of sale, the proceedings of the Crown give a preference over the effects still unsold.

In Exchequer it has been held that the principle adopted in Robertson and Jardine's case authorized a decision in favour of the Crown, where the goods were actually sold, [56] but a warrant for payment to the landlord was not yet granted.⁴

¹ 'It was ordered that the interlocutors complained of, in so far as they declare generally that the landlord's right of hypothec over the crop and stocking cannot be defeated by the prerogative process of the Crown, in virtue of the statute 33 Henry VIII., as extended to Scotland by the Articles of Union and the Act of Parliament 6 of Queen Anne, be reversed. But, in respect that the king's title does not sufficiently appear in the process, the cause be remitted back to the Court of Session, to inquire more particularly into the process, and the conduct thereof, whereby the effects in question are supposed to have been subjected to the king's title.' *Ogilvie v Wingate*, 13 June 1792, 3 Pat. 273.

² See Lord Hardwicke's argument on this subject in a letter to Lord Kames; and Lord Chief Baron Parker's opinion of the judges delivered in the House of Lords. *Kames' Elucidations* 381.

³ *Robertson v Jardine*, 6 July 1802, M. 7891. Gibb & Walker, the tenants, having fallen in arrear of rent, the landlord applied to the sheriff for sequestration: warrant of sequestration was issued 16th February, and the effects were inventoried and sequestered on the 20th. On the 27th the sequestration was reported, and a warrant issued to sell. On the 3d of March an information on the part of the Crown was exhibited against the tenants as unlawful distillers, and a fine of £150 was imposed. On the 10th of March, the warrant to sell not yet being executed, the officers of the Crown proceeded to levy their fine upon the effects of the tenants, and were stopped by a suspension from the Court of Session till the point of the Crown's preference should be tried. Two questions were made: 1. Whether the right of the landlord, with the proceedings in the sequestration, did not amount to a pledge made real by possession? And, 2.

Whether at least the warrant to sequester, and the warrant to sell, did not amount to a judgment in the full sense of the English law? Opinions of English lawyers were taken, and reports ordered from the sheriff-clerks to prove the course of proceeding in sequestration for rents. It appeared from the reports, that although, previous to the warrant for sale, some investigation is made as to the amount of the claim to be provided for, and the sum limited for which the sequestrator is to sell, the proper ascertainment of the landlord's claim is upon reporting the sale, when the landlord makes up an account of his claim; and on due investigation, a warrant is granted for payment. The Court proceeded upon the great ruling principle which had regulated the judgment of reversal in *Wingate's* case; and recurring to the determination of the case in Parker (*The King v Cotton*), as establishing that till sale of the effects the extent of the Crown does not come too late, they found the Crown in this case preferable: that the proceedings were not to be held, on the one hand, as equivalent to a pledge with possession, but only as equivalent to the mere *custodia legis*, which in England does not divest; and, on the other, that the warrant to sell was merely interlocutory, not final: and that, in the sense of the term judgment in this question, nothing is equivalent to it but a final order of execution, which requires no further application or interference of a court.

⁴ *The King v Johnston*, 29 June 1809. Here Hutchinson at West Craigs was a tenant of Lord Torphichen, who applied for a sequestration for £174 of rent. The goods were by warrant of the sheriff (24th April) sold, but the sale had never been reported. A writ of extent issued for £30 of taxes, on which the sheriff (22d October) extended the sum in the sequestrator's hand. A *scire facias* was then issued

9. The real right of Retention is, as well as Pledge, available against the Crown's process of extent.¹ This right may be exercised over moveables in the custody of a creditor belonging to his debtor; or over money in his hands where the debt is future.² Thus, a banker has money deposited in his hand, and a bill has been discounted with him, on which the name of the owner of the cash stands as debtor. If a writ of extent be in such a case taken out against the owner of the cash, it will be limited in its operation by the right of the banker, on his debtor's insolvency, to retain the fund in security of the payment of the bill.³

for recovering this sum, to which a plea was entered on the ground of the sequestration; and on a demurrer for the Crown, the case was argued whether the Crown or the landlord had a preference? The Court of Exchequer held the Crown preferable, as the process of the landlord had not been completed.

¹ *The King v Lee*, 1819, 6 Price 369. Here an extent issued against Ogle, a cotton manufacturer, indebted to the Crown, under which goods of his, unsold in the hands of Lee the defendant, his sale factor in London, were seized by the Sheriff of London. The goods were sold afterwards for £3230. The defendant claimed the goods, and traversed the inquisition; and a special verdict was found, stating the defendant's character of factor; the consignment of goods to have been by Ogle, according to the course of trade between manufacturers and factors, to be sold on commission, the defendant being answerable for the proceeds; that Ogle did from time to time draw bills of exchange on the defendant, on the security of the goods; that Ogle in this way was indebted to defendants £5182 on the balance of goods and bills; and that this debt exceeded the value of proceeds due, and of goods in possession of the defendants: But whether the defendant was possessed of the goods as of his own proper goods, the jury are ignorant, submitting it to the Court. The Lord Chief Baron delivered the opinion of the Court thus: 'The only question in this case is, Whether the defendants, as factors, have a right to retain the goods consigned to them, as such, against the claim of the Crown? None of the authorities which have been cited are applicable to this particular point; and therefore we must consider the question purely on principle. The cases cited on the part of the Crown only prove, that where there is an execution of a subject and an execution of the king sued out at the same time, the execution of the king shall have precedence. It is, on the other hand, stated by Lord Chief Baron Parker, in *Rex v Cotton*, in Parker's Rep. 118, to have been agreed, that in the case of goods pawned or pledged, before the teste of the extent, they could not have been legally seized. Now, by the common law, a factor has the same right to hold goods as a security for money advanced on them, and in the same manner as a pledge. The Crown's debtor himself could not have compelled the factors to give up the goods to him, without first paying them what was due. Therefore we think that the Crown could not compel the factors to give up their lien, without paying them what money they had advanced on the faith of the consignment to their principal; consequently judgment must be given for the defendants.'

² See afterwards, the doctrine of Retention; and particularly, *The British Linen Co. v Ferrier*, 20 Nov. 1807, n. r.

³ *The King v The British Linen Co.*, in Exchequer in Scotland, June 1826. I have been favoured with the following note of this case by one of the counsel in the cause:—

Lord Chief Baron Shepherd: 'This is a suit by *scire facias* on a writ of extent against Frederick Maclagan, charging him as Crown debtor. Upon the inquisition on the first extent by *scire facias* against the British Linen Co., the jury found that there was in the hands of the British Linen Co. £1000 received to the use of Frederick Maclagan, his property, of which he was possessed, in their hands. The company paid all but £350 (odd), which they said did belong to Frederick Maclagan, and a writ was issued for the said company to show cause why they did not pay this over to the Crown. The British Linen Co. plead that Maclagan was not possessed of nor entitled to this £350, on which they put themselves on their country. This is the proper form of plea in such a case; as, for example, in the case of a factor having a lien on part of a sum in his hands. It is not a case of compensation or set-off; for which reason also this is the proper form. I don't give an opinion on such a case.

'The facts in the special verdict are these:—The first writ of extent affecting Frederick Maclagan was of the 25th March (a previous extent on the 6th March was simply against George Maclagan); and it is the only one affecting him, being against George Maclagan & Co., and Frederick Maclagan. The question is, Whether at the 26th March this sum of £350 was not the property of Frederick Maclagan, so that he could take it out of the bank? In short, whether they (the bank) had a right of retention, as distinguished from compensation (which is out of the question; as well as whether the sequestration had proceeded so far as appointing a trustee, or an assignment to a trustee)? The question is as to the right to retain.

'Suppose that the British Linen Company Bank have £1000 in their hands, in whatever way made up, and that previous to issuing the extent the bank had discounted a bill drawn by Frederick Maclagan on George Maclagan & Co., accepted by Frederick and by George, and not due at the 26th March, when the extent was issued. (If the bill had been due and dishonoured by the drawer, there would have been no set-off. The bank might say, We have paid ourselves; and it would not have been lien or retention, but extinguishment of the debt by payment.) But the question is, Whether, the bill being current, the bank could have refused to pay Frederick Maclagan on 26th March, because they held the bill, and might retain funds to see if it would be paid? It appears to us that the bank had a right to do so—to retain the other funds till they should see whether the party was in a state *vergens ad inopiam*, or of actual insolvency. Previous to the 26th of March sequestration had issued against the Maclagans. Although that had no effect against the Crown, yet effect would be given against the Crown because of the right of retention, which depends on the circumstance of the party being *vergens ad inopiam*; and here is evidence not only of

10. Set-off cannot in England be pleaded against the Crown; the Crown not being [57] bound by any statute unless specially named, and set-off being the mere creature of statute.¹ In Scotland, where the doctrines of compensation are not held to rest exclusively on the statute, the plea seems to be more effectual. The question, however, in both countries, where debts are seized under the Crown's writ, is not so properly, Whether there is set-off against the Crown? as, What the king is entitled to take for his debt? The answer seems to be, that he can take only the balance due to his debtor.²

11. It does not appear to have been determined, or laid down authoritatively, whether the Crown be preferable to creditors holding privileged debts; as for physicians' fees, funeral expenses, wages of domestic and farm servants.

SECTION II.

OF ORDINARY DILIGENCE AGAINST THE MOVEABLE PROPERTY DURING THE DEBTOR'S LIFE, AND OF THE LAWS ESTABLISHING EQUALITY AMONG THE USERS OF IT.

There are three forms of execution for the debts of subjects: 1. POINDING; 2. [58] ARRESTMENT IN EXECUTION; and, 3. ARRESTMENT IN SECURITY. The general description of these diligences is this: 1st, That the creditor may, after charging the debtor to pay the debt contained in the judgment or decree, have his moveables POINDED, or seized, in execution; and either sold for his payment, or delivered over to him at an appraisement, if no purchaser appear. 2^{dly}, That he may, immediately after judgment, attach by ARRESTMENT IN EXECUTION moveables belonging to his debtor in the possession of another, or debts which are due to him. And, 3^{dly}, That he may, even before sentence, attach by ARRESTMENT IN SECURITY, on the dependence, the debts due to the debtor, or the moveables belonging to him which are not in his own possession; payment being made effectual in these two latter cases by means of a judgment or decree in a separate action of FORTHCOMING.

his being so, but of actual insolvency. I think it appears from the books on Scottish law, that there are rights arising from insolvency, or this state called *vergens ad inopiam*. Thus, in the case of a *debitum de presenti solvendum in futuro*, it is laid down, that a debtor being insolvent, or *vergens ad inopiam*, the creditor may arrest in the hands of a third party a debt due to the debtor. In such a case that arrestment would not have defeated the right of the Crown until forthcoming had followed. But the right of the creditor is thus proved to institute proceedings in order to secure himself against the contingency of the debt not being paid. If, then, the creditor has a right to arrest, it would be strange if he had not a right to retain, where the money is not in the hands of another party, but in his own. It may be said forthcoming is necessary to defeat the Crown in this case of arrestment. But no forthcoming is necessary unless where there is no possession, the object of forthcoming being to give that possession. The law gives the right to institute proceedings; and where the fact of possession exists, the lien is established. The British Linen Co. having possession, had a right on this footing to retain.

'But there are other grounds. Suppose that, in the ordinary course of dealings, they had had bills belonging to Frederick Maclagan, they would have had a lien on those bills. This appears from the English cases (5 Term. Rep. Cooke; Davis and Boucher), no distinction being made from the lien of a banker for bills over-due. 6 Price 369 was the case of a

factor, where the Exchequer found a factor had a lien for a current debt payable in future, as well as for one already due. The British Linen Co. would then have had a lien on bills. Could it be said, You would have had a lien on bills, but none when those bills are converted into money? Here there is no distinction as to the right of retention between the case of bills and that of money, or it would make a man worse off who held money in his hands than if he only held bills. The Crown must stand as Frederick Maclagan would have stood with the bank at the time. Their right arises from their actual possession; on the actual possession I formed my judgment as the ground of the bankers' claim of lien. We do not invalidate the Crown's right. The question depends on the period of time.

'Judgment, therefore, must be for the defendants, because Frederick Maclagan was not possessed of the money at the time.'

His Lordship then referred to a case furnished to him by Mr. Baron Hume, and stated that it was a strong case to show the rights of a party to retain money to abide the effect of a bill being paid or dishonoured which he had discounted. See Retention, below.

¹ *King v Copland*, Hughes' Rep. 204.

² So the Lord Chief Baron held in *King v Copland*, Hughes 230; and a similar view appears to be justified by the argument of Lord Chief Baron Shepherd in the Scottish case of the *British Linen Co.* Above, p. 54, note 3.

SUBSECTION I.—OF POINDING.

Poinding may be defined an ADJUDICATION and JUDICIAL SALE of moveables for the payment of debt.

There are two sorts of poinding: one for enforcing the payment of debts preferably secured on land; the other for enforcing the payment of ordinary debts. The former is called POINDING of the GROUND; the latter, POINDING simply, or PERSONAL POINDING. Both may be considered as vestiges of the old execution by Brief of Distress; by which the goods not only of debtors, but of the tenants and possessors of their lands, were taken in execution for payment of their debts. This was first redressed by 1469, c. 36, which declared the tenant liable no further for his lord's debt than to the extent of his term's rent. Then custom further restrained the force of the execution to such debts only as were *debita fundi*. The action of execution called poinding of the ground was framed for the purpose of completing the right of superiors and of creditors in *debita fundi*. For personal debts, the execution proceeded by poinding, on a warrant granted after the expiration of the days of charge, and directed only against the moveables of the debtor himself.

I.—POINDING OF THE GROUND.

It has already been observed, in treating of conventional hypothecs, that a preference over moveables has sometimes been held to exist by the mere force of the convention in rights of annualrent, and even in the modern heritable securities and real burdens. And some controversy has been maintained on the ground and principle of this supposed preference. But in consequence of some recent discussions, it seems now to be settled that no such preference exists, independently of the diligence of poinding of the ground. Without inquiring minutely into this curious subject,¹ but taking the doctrine in its practical application, it may be held as fixed: 1. That there exists no proper right of hypothec (like the landlord's) or of preference (like that which affects the land itself), by which the moveables on the ground may be considered as secured or attached to the creditor, without the operation of the diligence of poinding of the ground.² 2. That the right conferred by force

¹ For an inquiry into this point, reference may be made to one of the best dissertations of Mr. Ross, Lectures, vol. ii. pp. 392–455; and to a very learned and ingenious argument in the case of *Hay v Marshall*, Appeal Cases, 22 March 1826.

² In the case of *White v Tullis*, 18 June 1817, 19 F. C. 358, it was held by Lord Craigie, and the opinion adopted by the Court, 'that the right of annualrent, etc., gave a real lien on the lands, and a preferable security in the effects that were to be found upon the lands, for payment of the annualrents due.' And on this ground a creditor in such a real security was held entitled to carry off, by poinding of the ground, articles which had already been poinded by a personal creditor, though the warrant of sale had not been executed. See below, p. 61.

In *Hay v Marshall*, 7 July 1824, Fac. Coll., 3 S. 223, N. E. 157, the question occurred so as to present the point fairly for decision. The debtor in certain heritable bonds having become a bankrupt, sequestration was awarded while yet the creditors in those bonds had not proceeded to poind the ground, and the moveables on the land were sold. The heritable creditors claimed a preference on the price of the moveables so found on the lands, and contended that the sequestration took the estate with the burden of all pre-

ferences already existing. I was consulted by the trustee as to the ranking of the creditors, and advised him to reject the claim of preference of the heritable creditors, as they had not, independently of poinding of the ground, any preference, and had not by poinding of the ground secured any right on the moveables. The trustee's decision was brought before the Court of Session, who confirmed it. And on an appeal to the House of Lords, the question was examined with great care, and particularly the import of certain decisions, which were said to establish a preference independently of the poinding. But it was satisfactorily made out that these cases applied only to a competition on the rents, depending on the principle of assignation, held as intimated by the infirmity; and the decision of the Court of Session was affirmed, with costs. 2 W. and S. 71.

[Sequestration under the Bankruptcy Acts does not prevent the heritable creditor from proceeding with a poinding of the ground. *Bell v Caddell*, 1831, 10 S. 100. See also 11 S. 46, 12 S. 498. So held where the action was raised after sequestration, but before the confirmation of the trustee, the execution of the summons being effectual to secure a preference, subject to the condition that it is duly followed out. *Campbell's Trs. v Paul*, 1835, 13 S. 237; *Barstow v Mowbray*, 1856, 18 D. 846.]

of the voluntary security seems properly to be a privilege or power to attach and distrain the moveables, as long as they remain on the ground not completely transferred, or affected only by inchoated diligence.¹ And, 3. That the preference which such a creditor holds over the rents proceeds on a different principle (already explained²),—namely, assignation to the rents, with sasine as its completion, equivalent to intimation.

Poinding of the ground commences with an action already described,³ which is competent either before the Court of Session or before the sheriff, and in which the proprietor, possessors, and tenants are called. It proceeds in the form of a summons, stating the nature and extent of the *debitum fundi*; and concluding, 1. That letters of poinding and appraising be directed for poinding the readiest goods and gear upon the lands, in payment, etc., not exceeding a term's mail of the tenants and possessors of the said lands respectively; and, 2. That, so far as not satisfied, the ground-right and property of such part of the lands shall be appraised as shall be equivalent to the debt.

Nothing can be included in the operation of this diligence which does not belong either to the owner of the ground or to his tenant.⁴

On decree of poinding the ground being pronounced, letters of poinding are thenceforth, and without abiding any days of charge, issued; on which the messenger proceeds to seize and adjudge the goods subject to execution, and they are afterwards sold by warrant of the sheriff. No charge is necessary on the decree of poinding the ground before proceeding to execute the letters of poinding, as on a personal decree.

There is this peculiarity in the poinding, that, proceeding on and being the completion of a real right as proprietor, it is not communicable to the effect of *pari passu* preference, like personal poinding. Those who hold preferable rights or securities may appear, and, as in competition, be preferred.

Another peculiarity is, that the poinding does not expire with the life of the debtor. The force of the letters of poinding the ground subsists during the pursuer's life, to the [60] effect of authorizing all moveables on the land to be taken, belonging either to the owner or his tenants, to the extent of the rents.⁵

It has sometimes been supposed, that the preference of a poinder of the ground has a retrospect to the date of his real right; but if what is already stated be correct, this cannot be so. His preference not only depends on the poinding, but commences at the time of that diligence being used.

The criterion of the preference appears to be the execution of the messenger, as in personal poinding (below, p. 61). It does not seem that there is, in the nature of the diligence, any essential difference produced in competition by the force of the *debitum fundi*. That only extends the limits of the diligence, not its effects.⁶

This diligence is not held to be included in the congeries of diligences implied in sequestration, being against the interest of the general creditors.⁷

¹ This is the ground of the decision in the case of *Tullis*, preceding note. See also *Samson v M'Cubbin*, 1822, 1 S. 407, N. E. 381.

² See above, p. 25.

³ Vol. i. p. 724.

⁴ *Collet v Master of Balmerinloch*, 1679, M. 10550.

⁵ *Keir v Hepburn*, 1624, M. 10544. [By the Bankruptcy Act, 19 and 20 Vict. c. 91, sec. 118, the effect of this diligence is restricted to a preference for the interest of the current half-year, and the arrears for one year immediately preceding, unless the poinding has been carried into execu-

tion by sale of the effects sixty days before the date of sequestration.]

⁶ In *Tullis v White*, 18 June 1817, 19 F. C. 358, an heritable creditor poinding the ground was admitted to a preference over a personal poinder, although the decree of poinding the ground was not pronounced till the personal poinder had not only poinded, but had applied and was allowed to extract his warrant of sale. The heritable creditor was held entitled to interrupt the sale on an application for that purpose. See below, p. 61, note 4.

⁷ *Hay v Marshall*, above, p. 56, note 2.

II.—OF PERSONAL POINDING.

Poining proceeds in consequence of a precept of poining from an inferior court, or of letters of horning and poining.¹ The moveables of the debtor are seized, and adjudged by the messenger, and afterwards either sold by order of the sheriff for payment of the poining creditor's debt, or delivered over to him at the appraised value.

No poining can be executed till the debtor has been charged to pay the debt, and till the time has expired which law allows for the debtor's voluntary obedience. Even under the brief of distress, a certain number of days was allowed, after sentence, for complying with the judgment of the Court, before execution could proceed against either the land or the moveables. These were called the days of law; and they might safely be indulged to the debtor, at a time when the sheriff could attach his property as a security for the debt. Although, in the old law, fifteen free days after sentence were allowed for compliance, and the execution against the goods levied under the brief of distress did not proceed till after the expiration of that period, no warning to the debtor was necessary. After the institution of the College of Justice, and the introduction of poining upon special writs of execution, the days of law were still respected; but there was no charge to the debtor to pay: the pronouncing of sentence was thought sufficient intimation to him; and after the expiration of the days of law, the execution of the poining proceeded of course. The hardships of this must have become every day more manifest, as the trade of the country increased; and they are well described in the preamble of the statute 1669, c. 4, by which no poining can proceed till the days of charge expire. The only legal evidence of a compliance with this requisite is the messenger's return of a previous execution of charge.

In poining, as new-modelled by statute (54 Geo. III. c. 137, sec. 4),² the messenger, in making adjudication of the goods to the creditor, does not, as of old, take them at a value put upon them by men of low characters, his own retainers. But it is a process of which the completion is placed under the direction of the sheriff of the county, without suspending the immediate operation of the diligence; ensuring to the unfortunate debtor a fair value [61] for his property; and reconciling in a great measure the interests of the creditor and of the debtor, by giving to the one security against the disappointment of his diligence, to the other all the benefit of having the sale arranged in the way most likely to be productive.

The EXECUTION of poining, as now established, proceeds thus:—

1. If other creditors having diligence ready to poind appear, and demand to be conjoined in the poining, the messenger must admit them. He will be entitled or bound to refuse to conjoin such creditors, if there be any such objection as would have entitled him to refuse to act as messenger on the employment of that creditor; as if the days of charge are not expired, or the horning or execution of charge is liable to an *ex facie* objection.

2. The goods poinded to the value equal to the debt of the original and concurring creditor, and expenses, are valued or appraised by public appreciators, or unobjectionable persons skilled in such matters, sworn to act fairly: yet this is not well enough secured by the Act.³

3. After the goods are thus appraised, the value is proclaimed by the officer, and the goods are then offered back to the debtor at the appraised value.⁴ On the debtor's refusal

¹ The Court of Session was first authorized to issue letters of poining on precepts of inferior judges by 1661, c. 29.

² [On this subject a general reference may suffice to the provisions of the Personal Diligence Act, 1 and 2 Vict. c. 114,—a statute with which the profession are familiar, and which does not require exposition.]

³ Often, especially in poining by sheriff-officers, the poining is very exceptionable.

⁴ Lord Bankton is of opinion, that if the debtor were to buy them, they might be re-poinded by the same creditor. Bankt. iii. 13. 13. But this is not law; and so the Court held in the case of *Fiddes v Fyfe* in 1792. Bell's Oct. Cases 355.

to take them, the goods are adjudged by the messenger to belong to the creditor in payment of his debt.¹ The adjudication completes the real right of the creditor.

4. The messenger is then to leave the goods themselves, with a schedule of those goods, and note of the appraised value, in the debtor's hands, and report his execution of poinding to the sheriff or other judge ordinary, who shall give direction for keeping the goods poinded in safe custody, and bringing them to sale.

5. Although the debtor continues in possession, the creditor has a real right, which is not to be disappointed. And, *first*, 'Any person who intromits with or carries off the goods in the meantime, in order to disappoint the poinding, shall be liable in double the appraised value thereof.' *Secondly*, If necessary, application may be made to the sheriff for depriving a suspected debtor of the custody, on cause shown. As he is by the statute empowered to take directions for keeping the goods safe, there is no doubt of his powers to control the debtor's possession.

6. The sale shall not be on a shorter notice than eight days, nor longer than twenty, from the date of the order.²

7. The sale is made under the order of the Court, by exposing the goods at the upset price fixed; and if no one offers that price, the goods are handed over to the creditor at that value. The correct proceeding should be to report the matter to the sheriff, and let him adjudge the goods to the creditor, and settle its effect on the debt.³

8. A note or minute of the sale, and of the sum arising from it, is then to be lodged with the clerk within eight days after the sale. And,

9. The net sum, under deduction of all charges (to the amount of the debt, includ- [62] ing interest and expenses), is paid to the poinding creditor; or failing a sale, the goods themselves are delivered.⁴

If the debtor be not the owner of the goods poinded, the true owner may appear; and claiming the goods, oppose the poinding. This he may do any time before the sale of them; and now it is of less consequence whether he appear at the first, since the goods are not taken away, as formerly, to the market-cross, but left in possession of the holder till the sheriff shall order a sale. The messenger is bound to take the oaths of any persons claiming the property, and offering to swear to their right. Where the evidence of the property is perfectly clear on the part of the claimant, the messenger ought to stop; expressing in his execution the grounds of his forbearance. Where the property is doubtful, he ought to proceed, leaving it to the claimant to make good his right before the sheriff.

It has been doubted whether poinding may be executed within the sanctuary. But the Court has held that this privilege extends only to the person, not to the effects of a debtor. The same was held by the Court of Session as to effects in the palace of Holyrood House, while the king is not there resident. But this was reversed in the House of Lords.⁵

The DILIGENCE OF POINDING applies in the following circumstances:—

1. Poinding is competent of all moveables, whether in the debtor's possession or in the hands of others, except debts. Debts also were formerly levied under poinding; but this has not been practised during the whole of the eighteenth century. The proper diligence

¹ Nobody but the debtor, or those who act for him and by his authority, are entitled to take the goods at this value, otherwise the greatest oppression and collusion might be practised against the debtor.

² *Carmichael v Johnson*, 10 Feb. 1821, 20 F. C. 275. [Now regulated by 1 and 2 Vict. c. 114. See *M'Neill v M'Murchee*, 1841, 3 D. 554, as to the rule that, in computing the number of days, one of the extremes only is to be included.]

³ If the goods do not sell, and are given over to the creditor, how shall any subsequent application for a communication of the *pari passu* preference be regulated? It would rather

appear, 1. That if the goods are still extant, they must be taken as of their actual value, to be disposed of for the common behoof. 2. That if they have been *bona fide* disposed of, either at a less or greater value than the appraised value, the concurring creditor shall have part of the benefit, and suffer part of the loss. 3. That if kept and used by the creditor, they must be taken *ex necessitate* as of the appraised value.

⁴ 54 Geo. III. c. 137, sec. 4.

⁵ *Laing v E. of Strathmore*, 1823, 2 S. 223, N. E. 197; 22 Feb. 1826, 2 W. and S. 1. [See observations on this case in *Attorney-General v Dakin*, 4 L. R. H. L. 338.]

for debts is arrestment; of which hereafter. It is laid down by Lord Bankton, that neither ships themselves, nor goods on board of ships, are capable of being poinded; arrestment being supposed the only proper diligence for attaching them.¹ There does not occur any obvious principle in law on which this doctrine may rest; and the authority which he quotes for it is not to be found.

2. Poinding is the only diligence competent against moveables in the debtor's own possession. At one time, arrestment was held to be competent even in the debtor's own hands; but this doctrine has been given up for more than a century, during which period (in the words of Sir James Stewart) 'the *habilis modus* of affecting moveables in a debtor's own hand has been only by poinding.'² A question seems to have been moved at one time, whether money in a man's pocket could be poinded, and the opinion given seems to have been in the affirmative.³

3. Poinding is equally competent with arrestment of moveables in the hands of a third party. When first introduced, poinding was the sole execution against moveables. Arrestment has taken its place, in cases of debt due to the person against whom the diligence proceeds; but in all other respects poinding is unimpaired.

4. Where the possessor of goods has a hypothec or lien over them, he is not to be [63] deprived of it by poinding: he may therefore oppose the poinding, and stop it from proceeding to any effect injurious to him. Thus, a landlord of a house, or of a farm, may oppose a poinding of his tenant's furniture and stocking; for he has a hypothec over them, which no one coming in the debtor's right can disappoint. If consignation, however, be offered of the whole rent, the landlord cannot stop the poinding. So, wherever a factor has lien for his general balance, an artificer for the value of the labour bestowed, a carrier or shipmaster for the carriage and freight, they will be safe from invasion by a poinding creditor. But it would rather seem that the poinding would be allowed to go the length of an adjudication by the messenger, under burden of such lien, to the effect of constituting a real right in the creditor over the residue of the goods, after satisfying the lien. It was held (though the inconvenience and interruption under the old law was very great) that a poinding might proceed provisionally, although the possessor of the goods had, upon contract, a right to possess for a certain term.⁴ But the new form of the diligence relieves the doctrine of much of its practical difficulty; since a person holding a temporary right in security, as by pledge or lien, may be left uninjured in the enjoyment of his right, while the poinding proceeds to the full effect of vesting the creditor with a preference, under burden of the subsisting security.

5. It has been doubted whether money and bank-notes can be poinded, but the point has not been decided.⁵

The poinding MAY BE OPPOSED by the debtor; or by the true owner of the goods poinded, if the goods do not belong to the debtor; or by the possessor of the goods, though they be the debtor's, provided he can plead, as above, a right of lien over them.

¹ Bankt. iii. 26. 9. He cites a decision to this effect, Feb. 1750, *Cochran*. But I have not been able to find the report of any such case, and Lord Bankton gives nothing of the circumstances.

Perhaps this opinion respecting ships arose from the necessity, under the old law, of carrying everything poinded to the market-cross. And yet the rudder should have been sufficient, like the coulter of a plough. [In practice, it is understood that ships can be attached only by arrestment.]

² Ans. to Dirl. p. 10. *Tillicoultry v L. Rollo*, 1678, M. 10517.

³ This was in the very awkward case of a debtor resorting to the sanctuary with money which he refused to deliver up, or

declared his purpose of concealing from his creditors. The President (Forbes) and Lord Elchies gave their opinion that money could be poinded in a debtor's pocket. 5 Br. Sup. 708.

⁴ *Davidson v Murray*, 1784, M. 761. A house having been sublet with furniture, a creditor of the person who gave the sublease proceeded to poind the furniture. It was before the late reformation in the form of executing poinding; and the Court held that the poinding might proceed, and that the possessor was obliged to submit to the temporary inconvenience of allowing the furniture to be carried to the market-cross, 'although the poinding could not have its full effect before the right of possession expired.'

⁵ *Alexander v M'Lay*, 1826, 4 S. 439, N. E. 445.

The messenger and the sheriff have, according to the present proceedings, cognizance of the two several parts of the diligence: 1. The messenger acts as sheriff in that part in all that relates to the execution, appraising, and sale, etc.; adjudication in the conjunction of other creditors as co-pinders; and in judging of claims of property, or other objections to exclude the poinding. If, in performance of these judicial and ministerial functions, he has acted amiss, the party interested has a judicial remedy.¹ 2. The sheriff, in all that belongs to the warrant of sale, has jurisdiction, which entitles him to decide on the regularity of the diligence *ex facie*; on the correctness of the poinding of particular articles; on the expediency of the mode of sale, upset price, and other particulars relative to the conduct of the process.²

The debtor himself may oppose the poinding, upon the ground of any objection to the regularity of the diligence which appears *ex facie*,—as defect in the horning or other [64] warrant; the want of an execution of charge, or nullity in it;³ the prematurity of the poinding, etc. Or he may oppose on the ground of the property not being his. This, however, he must prove by clear evidence. His declaration, or even his oath, cannot be taken as sufficient. He may also oppose a repoining after he has purchased back his goods. See above, p. 58, note 3.

IN COMPETITION, the preference of poinding is regulated thus:—

1. The date of the messenger's execution (which is the adjudication of the goods) is the criterion of preference, provided the goods be sold or judicially delivered over within the appointed time, and the note or minute be lodged with the clerk within eight days after the sale or delivery.⁴ 54 Geo. III. c. 137, sec. 4; Act of Sederunt, Dec. 14, 1805.

2. In competition with the Crown, the pointer is preferable, if the messenger's execution precedes the teste of the extent. See above, p. 51.

3. In competition with voluntary conveyances, pledge, etc., the pointer is preferred if the messenger's execution precedes the completion of the transfer by delivery.

4. In competition with arrestors, the pointer will have preference, if his execution precedes the decree of forthcoming. The distinction between these two diligences lies in this, that the poinding is a perfect diligence, operating at once as a transference of the debtor's property to the pointer, and that it cannot proceed till after the expiration of the charge; while arrestment is an imperfect diligence, competent to be used the moment that decree is pronounced and extracted, or even before decree, but requiring a decree of forthcoming to complete it.

¹ *Hog v M'Lellan*, 1797, M. 8346. This case strongly illustrates the doctrine. A messenger having admitted a creditor to conjunction, whose execution of charge was of an erroneous, and indeed impossible date, the Court held these three points to be clear: 1. That the messenger's decision in this matter was not irreversible. 2. That it was necessary, in order to procure conjunction, to produce legal evidence that the charge had been given, and that the days were expired. 3. That the execution of a messenger is an *actus legitimus*, which must be perfect at the time it is first produced in judgment, and cannot afterwards be corrected or supplied by another.

² *Mitchell v Cuddie*, 1822, 1 S. 496, N. E. 461. The sheriff here was allowed to judge of a plea of personal exception to the poinding.

Clark v Clark, 1824, 3 S. 143, N. E. 96. Sheriff restricted to consideration of matters proper to the execution of the diligence.

³ It is not necessary to renew the charge after year and day, as for denunciation. *Anderson*, 1750, M. 10532; *Burton*, 1773, 4 Dict. 81.

⁴ It appears to me, with the greatest deference, that the view on which the case of *Tullis v White*, 18 June 1817, was decided, is erroneous, or at least that the dictum of the Lord Ordinary is to be taken with some qualification. The Lord Ordinary there held that the warrant of sale, and indeed the actual sale in consequence, and the lodging of the note of sale in the clerk's hands, come in place of the second appraisement, which was the completion of the old poinding. But the adjudication by the messenger, which formerly took place after the second appraisement, is now made on occasion of the first appraisement, one appraisement being sufficient; and the subsequent sale, and lodging of the note of sale, are (like the recording of sasine, inhibition, etc.) not the point of completion of the diligence, so much as a necessary adjunct, without which what has gone before becomes useless. The chief difficulty in the case of *Tullis* was, Whether the *debitum fundi* could be brought into operation by its appropriate diligence, while yet there remained any part of the execution of personal poinding uncompleted? 19 F. C. 358. [See remarks on this case in *Samson v M'Cubbin*, *infra*.]

5. A question, however, arises, Whether, subsequently to the adjudication by the messenger, but before the sale and report to the sheriff, and the lodging of the note of sale, the poiding may be defeated? And, 1. There must be no undue delay in the completion of the subsequent steps of diligence, otherwise the preference may be defeated.¹ 2. It has been held, that an heritable creditor poiding the ground, or the general creditors obtaining sequestration, while yet the goods poided are unsold, will prevail over the personal poiding as only an inchoated diligence;² and upon the same grounds, the Crown's execution by extent ought to be preferable. But this seems to require reconsideration.³

[65] 6. It seldom happens that a poiding comes into competition as an individual diligence. There are provisions, immediately to be explained, by means of which the diligence of poiding is prevented from conferring a preference on one individual, and the benefit of it communicated to all the creditors.⁴

SUBSECTION II.—OF ARRESTMENT AND FORTHCOMING.

As poiding is an adjudication and judicial sale of moveables, so arrestment and forthcoming is an adjudication preceded by attachment. The adjudication is in each the point at which the diligence is made effectual as against all competitors. By the diligence of ARRESTMENT, the moveables or money of the debtor in the hands of another person, or the debts due to him, are first attached, to remain subject to judicial determination; and afterwards, in an action of FORTHCOMING, they are to the amount of the debt ADJUDGED to the arresting creditor. Lord Stair (Stair iv. 50. 26) objects to the word forthcoming, as not correctly expressing the true character of the ADJUDICATION, which is the essential part of this diligence.

This form of diligence appears to have been originally borrowed from France. When the ancient form of proceeding, by brief of distress, was abolished, and, with the institution of the College of Justice, the spirit of the Roman law was introduced into our judicial proceedings, it was not unnatural that the forms of execution already established in that country, from which the whole of the new institution was borrowed, should be adopted.⁵

I.—OF ARRESTMENT IN GENERAL; AND OF THE DISTINCTION BETWEEN ARRESTMENT IN EXECUTION AND IN SECURITY.

ARRESTMENT is of two kinds: arrestment in execution, and arrestment in security. The difference appears in the name. The former is an attachment of the debtor's moveables till the creditor be fully satisfied; the latter is an attachment till surety shall be found that the sum or goods arrested shall be made forthcoming, if he shall be found entitled to demand it.

I. The ARRESTMENT IN EXECUTION with FORTHCOMING has a complex operation. An attachment is instantly laid upon the debts due, or goods belonging to the debtor, in the hands of others; and it is followed by an adjudication of them as effectual as poiding. As an inchoated adjudication, this diligence is not dischargeable on caution; as an arrestment,

¹ *Samson v M'Cubbin*, 1822, 1 S. 407, N. E. 381; *Lyle v Greig*, 1827, 5 S. 845, N. E. 785. See *Scoullar v Campbell & Co.*, 1824, 3 S. 77, N. E. 50.

² *Samson's case*, and *Lyle's*, *supra*, note 1. *Tullis v White*, *supra*, p. 56, note 2.

³ The view adopted by the Court in the above cases seems to render poiding a diligence of attachment like arrestment, rather than a complete adjudication, as it was intended to be. The doubt which still remains is whether the adjudication is not, from the moment it is made, a complete transference

provisionally,—the subsequent proceedings before the sheriff being intended only to give to the debtor and all who come in his place the greatest possible advantage in the disposal of the effects, etc., but not to have the smallest effect in defeating or suspending the diligence; and it would seem that ample justice is done to all the other creditors by the introduction of the *pari passu* preference, to be effected by bankruptcy or sequestration within sixty days. See below.

⁴ See below.

⁵ Pothier, *Trait. de la Proc. Civ.* vol. iii. p. 195.

it must be followed forth by an action of forthcoming, the transference of the real right not being completed till decree of forthcoming be pronounced.

1. The warrant to arrest is contained either in letters of horning or in letters of arrestment under the signet, proceeding on a liquid ground of debt;¹ or in the precept of an inferior judge, proceeding on his own decree, or on the registration of the ground of debt bearing a clause to that effect, or allowed by the statute to be registered for execution.² Such precept will have full effect within the jurisdiction of the judge; and if the [66] arrestee be in another shire, letters of arrestment will be issued on production of the summons; or letters of arrestment, or of horning containing arrestment, on the production of the inferior court precept. If the thing to be arrested be on board ship, a warrant of concurrence by the Judge-Admiral will give full authority for executing the diligence. So will a concurrence by the Water-Bailie of Clyde for arrestment within that jurisdiction.³ If the person in whose hand arrestment is used be out of Scotland, the execution, for the purpose of attaching the effects in the view of a competition, must be according to the directions for the execution of diligence contained in 6 Geo. III. c. 120, sec. 51. And by 54 Geo. III. c. 137, sec. 3, it is further requisite, in order to interpell the arrestee from making payment to his own creditor, that notice shall be given to the arrestee, or to those having authority to act for him. But the neglect of such notice will have no effect in a question of competition.⁴ By the execution of the warrant of arrestment the attachment is made.

2. The FORTHCOMING is an action which has two objects: 1. To ascertain the property in possession of the arrestee, or the debt due by him to the arrestor's debtor; and, 2. To complete the diligence of the creditor by adjudication; either adjudication to a purchaser, the property being sold for the arrestor's payment as in a poinding, or adjudication of the debt to the creditor. This action is brought before the judge ordinary of the place in which the arrestee resides, or before the Court of Session. The parties to be called as defenders in the action of forthcoming are the arrestee and his original creditor,⁵ technically called the common debtor.⁶ It is against the former that the decree of forthcoming is to be directed. The latter is called to attend to his interest, to prevent a decree of forthcoming from going out in favour of one who is no true creditor of his, or for a greater sum than is due. The only defences which it is competent for the arrestee to set up are, that he is not debtor to the arrestor's debtor, and holds no property of his; or that he has a lien

¹ Jurid. Styles, Signet Letters, pp. 623, 624.

² The Letters of Arrestment contain a warrant to messengers-at-arms, 'to fence and arrest the debtor's moveable goods, gear, etc. etc., to remain under sure fence and arrestment, aye and until the creditor be completely satisfied,' etc. Separate letters of arrestment are never used in execution, except on liquid grounds of debt, for the letters of horning contain a clause of arrestment equally available. Letters of horning and poinding order the messenger, 'in our name and authority, to fence, arrest, appraise, compel, poind, and distrinzie, all and sundry the readiest moveables, goods, gear, debts, and sums of money, pertaining and belonging to the said A. B.'

In the precept of inferior judges, the words of the warrant of arrestment are equally sparing. In each the word ARREST is the whole warrant, and indeed includes all that the messenger can do. When he has arrested, his power is at an end, and it is only by the judgment of a court that the attachment can be loosed. The terms of the execution of arrestment are these: The messenger 'fences and arrests in the hands of the said C D the sum of sterling, less or more, due and addebted by him to the said A B, or to any other person

or persons for his use or behoof, by bond, bill, etc. etc., with all and sundry goods, gear, etc., belonging to him, all to remain in your hands under sure fence and arrestment at the instance of the said complainer, aye and while (until) he be completely satisfied and paid of the sum of sterling of principal, and of expenses, and annualrent thereof.'

³ *May v Malcolm*, 1825, 4 S. 76, N. E. 79. Here the maritime part of the jurisdiction of the magistrates was held to authorize an arrestment on an ordinary process.

⁴ *Syme & Stewart v Anderson*, 1824, 3 S. 372, N. E. 262.

⁵ If the original creditor do not live within the jurisdiction in which the arrestee resides, and from which arrestment has issued, he must be summoned by a writ of supplement from the Court of Session.

⁶ This appellation is ambiguous, the arrestee being naturally taken to be the common debtor, as indebted to the true owner of the goods or debt arrested, and also in some sense to the arrestor. But this expression properly belongs to the action of multiplepoinding, where there is a fund on which several competing creditors have claims. The common debtor there is the person whose fund is attached as the subject of competition, and who is debtor to each of the competitors.

over the property; or that the arrestment or forthcoming is informal (in which case the decree will not save him from a claim at the instance of the original creditor); or that other arrestment or diligence is used in his hands for the same sum, so that he may be in danger of being obliged to pay twice.¹ It is the business of the original creditor alone to object to the claim of the arrestor; and if he do not appear and object, the arrestee has no right or interest to take up the plea.

[67] The first object in this action is to prove that the arrestee holds property of the debtor, or is due money to him, and the amount of it. For this purpose, all the channels of evidence are open to the arrestor. If the debt be established by written evidence, he will be entitled to an incident diligence for recovering such evidence from the common debtor, or other possessor of it. If the debt depend on a contract or obligation to be established by parole testimony, the arrestor ought to have the benefit of all that evidence which would be open to the common debtor himself; and there is no authority but that of Mr. Erskine for limiting the proof at the instance of the arrestor to a reference to the arrestee's oath.² If the arrestor can in no other way succeed, he may make a reference to the oath of the arrestee.³

According to the nature of the fund, the proceedings will vary. 1. If the fund arrested be a debt, the decree of forthcoming will adjudge that debt (at least as much of it as shall be necessary) to belong to the arrestor in satisfaction of his debt, and ordain it to be paid over to him. 2. If it consist of moveables, the arrestee will be ordained to produce them, that they may be sold as in a poinding;⁴ and the buyer's title is made good by adjudication of the goods to him, while the proceeds are adjudged over and paid to the creditor.

The effect of the decree of forthcoming, where a debt has been arrested, is to transfer completely to the arresting creditor the debt due by the arrestee to his original creditor; insomuch that it excludes the plea of compensation or set-off by the arrestee, which he might have stated against his original creditor, if he have neglected to state it against the arrestor during the dependence of the forthcoming.⁵

II. ARRESTMENT IN SECURITY proceeds upon a precept from an inferior court, or upon letters of arrestment issued from the signet by warrant of the Court of Session. Where the subject to be arrested lies within the jurisdiction of the Court of Admiralty, the arrestment must either proceed by precept from the Judge-Admiral, or be sanctioned by his concurrence; and within the precincts of the Water-Bailie of Clyde, a concurring warrant from him is necessary.⁶ The warrant is to arrest moveables, etc., 'all to remain under sure fence and arrestment, until sufficient caution be found that the same shall be made forthcoming to the complainer, as accords of law.'

This arrestment proceeds either on a debt future or contingent, or on a depending action.

¹ In such a case the proper remedy is by process of multiplepoinding or double distress, in which the arrestee states that there are several claimants upon the fund in his hand; and concludes that they should be called into Court to dispute their preference, so that he may pay safely to him having best right, under deduction of the necessary expense of his calling them into Court. Of this action, see afterwards.

[*Houston v Aberdeen Town and County Bank*, 1849, 11 D. 1490. Held (1) that an arrestee, defender in a forthcoming, has no interest to object to the arrestor's debt; and (2) that all objections or defences that would have been competent to the arrestee as against the common debtor, are competent against the arrestor in the process of forthcoming.]

² 'If he cannot prove the debt by writing, he must refer it to the oath of the arrestee; but though that oath be negative, that he owes nothing to the common debtor, it cannot hurt the common debtor in any action he may afterwards

bring for payment, since the oath was not given on his reference.' Ersk. iii. 6. 16. There seems here to be greater care taken of the interest of the common debtor than of that of the arrestor. The arrestor ought to be considered as having, by his diligence, acquired every right which is in the original creditor, and every remedy for enforcing payment as well as establishing the debt which was in him.

³ The result of this oath will not be conclusive against the common debtor. See preceding note.

⁴ *Muirhead v Corrie*, 1735, M. 687; *Stair* iii. 1. 38; *Ersk.* iii. 6. 17. [This applies to shares in joint-stock companies. *Sinclair v Staples*, 1860, 22 D. 600.]

⁵ *Wilson & Co. v Cunningham, Stevenson, & Co.*, 15 Dec. 1808, Baron Hume's Sess. Pap. and notes. See below, Of Compensation.

⁶ See *May v Malcolm*, 1825, 4 S. 76, N. E. 79.

1. In the former case, however clearly established the obligation may be, execution cannot further proceed on it than by mere attachment, to be made effectual by decree of forthcoming when the debt shall become payable. Upon an obligation *ex facie* legal and effectual, though future or contingent, a warrant will accordingly be granted for letters of arrestment in security.

2. A warrant for arrestment on the dependence is issued, of course, upon production of the depending process. Formerly it was doubtful whether there should be, strictly and properly, an action depending to authorize the granting of such warrants; and although in one case the Court supported an arrestment under a sheriff's authority, contained in [68] the precept or summons on which the action proceeded, this was chiefly on the ground that such was the practice in the Sheriff Court.¹ The practice in the Court of Session had never sanctioned the issuing of arrestment till a summons was produced executed. But as in many cases this might lead to the entire disappointment of the creditor, by allowing the debtor to withdraw all his arrestable funds, or creditors to gain advantage by previous arrestment, it was provided that 'in time coming, letters, or precepts of arrestment, bearing to be upon a depending action, may be granted summarily upon production of the libelled summons.' It is also declared unnecessary, either that the summons should be executed, or that the debt should be liquidated, at the date of the arrestment, provided these and all other necessary steps are taken without any undue delay.²

In the case of a debtor abroad, whether foreigner, or native no longer domiciled in Scotland,³ but whose effects are in Scotland, arrestment cannot be made on the dependence without a previous arrestment used for the purpose of founding a jurisdiction, unless where the sum or goods are already the subject of a multiplepoinding.⁴

Arrestment on the dependence is competent after judgment has been carried to appeal.⁵

III. DISTINCTION BETWEEN THE TWO KINDS OF ARRESTMENT.—1. One material distinction between an arrestment in execution and an arrestment in security is, that the former suffers prescription in five years from its date; the latter in five years from the date of the decree of constitution, or from the term of payment of a future debt.⁶

2. In their effects upon the ranking of creditors, arrestment in execution for a present debt, and arrestment in security for a future or contingent debt, are different. A creditor arresting in execution upon a pure or present debt, is entitled to rank in competition with other creditors for his whole debt, and to draw the whole or whatever dividend may belong to him instantly; a creditor in a future debt can rank only for the balance after deducting the interest to the term of payment; and a contingent creditor is entitled only to security, not to payment, to consignment of the dividend which shall correspond to his claim, or to caution that it shall be paid on the existence of the condition.

3. The chief difference between the arrestment in execution and the arrestment in security is, that the former, being an act of common execution to enforce payment, cannot be recalled or loosed on caution, unless there be ground for suspending the diligence; while the latter is an extraordinary remedy against the failing condition of the debtor, either where the debt is not yet due, or where an action is necessary to constitute the debt, and may be recalled if his credit is unsuspected and entire. As inhibition (which is a diligence having a similar object of security) is under the control of the Court of Session, by whom any improper and oppressive use of it will be restrained; so arrestment in security is also under control, to be loosed on caution, or even without caution, where it is unnecessary

¹ Oliphant, 1750, M. 678.

² 54 Geo. III. c. 137, sec. 2.

³ *Pedie v Grant*, 14 June 1822, as revd. in H. L., 1 W. and S. 716; *Smyth v Ninian*, 1826, 5 S. 8, N. E. 7.

⁴ *Mansfield & Co. v Smith, Wright, & Gray*, 1795, M. 2594.

⁵ *Sir W. Johnston v Jendwin and others*, 23 Jan. 1813, Fac. Coll.

⁶ 1669, c. 9. A process of multiplepoinding is sufficient to interrupt this prescription. *Thomson v Simson*, 1774, M. 11049. [By 1 and 2 Vict. c. 114, sec. 22, the period of prescription of arrestments is altered from five to three years.]

or oppressive. In a commercial country, this embargo upon a man's floating capital, his goods and his money, may be attended with the worst effects upon his credit. There are two remedies: one is, that the arrestment shall be removed altogether, if there be no good ground of alarm; and the other, that every arrestment in security may be loosed upon caution.

[69] 1. RECALL OF ARRESTMENT IN SECURITY.—This sort of arrestment will be recalled in the following circumstances:—1. If the debt be future, and no change have taken place in the situation of the debtor after the time of entering into the contract on which the diligence is taken out,—no possibility of alleging that he is *vergens ad inopiam*,—no diligence proceeding against him by other creditors; the Court will remove the arrestment, without caution or consignment. When a contract is entered into, or an obligation granted, it is to be presumed that the creditor demands all the security which he deems necessary, and receives all that it may be convenient for the debtor to give; beyond which he would not have consented to go. To force the debtor, then, by the operation of an arrestment, to find caution, or to lock up his property while yet the debt is not due, is a breach of the contract, an alteration of the terms on which the parties have settled, an occasion of great interruption and confusion to the debtor, to which no Court ought to subject him; and against which, unless his credit shall have begun to fail, he is entitled to relief. 2. The same reasoning applies to contingent debts. 3. Even in those claims which, *ex hypothesi* of the arrestor, are due, but which, not being liquidated, require an action to establish them, the arrestment will be recalled unless the condition of the alleged debtor be liable to just suspicion. For, on the one hand, it is not yet proved that there is a debt existing upon which the funds of the defender ought to be arrested, and his transactions interrupted; and, on the other, the creditor, by not taking a document in such a form as can admit of summary diligence, may justly be held to acknowledge that he did not look for such premature security, unless his debtor's credit should appear to be failing. 4. It is a more precise and effectual ground of relief against arrestment in security, that the arrestor is already secured, either in consequence of other diligence, as inhibition or adjudication in security, or by caution, or by lien or compensation.¹

2. LOOSING OF ARRESTMENT.—Where arrestment is used for a debt future, contingent, or not yet constituted by decree, the debtor is entitled to relief, on giving caution for the value of the property arrested, or (if that exceed the arrestor's debt) to the extent of that debt; and where the action is for a large sum libelled at random, the Court *ex arbitrio* modify a sum, upon finding caution for which the arrestment is loosed.²

Arrestment in security is loosed by virtue of letters of loosing, which formerly authorized the messenger to receive the caution, and so to loose successive arrestments. By 1617, c. 17, the Clerk of the Bills has the charge of seeing to the sufficiency of the caution;³ but the warrant for successive loosings still continued incorrectly. Recently this has been placed on a more correct footing by Act of Sederunt; and two forms of loosing have been provided by order of the Keeper of the Signet,—one special, the other general.⁴

¹ [See 1 and 2 Vict. c. 114, secs. 20, 21.]

² *Heriot v Forbes*, 1739, M. 802.

³ *Brown v Wemyss & Walker*, 1827, 5 S. 703, N. E. 656.

⁴ *Paterson v Cowan*, 1826, 4 S. 477, N. E. 482. By Act of Sederunt, 11th July 1826, it is provided, 1. Where a particular arrestment is complained of, the prayer shall be for a special loosing, and caution found that the sums, etc., arrested in the hands of those named shall be forthcoming as accords; and, 2. Where various arrestments are complained of, the prayer shall be for general letters of arrestment, and caution found *judicatum solvi*, and the warrant shall be to loose all arrestments,—an extracted copy of the letters of arrestment

being produced to satisfy the Clerk of the Bills as to the amount of the caution. 3. Where the arrestment is on an action for a random sum, caution shall be found to such extent as the Lord Ordinary on the Bills shall deem sufficient.

By order of the Keeper of the Signet, a new form of will for the two several kinds of loosing has been published: the will of the special letters being to loose the foresaid arrestment in the hands of B, and to intimate the loosing to the arrestor; the will of the general letters being to loose all arrestments used or to be used at the instance of the said A, by virtue of the said letters, etc., and to intimate the same

In Special Loosing the bond of caution 'binds the cautioner for and on account of the debtor, that the sums of money, goods, gear, debts, etc., arrested at the instance of [70] A B, by virtue of letters of arrestment, etc. in the hands of C D, shall be forthcoming to the arrestor, as accords of law.' In General Loosing, caution is found *judicatum solvi* to a certain extent.

Arrestment of either kind may at all times be loosed on consignment of the amount of the debt.

Intimation is generally made to the arrestor of the loosing; but that is not absolutely necessary,¹ except in the case of general loosing, and of arrestment for random sums, by Act of Sederunt, 11th July 1826, secs. 3, 4.

The loosing of arrestment is not a discharge or extinction of the creditor's diligence; but seems to be only in the nature of a licence to receive the goods or money, notwithstanding the arrestment. And so it has been held, that the goods or debt, notwithstanding a loosing of arrestment, are still subject to forthcoming, if in the arrestee's hands when the arrestor obtains his decree;² and of course his arrestment will in competition retain its place. It should also follow, that if the goods perish in the warehouse before removal, the loss is not to the cautioner. It would seem also that a fall of value must be borne by the arrestor, if no advantage has been taken of the loosing, and the goods remain where they were arrested. If another creditor arrest, and so the loosing becomes ineffectual, the cautioner will be free, on notice to the arrestor on whose diligence the loosing proceeded. And in such a case the original arrestment will be effectual in competition.

As the cautioner's obligation is to make the goods or debts forthcoming, not to pay the arrestor's debt, he would seem to be entitled, at any time while the goods are extant, to offer them up forthcoming to the arrestor, and so get free from his obligation. The goods or debt must, however, be *in statu quo*; for if the subject of the arrestment has in consequence of the loosing suffered injury, the cautioner must be answerable for it. But it may be doubted whether, if loss has arisen from natural decay, from fall of markets, or from insolvency of the debtor, the cautioner will be responsible, the goods or debts being again restored to the creditor's diligence in the same state as if they had been all along under his arrestment unloosed. In a recent case, where a ship was arrested on a depending action, and in consequence of loosing allowed to sail, the action was in dependence for fifteen years; and when the cautioner came to be called on under his bond, the ship had perished by natural decay: the Court held the cautioner liable for the value of the ship, as at the date of loosing the arrestment.³ It may also be doubted whether, if other creditors have used arrestments, even after the goods have been removed, the cautioner may not still be free on making them forthcoming, under the burden of those arrestments?

The common debtor must be called in the action of forthcoming brought against the cautioner in the loosing, the cautioner being liable no further than to the extent of the sum due by the common debtor; but the cautioner is not entitled to the *beneficium ordinis*,⁴ nor does he appear to have any *nexus* on the goods.

II.—PROPER APPLICATION OF ARRESTMENT.

The following propositions may be taken to express the general doctrine of the application and use of arrestment:—1. It is an incompetent diligence for enforcing obligations

to the said A, and to prohibit him from troubling the arrestees or using any new arrestments.

¹ *Crichton v Borthwick*, 1707, M. 798-9. *Bannerman*, 1753, M. 802; *Elchies*, Arrestment, No. 30.

² *Ersk. iii. 6. 13*; *Grahame v Bruce*, 1665, Stair i. 265, M. 792.

³ *Anderson, Child, & Co. v Pott & M'Millan*, 1825, 3 S. 498, N. E. 347.

⁴ *Dickie v Thomson*, 1743, M. 2110.

[On the subject of cautioners' liability, note that it was held by the whole Court (distinguishing the case from that of a cautionary obligation in a suspension), that a cautioner in

[71] which are not of a pecuniary nature.¹ 2. It is (during the debtor's life) the sole diligence for attaching his personal claims. 3. Against goods which are in the possession of another than the debtor, it is a diligence as competent as poiding. 4. It cannot be used, unless the fund to be attached is in the possession of another than the debtor. 5. Where the debt is due by bill or promissory note, arrestment is held not the proper diligence.² An onerous and *bona fide* endorsee cannot be injured by an arrestment of the sum due under the bill in the hands of the acceptor.³ In several of the more ancient cases, arrestment was held a competent diligence;⁴ but this doctrine may now be considered as departed from: it has been determined that an arrestment of bills is not competent.⁵ Exhibition has been

the loosing of arrestments on a dependence was bound to pay to the pursuer, on his obtaining decree against the common debtor, notwithstanding that the action had been remitted to judicial referees, without the cautioner's knowledge; and that the decree was pronounced in terms of their award, without any investigation by the Court. *Potter v Bartholomew*, 1847, 10 D. 97. See also *Macdougall's Tr. v Law*, 1864, 3 Macph. 68.]

¹ [*Macgregor v Howie*, 1836, 14 S. 707. *Idem*, as to arrestment on dependence of an action of waking and transference. *Roughhead v Stevenson*, 1842, 4 D. 1406.]

² Mr. Erskine enumerates bills among 'subjects which, though they be moveable, cannot be arrested' (iii. 6. 7).

³ There is a decision, preferring an arrestment to a blank endorsement, there being no sufficient evidence of the priority of the endorsement. *More v Paxton*, 1766, M. 12259. But this is very questionable. If the endorsement was onerous, and without notice of a prior arrestment, the endorsee would seem to be at all events entitled to preference.

⁴ In a preceding case, a bill, taken in the name of a person for behoof of him against whose funds the arrestment was directed, had been held to be legally attached by arrestment in the acceptor's hand. *Dunlop v Jap*, 1752, M. 741.

In the case of *Smith v Home*, 1712, M. 1502, the doctrine was held good, that a gratuitous endorsee is affected by arrestment in the hands of the acceptor.

And in *Logan v McCoul*, 1728, M. 1694, it was held that notice of a previous arrestment destroyed the preference of the endorsee.

In the case of *Crs. of Sir Lud. Gordon v Sir H. Innes*, 1740, bills were drawn in favour of a factor, and arrestments were used in the factor's hands, before the bills were paid. It was held the regular diligence to attach the obligation of accounting; though, *ex favore creditorum*, it was also held that an arrestment in the hands of the drawees might have been effectual, the factor being proved to be only an interposed person. M. 715; *Elchies, Arrestment*, No. 14.

⁵ *Haddow v Campbell*, 1796, M. 763. In that case M'Intosh sent a bill for £200 to Allan & Gow, to pay £38, due to Allan & Gow; and with notice that he meant, for the balance, to draw bills in favour of some of his creditors, whom he did not name. After the bill was accepted, Pitcairn, a creditor of M'Intosh, arrested in Allan & Gow's hand. The bill which had been remitted to Allan & Gow was paid 10th March. Thereafter a draft by M'Intosh, in favour of one of his creditors, was presented to Allan & Gow, 12th April, and protested for non-acceptance. Afterwards a second arrestment was used on Pitcairn's debt; and the question lay between the payee of the draft protested, and the first arrest-

ment used while the bill was not yet paid. Lord Braxfield held the arrestment inept, as the fund was a *nomen debiti*; and arrestment should have been used in the hands of the debtor, not in the hands of one only possessed of the document of debt. The Court confirmed the judgment. Lord Eskgrove held, that an arrestment in the hands of Drummond, the acceptor of the bill, would have been competent, though defeasible by an onerous endorsement, and professed that he could see no distinction between this case and Thorold's, in favour of the arrestment. He held the case to be the same as if a bond or obligation had been lodged with a trustee; and that arrestment could be available only for what was actually received of the sum at the date of its being used. The bill he held not to be attachable as a *corpus*. Lord President Campbell denied the competency of arresting in the hands of the acceptor by a creditor of M'Intosh. The bill was placed with the arrestee for a special purpose. The case of Thorold, as his Lordship stated it, seemed to be a little doubtful, for which he mentioned a note of Lord President Dundas, which seemed to say that the judgment as reported was altered. This, however, was stated by Mr. George Home (clerk of Court, a person of most remarkable correctness) to be a mistake. But his Lordship added, that this case did not depend on that precedent. If arrestment be competent at all, the present form is effectual: the *jus exigendi* was in the truster; and in late cases, the arrestment of the obligation to account was found competent,—arrestment being the proper diligence for attaching all personal obligations not the subject of adjudication. See case in *Kilk.* p. 39, and M'Leod's case in 1779. But he placed his difficulty on the ground of special appropriation. Lord Justice-Clerk M'Queen: In Thorold's case the subjects were chiefly accepted bills. The Court was of opinion that arrestments were good, and that the commission of bankruptcy had no effect in Scotland. In every trust there is a personal *jus crediti* which is arrestable. But here the truster had nothing in his hands: vouchers of debt are not subjects of arrestment. Lord Eskgrove: The person who remitted the bills did not specify the creditors to whom the contents should be paid, and so no special appropriation. President agreed as to this.

Dick v Goodall & Co., 1 June 1815, 18 F. C. 386. This was, much more than Haddow's, a case of special appropriation; but the Court is reported to have held the point as quite settled. 'In the case of *Roberts (Peutress & Roberts v Thorold)*, 1768, M. 756, and afterwards in the case of *Haddow (supra)*, the Court proceeded upon the general principle that it is impossible to arrest bills, i.e. the document itself, as distinguished from the sum due, in the hands of the endorsee. *Dick* ought to have raised an action of exhibition.'

thought the proper diligence.¹ An action of exhibition against the custodian of the [72] bill,² with an arrestment against the debtor, would probably be effectual, if the bill were in the hands of a third party. Perhaps a combination of arrestment and sequestration of the bill itself might be sufficient, where the bill is with the arrestor's debtor.³

III.—CRITERION OF PREFERENCE.

Where arrestments are in competition without a bankruptcy, these rules apply:—

1. In competition with the Crown, the date of the decree of forthcoming is the criterion.⁴
2. In competition with poinders, it is by the date of the decree of forthcoming, as compared with that of the execution of poinding, that the preference is to be decided.⁵
3. In competition with an executor-creditor, where the debtor has died after arrestment, it is by the date of the decree of forthcoming that the arrestor is preferred.⁶
4. In competition with voluntary conveyances, the criterion of preference is the date of the arrestment (provided it be duly followed by forthcoming), compared with the completion of the assignation.⁷
5. In competition with other arrestments, the priority of the execution of arrestment decides the preference, provided there be such a difference in time as clearly to evince priority.⁸
6. In competition with adjudication (where both diligences are competent), it does not seem to be settled whether the date of the arrestment or that of the forthcoming is the rule: the analogy of poinding and of confirmation would decide for the latter.
7. All these rules are subject to the equalization established for cases of insolvency; of which in the next Section.

IV.—OBJECTIONS WHICH MAY BE STATED AGAINST ARRESTMENTS.

I. OBJECTION TO THE DEBT.—Arrestment for intermediate security is competent on [73] future and contingent debts; the debt on which alone arrestment in execution can proceed, is a debt presently due. It was doubted whether the creditor in a contingent debt (as for the future payment of an annuity) could effectually arrest? But although diligence in execution is not in such a case competent, diligence in security, to guard against the debtor's insolvency, is competent. Following the principles of the Roman jurisprudence, the Scottish law allows future and contingent creditors to use diligence for security, by

¹ See Dick's case, preceding note, and Jamieson, *infra*, next note.

² Jamieson v Leckie, 1726, M. 711. See also preceding note, Dick's case.

I have been informed of another case (not reported), in which Malcolm, having in his possession bills to the amount of £4000 belonging to Brown, an arrestment was used in his hands by Douglas, Heron, & Co. The arrestee, having notwithstanding delivered the bills to Brown, was found liable in breach of arrestment. Douglas, Heron, & Co. v Malcolm, 9 March 1782. On inquiring concerning this case, I am assured by Lord Craigie that the decision went on circumstances of gross fraud, not on the point of law.

³ There is an example of a sequestration of a bill in Sir H. Dalrymple v Ross, 1737, M. 4819.

⁴ The King v British Linen Co., *supra*, p. 53, note 4.

⁵ See above, p. 61 (4).

⁶ See the older opinion (in Stair's Decis. vol. ii. p. 839)

corrected, Carmichael v Mossman, M. 2791; Wilson v M'Lellan, 1823, 2 S. 430, N. E. 383.

⁷ Douglas v Mason, 1796, M. 16213.

⁸ Lord Stair has assigned an interval of three hours as necessary (Stair iv. 35. 7). But in Cameron v Boswall, 1772, M. 821, Hailes 470, it was held that if the executions show a distinguishable priority, they must be held *pro veritate* till the contrary be established. See Douglas v Mason, *supra*, note 7.

Wright v Anderson & Lawrie, 1774, M. 823. Here the executions bore, the one, between the hours of five and six; and the other, between the hours of five and seven; and they were preferred *pari passu*, because the same messenger, possessed of both diligences, executed both. Lord Pitfour said, 'When we go to examine minutes and hours, there must be a demonstrative priority. Without that, arrestments must come *pari passu*.'

Douglas, Heron, & Co. v Palmer, 1777, 5 Br. Sup. 381; Gibson & Balfour v Goldie, 1779, M. 824, Hailes 738.

adjudication in security, or by inhibition, or by arrestment in security. And although not entitled to instantaneous effect, as a judicial transference, such diligence preserves the right of the creditors against other creditors, so as to secure a fair proportion in the division of the debtor's funds. Accordingly, where a wife, having decree against her husband for an aliment of £100 a year, uses arrestments in security, she will, in a competition between her and the other creditors having *parata executio*, be preferred, according to the date of her arrestments, to the effect of securing to her a fund for payment of her annuity.¹

II. OBJECTION TO THE ARRESTMENT AS USED IN IMPROPER HANDS.

1. An arrestment is ineffectual against property in the debtor's own possession; or in that of persons who are in law identified with him; otherwise it would operate as an inhibition in moveables, without being attended with those requisites of publication which accompany that diligence.² It seems to be settled, that wherever goods are in the hands of another than the owner, upon a contract which, involving mutual obligation, admits of an *actio contraria*, as meeting an *actio directa*; which implies, therefore, that the possession cannot legally, without an action, be retained against the consent of him who holds it; then the possession is to be considered as not with the owner. And, of course, arrestment is a legal diligence; as where goods are in the hands of a manufacturer, of a carrier, of a shipmaster, of a factor, or even of a depository.³ On the other hand, wherever goods are held in mere custody by a person who, having no right to detain them a moment after they are demanded, may without illegality be violently and *via facti* deprived of them by the proprietor, and who can claim no retention, and oppose no *actio contraria* against a demand for the goods, the owner is to be held as himself having the possession of them, so as to exclude arrestment. So goods in the custody of a servant, clerk, or steward, are not subject to arrestment for the debt of the owner.⁴ So the tenant of a furnished house has been held as the mere custodian of the furniture, and arrestment in his hands for the debt of the owner held inept.⁵ Perhaps the same rule would be applied to the case of illegal possession.⁶ Certainly a post-chaise, arrested as in the custody of the traveller, would not be held as attached;⁷ unless, perhaps, it were hired or jobbed out on time. The question has also occurred as to goods in the king's warehouse bonded for the duties, the creditor being himself the keeper of the warehouse.

2. Arrestment of money due to the arrestor's debtor is not effectual, if used in the hands not of the person directly indebted to him, but in those of *his* debtor, or of a factor

¹ *M'Donald & Elder v M'Leod*, 15 Jan. 1811, Fac. Coll. This case, however, was compromised without any judgment by the Court.

² Ersk. iii. 6. 5; Stewart's Ans. to Dir. *voce* Arrestment; Stair iii. 1. 25.

³ Ersk. iii. 6. 5; Appine's Crs. competing, 1760, M. 749.

[As to Carriers, see *Matthew v Fawns*, 1842, 4 D. 1242; *Lindsay v London and N.-W. Railway Co.*, 1860, 22 D. 571. As to Shipmasters, *Kellas v Brown*, 1856, 18 D. 1089. As to Agents, *infra*, p. 71, note 2. As to Auctioneers, *Adam v Anderson*, 1837, 15 S. 1225; *Mackenzie & Co. v Finlay*, 1868, 7 Macph. 27. As to Trustees, and the necessity of serving the schedule upon a quorum, *Black v Scott*, 1830, 8 S. 369. As to incompetency of arrestment of private funds of Trustees and Executors in an action directed against the trust or executry estate, *Mags. of Dundee v Taylor*, *infra*; *Macfarlane v Sanderson*, 1868, 40 Jur. 189.]

⁴ Thus, a servant's possession is the possession of his master: the servant has no right in his person which can ground any lien, or require an action by his master in order to recover his goods. Accordingly, in a very strong case, it was found that pawning, and not arrestment, was the diligence

for affecting a moveable in the hands of a servant. *Cunningham v Home*, 1760, M. 747.

The same is said to have been decided as to the arrestment of waggon-horses in the care of a superintendent, pawning being held the proper diligence. *Burns v Bruce*, 27 Feb. 1799. But the case is not reported.

⁵ Where a house is rented, and along with it the furniture, the tenant cannot retain the furniture after his possession is at an end. His possession is therefore the possession of the owner; and, accordingly, the Court found that where a person had sublet a house, and with it his own furniture, an arrestment was inept, pawning being the only proper diligence, though it could not have its full effect before the right of possession expired. *Davidson v Murray*, 1784, M. 761.

⁶ *Glendinning's Crs. v Montgomery of Magbiehill*, 1745, M. 2573. The Court held *retention* competent on a possession begun on an illegal though *bona fide* title. This has since been disapproved of (see below, Of Retention). The same rule would seem to apply to arrestment.

⁷ This point has not been decided; but it is taken as an illustration in argument in many cases, and never denied.

or steward for him.¹ But where the arrestment is used in the hands of a commissioner, to whom the general management of one's affairs are committed, or of a tutor, it will be as effectual as if used in that person's own hand.² Arrestment also is competent, if used in the hands of a judicial factor,³ or of a private trustee for creditors.⁴ The fund in such cases is held by the trustee in an arrestable shape, for it is the obligation to account which is the proper subject of attachment.⁵ It does not seem to be necessary that the trustees should have the subjects vested in their persons; as by infestment, or by confirmation as executors.⁶ Arrestment is competent in the hands of a person employed to get payment of bills, or to sell goods, or to recover money; for he is not, in the sense of this rule, identified with his employer; and he is under an obligation to do diligence, and to account.⁷

3. Where a debt is due by an hospital, or by a bank, arrestment in the hands of the treasurer has been held correct.⁸

4. Arrestment is not good in the hands of a person in whose possession goods or bills are, which have been appropriated to a specific purpose, or consigned to an agent or [75] factor, for the benefit of persons to whom notice is given, so as to complete the right and vest the *jus quæsitum*. Thus, where tenants were decerned to pay money to their landlord, to be employed in repairing a house liferented by another, arrestment in the tenant's hands by a creditor of the landlord was not sustained.⁹ Again, where a debtor, at a meeting of his creditors, places furniture in a trustee's hands, with an order to sell it and pay them, it is not arrestable;¹⁰ or where a consignment is made from abroad for payment of particular creditors;¹¹ or where bills have been deposited to be given to particular creditors.¹²

5. Arrestment is ineffectual if the person in whose hands it is used is not in the actual custody of the funds. An arrestment, for example, in the hands of a consignee before the

¹ *Campbell v Falkney*, 1752, M. 742. Here the arrestment was used, not in the hands of the debtor to the arrestor's debtor, but of trustees to whom the debtor's debtor had conveyed his estate. It was held an ineffectual arrestment. *Henderson v Stewart & Henderson*, 1796, M. 5534. Here Ferguson, a creditor of a bankrupt, had produced an interest in a ranking. The estate was sold, and bond granted by the purchaser to pay the creditors as they should be ranked. A creditor of Ferguson arrested in the purchaser's hand. After the creditors were ranked, Ferguson assigned his dividends, and in a competition the assignee was preferred, and the arrestment held to be inept. Lord President Campbell said: The arrestment should have been in the hands of the common debtor, and produced in the ranking as an interest, which would have put the arrestor in Ferguson's place. But the purchaser was not properly debtor to Ferguson, so as to validate an arrestment in his hands.

Mr. Erskine, after stating the doctrine of the case of *Campbell v Falkney*, suggests some qualifications of it; but those qualifications have not been countenanced by any decision. Ersk. iii. 6. 4.

[The principle seems to be, that the creditor is not entitled to prevent his debtor's funds coming into the possession of their proper custodian. On this ground, a beneficiary is not entitled, unless in exceptional circumstances, to use arrestments in the hands of debtors to the trust, on the dependence of a claim against the trustees for money due to him under the trust-deed. *Maga. of Dundee v Taylor & Grant*, 1 Macph. 701.]

² Ersk. iii. 6. 4. [Telford's *Exr. v Blackwood*, 1866, 4 Macph. 369. Arrestment sustained of client's money in the hands of his law agent.]

³ *Cross & Bogle v Moir*, 1775, M. 757, Hailes 615. See also *Wilson v Smart*, 31 May 1809, Fac. Coll.

⁴ *Ramsay v Grierson*, 1780, M. 759, Hailes 855. Lord Braxfield said: Where an estate is conveyed to a trustee, as in this case, what is the purpose? It is to have the whole sold, and the price divided. This only gives a *jus crediti* to each creditor. The right of each creditor is a personal right against the trustee. It is impossible that an adjudication can carry this; it must be carried by arrestment. This is illustrated by the case of copartners, etc.

This doctrine was held to be settled. *Douglas v Mason*, 1796, M. 16213.

⁵ [So held where the right of the common debtor was a right to a share in the proceeds of heritage in the possession of trustees in trust for sale. *Learmont v Shearer*, 1866, 4 Macph. 540.]

⁶ In *Grierson's case* (*supra*, note 4), the trustees were not ineft. See *E. of Aberdeen v Scott of Blair's Crs.*, 1739, M. 738.

⁷ *Gordon v Sir H. Innes*, 1740, M. 715; Elchies, Arrestment, No. 14. Perhaps the subsequent case of *Haddow v Campbell*, *supra*, p. 68, note 5, went on the distinction stated by Lord Kilkerran in his note to *Gordon's case*.

⁸ *Keir v Crs. of Menzies*, 1739, M. 738; *Carmichael v Mossman*, 1742, M. 2791. [See *Henderson's Tr. v Drummond*, 1831, 9 S. 618; *Ewing & Co. v McLelland*, 1860, 33 Jur. 1.]

⁹ *Baillie v Naismith*, 1674, M. 703.

¹⁰ *Souper v Smith's Crs.*, 1756, M. 744, 5 Br. Sup. 308.

¹¹ See above, vol. ii. p. 12. See also *Stalker v Aiton*, 1759, M. 745. Here goods were consigned, with instructions to pay certain creditors named in a list. The creditors agreed to accept of this payment, and a creditor afterwards arrested. His arrestment was held inept.

¹² *Jamieson v Leckie*, 1729, M. 711.

goods have come into his hands,¹ or in those of a factor who has sold and delivered goods, but has not yet got payment, is bad.² But an exception has been admitted in the case of an insurance broker, who, though he has not received the premiums due to his principal the underwriter, is held as his debtor for those premiums, so that the creditors of the underwriter may effectually arrest in his hands.³ Another exception is admitted where the arrestee is under an obligation to do diligence and to account.⁴ And it may be added as a third, that rents, interests, and annuities may be effectually arrested *currente termino*, although, strictly speaking, the future part of the term's payment is not yet due.

6. Where one has not the custody or possession of the goods, although he may have complete power over them, an arrestment in his hands will not avail.⁵

7. Where goods are deposited in a house or cellar let to another than the owner of the goods, they are in the tenant's custody: as, where the proprietor of an estate lets his mansion-house, leaving wine in his cellars, and then sells the estate and mansion-house, the custody of the wine seems to be with the tenant, not with the purchaser.⁶

III. OBJECTION TO THE ARRESTMENT AS USED PREMATURELY.—Arrestment used before the debt arises is ineffectual. Rents or annuities sometimes give rise to questions of this sort. It has been decided that an arrestment on the *term-day*⁷ carries only the rent due to [76] that day, not the rent of the ensuing term. Where the term of payment is postponed by stipulation, the rent is still arrestable according to the legal term.⁸

IV. OBJECTIONS ON ACCOUNT OF INFORMALITY.—1. To the efficacy of the *nexus*, it is necessary that the letters of arrestment shall be correct. 2. That the schedule of arrestment shall be regular and formal, bearing the names and designations of the witnesses present, and served on the arrestee.⁹ 3. That, although there is no specific formula for execution of arrestment, it is generally necessary that the essential particulars in the notice, and the place and time, should distinctly appear.¹⁰ 4. The precaution of notice to an arrestee abroad, required by 54 Geo. III. c. 137, sec. 3, is not necessary to the *nexus* in a competition.¹¹ And, 5. Where the messenger's return of an execution is erroneous, a new return may be made, stating the matter correctly.¹²

¹ *Stalker v Aiton*, *supra*, p. 71, note 11. Besides the point there stated, a question arose on an arrestment used previously to the goods coming into the consignee's hands, and it was found bad.

² [Conversely, in such a case, arrestment used in the hands of the shipmaster is effectual. *Kellas v Brown*, 1856, 18 D. 1089; and see *Johnstone v Dundas' Trs.*, 1837, 15 S. 904.]

³ *Pitcairn & Scott v Adair*, 7 Feb. 1809, Fac. Coll.

⁴ See above, p. 71.

⁵ *Hunter v Lees*, 1733, M. 736. Corbet, being proprietor of a cellar too large for his own occasions, let out one-half of it to other traders. The key generally lay in his house. Ewing took one-half of the cellar, the key continuing to lie in Corbet's house. Corbet failed, and Ewing took the key into his own possession. Hunter, a creditor of Corbet's, arrested tobacco of Corbet's lying in his own side of the cellar, by executing his diligence against Ewing as holder of the key, and so possessor of the cellar and its contents. In a competition between Hunter and a person to whom Corbet had afterwards conveyed his goods, the assignee was preferred, as the arrestment was an ineffectual diligence in these circumstances; Ewing not being custodian of the tobacco, nor in any proper sense a possessor, so as to be liable to any action for delivery, or making forthcoming.

⁶ [As to arrestment in the hands of clerks of court, see *Pollock v Scott*, 1844, 6 D. 1297; *Rennie v Sang & Adam*, 1847, 10 D. 223.]

⁷ *Wright v Lady Cunningham*, 1802, M. 15919. This was a competition of arrestments, one of which was used on the 11th November, the other on the 25th. The subject of competition was the rent subsequent to Martinmas. The Court unanimously held: 'That the whole term-day must elapse before the next term commences; and that an arrestment on that day, to affect the next term's rent, is premature.'

The same difficulty had occurred in summer session 1799, in the case of the *Crs. of Craigforth*, where the Court was much divided in opinion; but the case was compromised, and never determined.

⁸ *Handiside v Corbyn & Lee*, 15 Jan. 1813, Fac. Coll., where an arrestment on 31st May 1809 was held to attach the whole year's rent from Martinmas 1809 to Martinmas 1810, although by agreement that rent was not payable till Whitsunday 1810 and Martinmas 1811.

⁹ *Stewart v Brown*, 1824, 3 S. 56, N. E. 36. Here the Court drew the distinction between arrestments and citations. See, as to citations, *Beattie v Lee*, 1823, 2 S. 220, N. E. 194.

¹⁰ *Montgomery v Fergushill*, 1632, M. 3749; *Orichton of Castlemains*, 1684, M. 3750; *Wight v Wight*, 1822, 1 S. 424, N. E. 395; *Scott v Fisher*, 1825, 4 S. 261, N. E. 266.

¹¹ *Syme v Anderson*, 1824, 3 S. 372, N. E. 262.

¹² *May v Malcolm*, 1825, 4 S. 76, N. E. 79. But it is doubtful whether this is admissible in a competition. In *Hog*

V.—EXTENT OF THE CLAIMS SECURED BY ARRESTMENT.

Lord Kilkerran has laid it down as applicable to both kinds of arrestments: 1. 'Where the ground of the arrestment is a bond containing penalty, the penalty is as much the ground of the arrestment as is the principal and annualrents; and therefore the sum recovered upon the forthcoming will only extinguish so much of the principal and annualrents as comes free to the forthcomer after deduction of his expense. But where the ground of the arrestment is a bill, then, as the expenses in the forthcoming were not the ground of the arrestment, the sum recovered on the forthcoming will wholly apply to extinguish the principal and annualrents of the bill, and the expenses be duly acclamable by personal action against the common debtor.'¹ 2. Where the arrestment is on a depending action, it will cover the expense of the action, even where decree is in the agent's name.² 3. It does not cover the expense of the forthcoming.³

COMMENTARY ON THE LAWS EQUALIZING DILIGENCE AGAINST MOVEABLES DURING THE DEBTOR'S LIFE.

It is remarkable that, notwithstanding the strange and unjust consequences of permitting priority in execution to bestow preference, it was not till little more than fifty years ago that the law of Scotland knew any check upon this rule, so far as regarded the moveable or personal property.⁴

Prior to the memorable year 1772, not only was each creditor entitled in Scotland [77] to proceed with his diligence, regardless of all competition; but the laws of the preceding century, for repressing fraud, perpetuated those evils. While yet the bankrupt law of a country is imperfect, some relief is derived from private trust for equal division. But in Scotland, by the second branch of the statute of 1621, any creditor who had taken even the first step of his diligence could interrupt or destroy such a trust-conveyance, although made for the general behoof; and by the statute of 1696, c. 5, a creditor might, by rendering the debtor bankrupt, prevent any such conveyance from having the effect of disabling individuals from acquiring preferences by legal execution; thus completing the injustice of the old maxim, so applied, *Vigilantibus non dormientibus jura subveniunt*.

There were other consequences of this state of the law which must have been felt severely. The slightest rumour against the credit of a debtor brought all his creditors on him, leaving no time for inquiry or accommodation; but each alarmed with the thoughts of exclusion, pushing forward to execution, regardless of all consequences to the debtor, or to the interests of others.

In 1754 an attempt was made by the Court of Session to remedy the most prominent part of the evil. An Act of Sederunt was made, in which, after explaining the motives of their interposition, the judges laid down certain rules, by way of experiment, for securing equality among the creditors of bankrupts doing diligence against the moveable estate.⁵

But this remedy was premature or imperfect. Merchants still complained of the accumulation of diligences, which this Act tended not much to diminish; and when the Act expired (for it was enacted only for four years), it was not renewed.

Thus matters returned to their old condition, and for fourteen years creditors endured

v *M'Lellan*, 1797, M. 8346, a clerical error was held irremediable, after the execution was produced in judgment. But, 1. The sole evidence offered to correct the execution was parole; and, 2. The schedule was not produced in verification of the execution.

¹ *Kilk.* p. 39.

² Lord Kilkerran (in *Dickie v Hall*, 15 Feb. 1744), p. 42, M. 772, lays it down that it covers only the expense previous to arrestment; but this is not law. *M'Donald & Halket v*

Wingate, 1825, 3 S. 494, N. E. 344; *May v Malcolm*, 1825, 4 S. 76, N. E. 79.

³ *May's case*, *supra*, p. 72, note 12.

⁴ In France, from which we borrowed the diligence of arrestment, bankruptcy had a similar effect on preferences by execution, as on those bestowed by voluntary deed. 2 *Bornier*, *Confer. des Ordon. de Louis XIV.* vol. ii. p. 674.

⁵ See Act of Sederunt, 10th August 1754. This Act went manifestly beyond the powers of the Court of Session.

this unimproved and unjust state of the law. At last, in 1772, a remedy was introduced by the Sequestration Act, which did much to put a stop to the evils of preference by individual diligence, and to the accumulation of proceedings, the greatest defect in the Act of Sederunt. As applicable to every debtor, whether a trader or not, this law introduced a process of general attachment, vesting the estate in the hands of the Court of Session, to be delegated by them to a factor chosen by the creditors for managing the common fund, and for having it divided among all the creditors. It was declared, that no individual arresting or poinding thirty days before sequestration should have any preference. But there were great defects in this system, which were strongly urged in 1783 as reasons for abandoning the plan altogether; and the Sequestration Law had nearly shared the fate of the Act of Sederunt of 1754. Strong representations of the evils of the old law in mercantile cases led to the re-enactment of the Sequestration Act as a remedy in mercantile bankruptcies; while provision was made for other cases, upon a plan somewhat similar to that of the Act of Sederunt of 1754.

By the statute of 1783 it was declared, that all arrestments within thirty days before or four months after bankruptcy should be ranked *pari passu*; and that no poinding within the same period should give any preference over creditors having liquid grounds of debt, or decrees, provided they summoned the pinders within the four months. The statute of 33 Geo. III. c. 74 made only this alteration on the rule, that instead of thirty days before bankruptcy, the period should be sixty days; and that the pinder should have, besides his expense, a preference of ten per cent. on the price of the poinded goods. In renewing this law (by 54 Geo. III. c. 137, secs. 2 and 5), the bonus of ten per cent. given to the first pinder was taken off.¹

The object of this law is, that when creditors see diligence begun against their debtor, [78] who is insolvent, they have in their own power a remedy against the injustice which would thence arise. By rendering the debtor bankrupt, and following the measures prescribed, they may place themselves on an equality with creditors who have proceeded to pind or arrest.

To the perfection of this law, as a provision for cases not mercantile, it is necessary that some process should be introduced equivalent to a general arrestment for all the creditors; and it also may seem necessary that there should be some means devised for publishing to creditors the commencement of diligence.²

In order to attain the equality which the statute has put within the power of creditors, two things are requisite:—

1. In the first place, the debtor must be made BANKRUPT, according to the description in the statute. This must take place within sixty days of the ‘using’ of the diligence, which is to be equalized.³ This expression would seem to apply to the delivery of the schedule of

¹ [By 19 and 20 Vict. c. 79, sec. 12, it is enacted, 1st, That arrestments and poindings used within sixty days before or four months after notour bankruptcy, are to be ranked *pari passu*; 2d, If the arrestments be on the dependence, or for an illiquid debt, the proceedings are to be completed without undue delay; 3d, Any creditor who, within the above period, produces a liquid ground of debt in any action relative to the subject of the arrestment or poinding, is to be ranked as if he had executed an arrestment or poinding; 4th, Any creditor obtaining payment during this period is to be liable to account to others entitled to rank *pari passu*, after deduction of the expense of recovering the fund; and, 5th, Arrestments used subsequently to the expiry of the four months are not to compete with those used before, but may rank according to law and practice on any reversion. Nothing is said in this last case as to poindings.]

² [This is accomplished by the present Bankruptcy Act, which abolishes the distinction between traders and non-traders.]

³ The expression of the Act is, ‘That all arrestments which shall have been used for attaching, etc., within sixty days prior to bankruptcy, etc., shall be ranked *pari passu*,’ and that ‘no poinding of the moveables, etc., used within sixty days before the bankruptcy,’ shall give a preference to such pinder. 54 Geo. III. c. 137, secs. 2 and 5. [Arrestment used within sixty days of bankruptcy is ineffectual, notwithstanding that decree in a forthcoming has been obtained before bankruptcy. *Dobbie v Nisbet*, 1854, 16 D. 881. The provisions contained in the statutes cited, and repeated in the Acts 2 and 3 Vict. c. 41, and 19 and 20 Vict. c. 79, apply to the sequestration of the estates of deceased as well as living debtors. *Rough’s Trs. v Miller*, 1857, 19 D. 305. See sec. 164 of the last-mentioned statute.]

arrestment to the arrestee in the one case; and in the other, to the adjudication by the messenger, and the leaving of a schedule of poinding in the hands of the debtor. Calculating backwards from the date of the bankruptcy, all arrestments not completed by delivery of the schedule of arrestment to the arrestee, and all poindings in which the messenger has not made his adjudication prior to the commencement of the sixtieth day, will be subject to the law. The execution of the messenger mentions the dates; and the rules of computation are the same with one on which it will be necessary hereafter to comment at large.¹

2. Next, the creditors must use such DILIGENCE as may under the law be entitled to a *pari passu* preference with that against which the remedy is to be provided.

1. If the diligence against which provision is to be made be an arrestment, creditors having signed documents may at once obtain letters of arrestment; or if their claims be still unvouched, they must libel summonses, and arrest on the dependence.² And in this way every creditor may have the benefit of the Act, for all this may easily be done within the four months.

2. If the diligence to be levelled is a poinding, there is more danger of disappointment. The creditors must either have their debts liquidated, by a voucher granted before the sixty days preceding notour bankruptcy;³ or they must obtain the decree of a court, and before the expiration of the four months summon the poidner to communicate a proportional share of the goods poinded; or judicially produce their document or decree in some process of competition relative to the goods or the price.⁴

3. In order to defeat such preferences, it is frequently concerted between the creditors and the debtor, that a document of debt should be granted to a trustee for the creditors, [79] on which diligence may proceed in terms of the Act. But such a transaction has been held exceptionable on the Acts of 1621, c. 18, and 1696, c. 5.⁵

4. Where a sequestration is awarded or applied for, the individual creditors are stopped from arresting; the sequestration operating as an arrestment, as well as every other sort of diligence, for the general behoof.⁶ It should follow, that where sequestration is applied for within the four months after a bankruptcy, under the Act of 1696, no creditor arresting or poinding within the sixty days preceding the original bankruptcy should have preference; or, in other words, that every creditor proving under a sequestration should have equality with all arrestors or poidners whose diligence is within the sixty days preceding the original bankruptcy. The view of the Legislature unquestionably was, to make sequestration a congeries of all sorts of diligence necessary for accomplishing the attachment of the estate and effects of the bankrupt, for the benefit of all the creditors; an adjudication to concur with the prior adjudications of individuals; an inhibition; an arrestment and poinding, to attach in the hands of the debtor himself, or of his debtors, everything belonging to him, as a fund divisible among the creditors. But unfortunately the words of the law are so ambiguous, that however consistent with the intention of the Legislature, and however essential to the just operation of the law, the Court held themselves bound to reject the

¹ See this matter discussed below, in Commentary on the Act 1696, c. 5.

² [This is no longer necessary where any creditor has used arrestment. *Supra*, p. 74, note 1, 3d head.]

³ See the case of *M'Math v M'Kellar*, 1791, Bell's Oct. Ca. 22.

⁴ It was at first required by the statute, that the poidner should be *summoned*. But the spirit of the law applied to many cases in which it could not, strictly speaking, be said that the poidner was summoned. This came to be tried in the case of *Hog v M'Lellan*, 2 June 1797, where a creditor had been improperly conjoined in a poinding by the messenger. The original poidner executed a new poinding on another debt, and then applied by petition to the sheriff to have the former recalled so far as the conjoined creditors were con-

cerned. Those conjoined creditors applied, by another petition, to have the new poinding recalled; and the two petitions were conjoined. These petitions were in court within the four months; and one question was, Whether this was not equivalent to *summoning* in the Act? And on the ground that it was so, the Court found the conjoined creditors entitled to their share.

The matter is now cleared by the words of the late statute, as above.

⁵ *Strang v M'Intosh*, 12 May 1821, Fac. Coll., 1 S. 1. [But see 19 and 20 Vict. c. 79, sec. 12.]

⁶ [As to the application of this rule to the use of arrestment by a seller in his own hands, under the Mercantile Law Amendment Act, see *Wyper v Harvey*, 1861, 23 D. 606.]

claim of the general creditors to a participation in arrestments used more than sixty days prior to the sequestration, though the sequestration was applied for within the four months subsequent to the bankruptcy under the Act 1696.¹ It is much to be regretted that, with a determination standing so manifestly against the acknowledged spirit of the law, no [80] alteration should have been made on the words of the statute: for the case continually occurs in consultation.

5. Where bankruptcy once takes place, it continues till solvency returns; and as a consequence of this, it has been held that the means provided for equalizing arrestments and poindings cannot be resorted to as a remedy against diligence used after the expiration of four months from bankruptcy. This unhappy though perhaps logical deduction has been productive of great injustice in many cases.²

It has not occurred to be determined what shall be the operation of the laws of *pari passu* preference where the arrestment has been loosed on caution. But, 1. It would appear that where the goods or money remain *in statu quo*, notwithstanding the loosing, the arrestor whose attachment has been loosed may claim the benefit of the *pari passu* preference along with subsequent arrestments. 2. That the removal of the goods in consequence of the loosing seems to discharge the arrestment; though this has not been decided. If so, subsequent arrestors would not, as against the arrestee, liable for breach of arrestment, be obliged to admit to *pari passu* preference the arrestment that has been loosed. 3. That the cautioner has no *nexus* over the goods without a new arrestment; but he may use such arrestment on his right of action against the debtor, *ad factum præstandum*. See above, p. 67.

It seems scarcely necessary to observe, that the statute has left all diligence against moveables, by poinding and arrestment not used till after four months have expired from

¹ *M'Geachy and others v Mellis*, trustee for Johnston's creditors, 2 March 1808. William Johnston & Co. were made bankrupt, under the Act 1696, on the 20th April 1802. Arrestments were used in April, May, and June, which of course were, under the law, subject to be equalized. On 21st July, more than sixty days beyond the bankruptcy, but on the one hand within sixty days after some of the arrestments, and on the other within the four months during which individual creditors might have arrested, so as to partake of the *pari passu* preference, a sequestration was applied for and awarded. An action of forthcoming was raised by the arresting creditors, in which the trustee under the sequestration appeared for the general interest, and claimed benefit under the rule of *pari passu* preference. The case was reported to the Court, on informations, when it was found, 'That the act of the Court awarding sequestration on the first deliverance on the petition for sequestration cannot be held as an arrestment in the question with arrestors, whose diligences were used sixty days or more before the sequestration.' On a petition and answers, the matter appeared so important that memorials were ordered anew, but the judgment was adhered to. Lord President Campbell, though he admitted that there was much ambiguity in the language of this Act, was of opinion that the spirit of the law required an opposite decision, and that the words were sufficient to support that construction. The whole question is, Whether a sequestration is not an arrestment for the benefit of all the creditors? It is held as an adjudication, though, strictly speaking, it is no adjudication: it is held so in all questions of *pari passu* preferences. So should it be held also as an arrestment. To this purpose the general words are

strong. The sequestration, it is declared (by sec. 24), 'shall operate as a complete attachment and transfer of the moveable or personal estate for behoof of all the creditors,' etc. It were better if the word arrestment had here been used; but the meaning is clear, and the expression broad enough to include arrestment. To this opinion Lord Craig acceded. Lord Meadowbank said that, though this particular question was manifestly not in the view of the Legislature when the law was made, the general rule of the common law—*vinco vincentem vinco te*—will secure a general *pari passu* preference. The arrestments within the rule of relation to the bankruptcy of the Act 1696 are subdued and equalized by those which are within sixty days of the sequestration. But the sequestration again subdues and equalizes them; and so by the maxim, *vinco vincentem*, etc., the sequestration is equalized with the early arrestments. He also considered sequestration as an arrestment and forthcoming for the general benefit, and held this to be the only view by which the manifest intention of the Legislature could be made out. But Lord Justice-Clerk Hope, Lords Hermand, Cullen, and Armadale, were decidedly against this doctrine, and, however much to be regretted, held the words of the law as too strong to permit a court to follow this construction. This decision has since been confirmed in the Second Division, *M'Ewan v Young*, 27 May 1817, 19 F. C. 341, and the Legislature alone can now alter it.

[By 19 and 20 Vict. c. 79, sec. 108, it is provided that sequestration shall have the effect of an arrestment and forthcoming, and of a completed poinding, thereby correcting the anomaly pointed at in the text. See *Bank of Scotland v Robertson*, 1870, 8 Macph. 391.]

² See *Strang's case*, *supra*, p. 75, note 5.

the date of the bankruptcy, 'to rank with one another according to the former law and practice.'¹

SECTION III.

OF DILIGENCE AGAINST MOVEABLES AFTER THE DEBTOR'S DEATH, AND OF THE LAWS ESTABLISHING EQUALITY AMONG THE CREDITORS OF DECEASED DEBTORS.

Upon death, the intestate moveable estate passes by the law of Scotland to the next of kin, or it goes according to the will of the deceased. In either case, the person who takes up the succession is called executor; and his title in that character to take possession of the goods, and enforce payment of the debts due to the deceased, is established in the Commissary Court, which has come in place of the Bishop's Consistorial Court. But, till recently, it stood as a peculiarity of the law of Scotland (attended occasionally with very painful consequences), that the judicial interference of the Commissaries was not only requisite to give to the executor the right to administer and take possession, but necessary (unless where the effects had been reduced into actual possession) to vest the interest or right in the executor, so as to make it transmissible either by will or by succession to the next of kin. Without confirmation by the Commissaries, the moveable succession on his death went to the person who would have taken it if he never had existed.

In England, the executor's title to administer and take possession is established by proceedings in the Ecclesiastical Court, of a description not very unlike those of our Commissary Court. Letters of administration are issued to the person who shows his title by will or legal succession, which entitle him to the full and uncontrolled administration and possession of the funds. But, by the law of England, neither the taking out administration, nor the actual possession of the funds, are necessary to vest the right of the next of kin. The residue of the property of a person dying intestate, after payment of his debts, becomes, immediately on the death of that person, vested in interest in the next of kin; [81] so that each person's share of such residue, though unascertained till the debts are paid, is transmissible as the personal estate of such next of kin to their representatives, or may be disposed of by their wills. The letters of administration are thus merely the proofs of his title, and the step by which the actual possession is to be obtained.²

This difference of principle in the laws of England and Scotland was found to produce very important consequences in cases of moveable succession, and in questions between husband and wife, where the funds were partly English, partly Scottish.³

The questions to which attention is here more immediately to be directed are those in which creditors have occasion to proceed, either against the moveable estate of their deceased debtor, or against the moveable succession which may have fallen to their debtor by the death of another. This is to be done either by directing proceedings against the executor confirmed, or by applying to be confirmed as executor-creditor, with a permission to administer to so much of the funds as may pay the debt of the creditor applying. Where there are many creditors engaged in the same pursuit, a competition may arise in either of these two courses of proceeding, or there may be a rivalry between the creditors of the deceased himself and the creditors of the executor or successor.

¹ 54 Geo. III. c. 137, secs. 2 and 5.

² Sir S. Romilly and Mr. John Bell delivered opinions to this effect in the case of *Egerton v Forbes*. See Fac. Coll. 27 Nov. 1812, pp. 19 and 20, note.

³ In a note to a former edition of this work, I took occasion very strongly to mark this peculiarity of the Scottish law, and to recommend it to serious attention that there should be an alteration on the law as to the vesting of estates both in

heritable and in moveable succession. Perhaps there is no other part of the law in which ignorance or unskilfulness in conveyancers, or neglect from an over-confidence in life, is daily producing consequences so frequent and unhappy.

The object thus pointed out has been accomplished, as to moveables, by 4 Geo. IV. c. 98, in which statute, however, there are some unfortunate ambiguities of expression.

To explain these situations, it may be proper to show,—

1. The usual course of proceeding in confirmation by an executor-nominate, or by the next of kin.
2. The proceedings which the creditor of a person deceased may adopt against the executor confirmed, or where there is no confirmation.
3. The rules of competition between creditors thus suing the executor, or demanding confirmation in their own persons. And,
4. The remedy open to creditors of the executor himself, with the rules of preference to which the creditors of the deceased are by statute entitled over the creditors of the executor.

SUBSECTION I.—OF CONFIRMATION AS EXECUTOR NOMINATE OR DATIVE.

The power of conferring or confirming the administration of the moveable estate or executry upon the death of the owner is in the Commissary Court. The title of any one claiming the office of executor is examined, and, on proof of his right, confirmed; whence the whole proceeding is called CONFIRMATION.

1. EDICT.—Upon the application of any one having interest by will, or as next of kin or otherwise, the Commissary Court issues an edict, giving notice to all concerned that the Court is, at the distance of nine days after publication, to proceed in the confirmation of an executor to the deceased.¹ It is published by being affixed to the church door of the parish of the deceased's residence; and if he died abroad, *animo remanendi*, citation, formerly given at the market-cross of Edinburgh and the parish church door of St. Giles, will now be regulated by 6 Geo. IV. c. 120, sec. 51.

2. CLAIM.—The office of executor nominate or dative is that of administrator or trustee for all concerned; for creditors in the first place, and next for legatees, and for those en-[82] titled to the residuary succession, whether himself or others. The person claiming the office of executor must show either his title by Will, or his right as Next of Kin, etc. 1. Those named by a valid will of the deceased are preferred to all others; and the Commissaries at once confirm the title of the executor-nominate. This is called the CONFIRMATION of a TESTAMENT TESTAMENTARY.² 2. The next in order are universal disponees, who take under a general disposition or settlement. 3. The next of kin, one or many (all of the same degree being equally entitled to the office), are preferred in the third place. 4. The widow in the fourth place. And last of all come creditors and legatees, not that they have a weaker title to the property of the deceased, but that they have not the character of general trustees for all concerned, but proceed only for their own benefit.

3. CONFIRMATION.—The title of the executor-nominate is at once confirmed.³ That of any other claimant is preceded by a judgment, adjudging the title to be in that person, called a DECREE DATIVE. The confirmation is a sentence proceeding on the testament, called CONFIRMATION of a TESTAMENT TESTAMENTARY, or following a decree dative, called CONFIRMATION of a TESTAMENT DATIVE, by which the Commissaries authorize the person or persons preferred to the office of executor to sue for, possess, and administer the whole moveable estate of the deceased, for the behoof of all concerned.

As the office of administrator, or executor nominate or dative, is a trust for all concerned in the moveable succession, it was originally requisite to present to the Commissaries, on oath, an inventory of the whole executry, and to find caution. The former requisite fell into disuse after the abolition of the quots, which the clergy were formerly entitled to claim

¹ [By the Confirmation and Probate Act (21 and 22 Vict. c. 56) the application is to be made by petition to the sheriff, in place of by edict. See the forms of procedure prescribed by the statute in reference to the appointment and confirmation of executors.]

² It seems to be analogous to letters of administration, with the will annexed, in England.

³ Formerly he was required to find caution. By 4 Geo. IV. c. 98, sec. 2, this is no longer necessary. [See the procedure prescribed by 21 and 22 Vict. c. 56.]

as their part of the succession, and confirmation proceeded on any inventory which might be presented. To the effect which the *ipso jure* vesting of the succession, according to the laws of other countries, has (and which is now established in Scotland), such confirmation vested in the executor the right to the whole succession, so as to give to those taking right through that person (as husband's *jure mariti*, creditors, executors, etc.) a title to the succession. By statutes enacted for the purposes of revenue, the necessity of giving up a full inventory was restored; and by the recent Act 4 Geo. iv. c. 98, sec. 3, it is required that the person seeking confirmation 'shall confirm the whole moveable estate known at the time, to which such person shall make oath.'¹

It may be observed, 1. That the next of kin are by mere survivance vested in the right of succession, to the effect of transmitting it to their representatives.² 2. That, without confirmation, the executor has no title upon which he can force the debtors of the deceased to pay, or the possessors of his moveables to deliver them; and that, if they do deliver or pay without seeing the executor's title by confirmation completed to that debt or moveable, they must run the hazard of the executor's title; and it would seem the risk also of the responsibility of an executor-dative, who would have been compelled to find caution had the debtor insisted on confirmation.³ 3. That even, as the law stood formerly, the right to such moveables as, being in England, were by the law of England vested *ipso jure* on the death, was held to vest in the next of kin in Scotland, though it was still necessary to [83] have titles of administration, in order to enforce payment of debts, or to obtain possession of the effects due.⁴

The rules according to which an executor confirmed is accountable to others will be explained in the next section.

SUBSECTION II.—OF THE PROCEEDINGS COMPETENT TO THE CREDITOR OF THE DECEASED.

A creditor may have commenced his proceedings before the death of his debtor; or he may have to take his remedy against the estate after his debtor's death; and his proceedings will be according to the following methods.⁵

¹ By the 44 Geo. III. c. 98, sec. 23, it is ordered that all executors, etc., shall exhibit, upon oath, a full inventory of the estate and effects to be recorded, on penalty of double the value of the stamp duty, payable by the schedule on the amount. And by 48 Geo. III. c. 149, sec. 38, the duty is laid on the inventory; and the executor, etc., is required to give up a full inventory, duly stamped according to the Act, under a penalty of £20 and double duties.

² 4 Geo. iv. c. 98, sec. 1. Formerly it was necessary to reduce the estate into possession, or to confirm, in order to vest the right. *M'Whirter*, 1743, M. 14397; *Jameson v Spottiswoode*, 6 Dec. 1808, Fac. Coll.; *Spence v Alcorn's Crs.*, 1751, M. 14400; *M'Dowal v M'Dowal*, 1784, M. 14404.

³ But see *Taylor v Sir W. Forbes & Co.*, 9 June 1827, 5 S. 785, N. E. 732. [*Maitland v Cockerell*, 1827, 6 S. 109; *Dickson v Barbour*, 1828, 6 S. 856; *M'Target v Monteith*, 1829, 7 S. 591; *Barnet v Duncan*, 10 S. 128; *Bridges v Ewing*, 1832, 11 S. 335; *Bones v Morrison*, 1866, 5 Macph. 240.]

⁴ *Egerton v Forbes*, 27 Nov. 1812, Fac. Coll.; and *Craigie v Gairdner*, 12 June 1817, Fac. Coll. These two cases deserve to be studied. In the former the *ipso jure* transmission of executry, by the English law, conferred on a husband, *jure mariti*, the right to stock so vesting in the wife. In the latter, confirmation was held unnecessary to vest stock in England in the Scottish executor. *Milligan v Milligan*, 1826, 4 S. 432, N. E. 438.

⁵ In England, the remedy to a creditor of the deceased is regulated thus:—

1. The estate of the deceased is, in the person of the executor, liable to direct execution for the testator's debts, with the following discriminations:—1. If an action have been commenced against the testator, and he die in the course of it, it may be transferred against the executor, by a writ called *Scire Facias*; and the judgment proceeding against him goes to execution, as if he were the original party. 2. If the defendant die after judgment, the judgment may be revived against the executor, by a writ of *scire facias*, in the court in which it is entered up; and, 3. If *feri facias* be actually taken out against the testator before his death, it is effectual, and may, without any revival, be put to execution against the executor. *Farrer v Brooks*, 2 Crom. 105. The sheriff in all these cases may proceed to execution against the goods in the hands of the executor, as if still in the hands of the original debtor. *Sellon*, Pr. of King's Bench and Common Pleas, i. 528, and ii. 190–196. If none of the testator's kindred will take out the administration, a creditor may by custom do it, in order to procure his payment. 2 Blackst. 505.

2. Against the estate and effects of the executor himself the creditors of the testator can have no execution, unless he shall prove the executor to have wasted the executry funds; which is established either under a writ of inquiry, called a

1. If the diligence have been already commenced during the life of the deceased, and have proceeded so far as to form a complete attachment or real right before death, it may be prosecuted, and will have effect against the executry. Thus, a writ of extent, which has the effect of a complete attachment, by relation back to the date of the fiat, is effectual after death, provided the fiat be dated previously. So poinding of the ground, executed before death, will affect the moveables on the ground after the proprietor's death. Personal poinding, if executed before the debtor's death, will be effectual to ground an order of sale and payment after.¹ And, finally, an arrestment, of which the execution is dated before the debtor's death, will ground a decree of forthcoming after.²

2. If the executor have completed his right by confirmation, or by taking possession of the moveables of the deceased, he will be liable to a personal action at the instance of the creditors of the deceased; either to the extent of the inventory, or universally, as having taken possession, or intromitted, without a confirmation and inventory. If the debtor die while an action is depending against him, the executor may be directly called as a party, and the decree may be issued against him as executor. If decree has been pronounced against the deceased, it can be revived against the executor by an action.

3. If the executor have not entered and made up titles, so as to enable the creditor to reach the executry by means of his administration, the creditor may himself be con-[84] firmed as executor-creditor, to the effect of taking his payment under his own administration.³

But to explain this subject a little more minutely:—There are two situations in which the succession may stand: either the next of kin, or the executor named by the deceased, may have completed his titles, and assumed the administration; or the executor may not yet have assumed the administration. And for the use of a creditor desiring execution in either of these two situations, there are different remedies.

I. WHERE AN EXECUTOR HAS BEEN CONFIRMED, whether as EXECUTOR-NOMINATE or EXECUTOR-DATIVE, he is a trustee for the heirs, legatees, and creditors of the deceased; and they may proceed against him as such. His confirmation proceeds upon an inventory lodged by him of the executry; and for the faithful administration of the fund he gives security, if an executor-dative, though that is not now required of an executor-nominate. In proceeding against the executor, a creditor is not entitled to revive any warrant of execution obtained against the deceased, but he must raise an action against the executor for payment of the debt. It would appear that, formerly, a decree obtained in such action was regarded as somewhat of the nature of a decree of forthcoming upon an arrestment, and held to bestow a preference not only from the date of the decree, but even from the date of the citation in the action.⁴ And although the idea of allowing this effect to a decree against an executor was so far given up, that the preference was not held to begin with the date of the citation,⁵ still the decree was long understood to give a preference. But it is now settled,⁶ that while the fund continues undistributed in the hands of the executor, a decree in favour of one creditor gives no preference over others, provided they have interpellated the executor from payment by a summons. Should the executor himself happen to be a creditor, the confirmation is held to be to him a diligence for the recovery of his debt. As an action and judgment against himself would be absurd, he is entitled, where he happens

Devastavit; or by bringing an action of debt against the executor, upon the judgment obtained during the testator's life, and suggesting in that action a devastavit. Upon the waste being proved, judgment proceeds against the executor, *de bonis propriis*. 2 Sellon 198, 199.

¹ *E. of Morton v Somerville*, 1765, M. 6197.

² *E. of Aberdeen v Scott's Creditors*, 1738, M. 774. In competition with an executor-creditor, the date of the decree of forthcoming is the criterion of preference. See

above, p. 69. *Wilson v Fleming*, 1823, 2 S. 430, N. E. 383.

³ 1 Dict. 180.

⁴ *Gray v Callendar*, 1723, M. 3140, revd. 1724, Robertson 483.

⁵ *Græme*, 1738, M. 3141; *M'Dowall*, 1742, M. 3141, Elchies, Executor, 9; *Johnston*, 1742, Kilk. 176.

⁶ *Russell v Simes*, Bell's Oct. Cases 217. See below, p. 84.

to be a creditor of the deceased, to pay himself by retention ;¹ and this even to the effect of securing him in relief of engagements undertaken for the deceased.

In order to understand clearly the nature of the proceedings by which the creditors are to make their rights complete against the executor, it is necessary to observe the situation in which the funds may be placed under his management as trustee.

1. The funds may not be recovered by the executor. In this case the creditors may proceed, upon their decree obtained against the executor, to do diligence by arrestment and poiding against the fund,² and by personal execution against the executor.

2. If the executor has obtained bonds from the debtors of the deceased in his own name, the executry creditors may proceed to attach the sums thereby due ; and they will be preferable in consequence of such diligence to the executor's own creditors.³

3. If the executor should have received payment of the executry fund, and mingled it with his own funds, he may be forced, by diligence against his own estate or person, to pay the executry creditors ; and on his failure, recourse may be had against the cautioner [85] in the confirmation. If the identity of the executry fund can be established, the creditors of the deceased will have a preference.⁴

4. If the executor has, without confirmation, taken possession of the moveable estate, he is liable to the debts of the deceased, on the ground of VITIOUS INTROMISSION. This formerly was a penal consequence of having neglected to preserve a proper check for ascertaining the amount of the deceased's funds. The tendency of late years has been to push the responsibility no further than a fair reckoning of the amount of the funds may justify.⁵ See above, vol. i. p. 705.

But, 5. There may be subjects omitted in the inventory made up by the executor, or those which are included in it may be valued too low. For this there are two remedies to creditors : either the creditor may bring an action against the executor for the value of the subject omitted, if the intromission with it can be proved ;⁶ or he may apply to the Commissary to be himself appointed '*executor ad omnia vel male appretiatum*.' To this application the executor, as trustee for all concerned, must be made a party ; and, generally, the only effect of it is to make the omitted effects be added to the confirmation, so as to form a part of the fund.

II. WHERE NO EXECUTOR IS CONFIRMED.—This includes not only the case where the executor has not been confirmed at all,⁷ but also the case of his having omitted part of the effects in his confirmation ; and several points may be distinguished :—

1. If the debt due to the creditor of the deceased be constituted by writing or decree, he may apply to be himself confirmed as EXECUTOR-CREDITOR, to the effect of administering to so much of the property as may be sufficient for paying off his debt.⁸ This diligence is completed by the confirmation ; for the decree dative which precedes the confirmation, and finds the creditor entitled to the office, has no effect in vesting any real right in the creditor.⁹ This confirmation vests the real right in the creditor, and forms the criterion of competition.¹⁰

¹ L. Napier, 1740, M. 3849 ; M'Dowall v M'Dowall, 1744, M. 10007. See Murdoch, 1826, 4 S. 479, N. E. 484.

² Atkinson, etc. v Learmonth & Lindsay, 1808, M. App. Serv. and Conf. No. 3 ; Swayne v Fife Banking Co., 1822, 1 S. 479, N. E. 445.

³ Kelhead v Irving, 1674, M. 3124 ; Stair iii. 8. 71.

⁴ Dirleton and Stewart, *voce* Executor.

⁵ Barbour v Kelvie, 1824, 3 S. 299, N. E. 210.

⁶ Inglis v Bell, 1639, M. 2737.

⁷ [It is important to notice that the mere possession of the title of executor nominate or dative, without confirmation, does not exclude confirmation on the part of executors-creditors. Nor is this diligence excluded by the dependence of a

multiplepoiding, or by consignment. Smith's Trs. v Grant, 1862, 24 D. 1142.]

⁸ Act of Sederunt, 14th Nov. 1679.

⁹ Carmichael v Carmichael, 1745, M. 9267, 71 ; Wilson & M'Lellan v Fleming, 1823, 2 S. 430, N. E. 383.

¹⁰ Cust v Garbet & Co., 1775, M. 2795. An assignation in favour of Cust of shares in the common stock, was intimated between eight and nine in the morning of 30th October. On the same day Garbet & Co. were confirmed as executors-creditors. The Court, 'in respect it appeared from the instrument of intimation produced that the same was made to the acting partner and manager at the Carron Co.'s office between the hours of eight and nine in the morning of 30th October 1771,

2. If the debt be not constituted, another course is necessary. By 1695, c. 41, it is provided: 'That in case of any depending cause or claim against a defunct the time of his decease, it shall be leisome to the pursuer of the said cause or claim to charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge given; which charge, so execute, shall be a passive title against the person charged, as if he were a vitious intromitter, unless he renounce. And then the charger may proceed to have his debts constituted, and the *hæreditas jacens* of moveables declared liable by a decree *cognitionis causa*; upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form.'

3. A creditor who thus confirms *ad omis*sa, acts not as trustee for others, but only as [86] proceeding in diligence for himself; but by the recent statute he is bound to give notice of his proceedings in the Gazette,¹ by inserting such notice within ten days after his edict has been signed by the clerk, and producing a copy of the Gazette containing such notice in the clerk's hand.²

4. Where a creditor is about to be confirmed as executor-creditor, and another creditor coming forward finds no other fund open to his diligence, he may apply to be conjoined in the office of executor-creditor, to participate equally in what may be recovered.³

SUBSECTION III.—EQUALIZING OF DILIGENCE AFTER DEATH.—COMMENTARY ON THE ACT OF SEDERUNT
28TH FEBRUARY 1662.

The rule of the common law, which bestows preference upon priority in execution, produced, among creditors doing diligence after the death of the debtor, consequences as unjust as those which were so grievous in the common case. The remedy provided against them so far differs from that which is directed against the inequalities of diligence during the debtor's life, that the latter has reference to the debtor's bankruptcy, the former to his death.

The death of a debtor is an event which naturally calls upon his creditors to apply for payment of their claims. If priority of demand were to entitle the creditor to priority or preference in payment, the little opportunity which creditors, especially those at a distance, may have of knowing that their debtor is dead, would give to his friends, and those connected with or living near him, a most unjust advantage. But it is also unjust and illegal, even at common law, for an executor who is a mere trustee to pay to the first claimants, without regard to the number who are behind, or to the adequacy of the fund. An executor

and that it is not denied that the hour of cause in the Commissary Court is not till eleven o'clock in the forenoon, found that the assignation in favour of the said Benjamin Cust was completed by the said intimation before any step was or could be taken upon the edict in the confirmation in favour of Garbet & Co., and therefore preferred Cust for his interest produced.'

[*Macleod v Wilson*, 1837, 15 S. 1043. An executor-creditor confirmed who had not been interpellated by the use of diligence on the part of any of the other creditors within six months from the ancestor's death, held to have acquired a preference.]

¹ 4 Geo. IV. c. 98, sec. 4.

² Act of Sederunt 2d Nov. 1825, in execution of the Judicature Act of 6 Geo. IV. c. 120.

³ *Lee v Mrs. Donald*, 17 May 1816, Fac. Coll. Here Mrs. Donald having given up an inventory, and confirmed as executor-creditor of A. Donald, £40, as a dividend belonging to a share which he held in a company, she intromitted with

the subsequent dividends in virtue of a decree of the Court in a multiplepoinding, but without any eik to her confirmation. Miss Lee then published an edict for confirming herself executor-creditor *ad omis*sa. Thus two questions arose: 1. Whether executor-creditor is a trustee for others? 2. Whether Mrs. Jones was not, at all events, entitled to be conjoined in the confirmation *ad omis*sa? It was held, That an executor-creditor acts only as in a step of diligence for himself; that he takes nothing but what he expressly gives up; that what he leaves may be confirmed by another creditor *ad omis*sa; that whether it be unlifted or intromitted with without title, it is still subject to confirmation *ad omis*sa; and that any creditor (the intromitter among others) may insist on being conjoined in the confirmation *ad omis*sa.

[*Willison v Dewar*, 1840, 3 D. 273. Note that a preference is secured by confirmation, subject to the rule of equality, within six months. *Smith's Trs. v Grant*, and *Macleod v Wilson*, *supra*. This, however, does not preclude other creditors from attaching the residue. *Ibid.*]

enters upon the administration according to an inventory; and is entitled to no other character, in regard to the creditors, but that of a trustee bound to recover the fund, and to distribute it fairly. But so far had these principles been forgotten or overlooked in the old law, that an executor was thought entitled to pay all demands by creditors of the deceased, without hesitation or inquiry into the adequacy of the funds. A similar injustice was practised in the granting of confirmations to creditors, though these are evidently encroachments upon the office of trustee for the general behoof, and ought never to have been granted, without such intimation being given to all concerned as might have enabled them to take measures for their safety. To correct these evils, laws were enacted under Cromwell's administration, by which it was provided, 'That hereafter there be no executor-creditors decerned and confirmed to any defunct, until half a year be passed after the defunct's decease; and that no decree for payment be extracted against any executor for six months after the defunct's death; and that all creditors who shall use diligence against the executor within the said six months shall come in *pari passu* with others that [87] have decrees ready to extract.'¹ These laws expired with the Commonwealth; but their justice was strongly impressed on the mind of the nation; and as points of common law which required only to be declared and regulated, they were re-enacted by the Act of Sederunt of the Court of Session, 28th February 1662, whereby it was provided that all creditors using legal diligence within the six months, by citing executors or intromitters, or by being confirmed executors-creditors, or by citing other executors-creditors, shall come in *pari passu* with other creditors, they bearing a share of the expense.

There are certain debts, however, which do not fall under the rule of those provisions, but are entitled to be paid in preference. The funeral expenses of the deceased, and certain other debts, are privileged beyond all ordinary debts, and the executor has always been entitled to pay these without abiding the expiration of six months.²

This *pari passu* preference resembles the *pari passu* preference established for adjudications within year and day of the first effectual: it equalizes all claims against the executry of a deceased debtor, legally notified by citation, within six months after death. But there is one marked distinction between these two rules. That which is established for adjudication is absolutely exclusive of all creditors who have not obtained decree within year and day; that which is provided for claims upon the executry is not exclusive, but leaves room for creditors to apply even after the appointed term is expired, and to obtain a share of the fund, provided it be still undivided. This distinction arises from the very constitution of the two rules. The one is a statutory rule, and the point from which the term runs is intimated to the public by the record; the other is a point of common law, moulded into shape by the statute of Cromwell, and by the Act of Sederunt of the Court of Session, which are intended only to secure at all events a delay of the division long enough to allow creditors to make their claims, but without having any penal consequence should the funds by accident remain undivided after the elapse of the appointed term.

In competitions among the creditors of the deceased, two cases may here be distinguished: 1. Where diligence has been commenced before death. 2. Where all the creditors have taken their proceedings after that event. A third case will be the subject of the next article, viz. Where the creditors of the executor come into competition with those of the deceased.

I. If diligence have been commenced against the debtor during his life, it may be important to distinguish whether the debtor was made a bankrupt or not.³

1. Where the debtor has been rendered bankrupt during his life, it seems to follow, 1. That where a creditor holds a liquid document, or a decree against the deceased debtor, he may, notwithstanding the debtor's death, summon the poidner to communicate the benefit

¹ 1654, c. 16 and 18.

² See below, Of Privileged Debts.

³ This is of no importance in regard to Extents (see above, p. 49), or to Poining of the Ground (above, p. 56 et seq.).

of his diligence. It is not clear whether this can be done without citing the executor; but there seems to be some reason for concluding that the pointers may proceed without citing him, as well as while the debtor is still alive. For the pointed property is not part of the executry, but cut off as it were by the operation of the effectual pointing, and transferred to the pointer: so that the creditor who claims under the above law a communication of the benefit, claims his share of that property which the bankruptcy has rendered common to all the creditors; which if he do not claim, the pointer will get undivided, and of which, at all events, the executor can draw no share. 2. That where the creditor has no written or judicial constitution of his debt, but immediately proceeds to constitute it against the executor, as representing his debtor, he seems to be entitled, under a decree against the [88] executor, to all the privileges of a creditor holding a liquid document against the deceased; in particular, to the same communication of diligence which such a creditor has a right to claim. The analogy of the case of Sinclair, respecting the *pari passu* preference of adjudication led before and after death,¹ seems to establish this beyond a doubt. That, and other cases upon adjudications, would also seem to fix, that, to avoid the injustice of throwing such a creditor beyond the appointed term, his decree would be allowed to pass, reserving all objections *contra executionem*. 3. That where an arrestment has been used, the creditors who wish to take the benefit of the *pari passu* preference according to the statute must bring their action against the executor, and arrest upon the dependence. The fund arrested is clearly a part of the executry, although attached; and arrestment on the dependence of an action of constitution against the executor seems to be effectual to give the creditor the benefit of the statute.

2. But if the debtor have not been made bankrupt during his life, and some of his creditors have pointed or arrested, there does not appear to be any remedy by which the other creditors can after his death insist for a *pari passu* preference, since no man can be declared a bankrupt after he is dead; and the law provides no other medium for equalizing the diligence. For this some provision should be made by the Legislature.²

II. Where the debtor has died, while yet there has been no diligence used by his creditors, the Act of Sederunt protects the creditors against distribution of the fund till the expiration of the six months from their debtor's death. The creditors are to acquire a share in the division in the following ways:—

1. If an executor has been confirmed, an action must be raised against him by each creditor (or by a trustee for a number of them concurring, to save expense); and the citation in that action constitutes the claim, as a debt to be paid from the executry, if it shall ultimately be sustained.

2. If there be no executor confirmed, or if he have not taken up the whole executry, the creditor (or trustee for many) wishing to have the benefit of the law must get himself confirmed executor-creditor; or (if another creditor has already been confirmed as executor-creditor) he must cite the executor-creditor within the six months. Creditors who have taken these measures are entitled to a share of the executry fund; a part of the expense, if there has been a confirmation as executor-creditor, being deducted from their claims.

3. Beyond the six months, although there is no protection to a creditor who has not appeared, that the fund shall not be distributed among those who have come forward; yet if the fund have not actually been distributed by the executor nominate or dative, a citation by the creditor will be a sufficient interpellation of payment, and fully entitle him to be included in the division.³ It does not appear, however, that where a creditor has obtained

¹ See above, vol. i. p. 762.

² Why not declare that a person insolvent, dying before he be made bankrupt, shall be held in all questions relative to preferences by voluntary act, or legal diligence, as a bankrupt on the day of his death?

No provision of this sort has been introduced into the recent statute. But it is, I believe, in contemplation to make it a part of the new Bankrupt Act.

[See 19 and 20 Vict. c. 79, sec. 164.]

³ Russell v Simes, 1791, Bell's Oct. Ca. 217. Litster died

himself confirmed executor-creditor, a citation to him after expiration of the six months would entitle the citing creditor to a share of the fund which he had confirmed: for [89] the proceeding of a creditor confirming is truly in the nature of a diligence for his own payment, and his liability to be called on to communicate seems to be limited to the six months.¹

SUBSECTION IV.—OF DILIGENCE BY THE CREDITORS OF THE EXECUTOR HIMSELF, AND OF THE PREFERENCE SECURED TO THE CREDITORS OF THE DECEASED.

Although the executor-nominate, or residuary legatee, or next of kin, who succeeds to the moveable estate on the death of the owner, is, when confirmed, a trustee for all interested in the succession, for legatees, and especially for the creditors of the deceased, he has a reversionary right to what remains of the fund, of which his own creditors are entitled to have the benefit. The proceedings, therefore, which the executor's own creditors are to follow next demand attention, and the restraint imposed on their diligence by the interest of the creditors of the deceased. The proceedings which by the Act of 1695, c. 41, are prescribed to be taken by creditors of the executor, in case their debtor does not enter to the succession, are accompanied by a declaration of the preference reserved to the creditors of the deceased. It is provided, 'That the creditors of the nearest of kin may either require the procurator-fiscal of the Commissary Court to confirm and assign to them, under the peril and pain of his being liable for the debt if he refuse; or they may obtain themselves decerned executors-dative to the defunct, as if they were creditors to him; with this provision always, that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of the debtor's decease, shall always be preferred to the diligence of the said nearest of kin.'²

I. PROCEEDINGS BY THE CREDITORS OF THE EXECUTOR.—These vary as the executor has been confirmed or not.

1. If the executor have been confirmed, the executry funds may be confounded with his own, so that they cannot be discriminated; in which case his creditors can proceed only by the common personal diligence to recover their debt. If the fund be still capable of discrimination, the creditors of the deceased may insist for a preference over those of the executor within a year from the death.

2. If the executor have not been confirmed, his creditors may apply for confirmation as executor-creditors, as if they were directly creditors of the deceased; or they may make a requisition on the procurator-fiscal of the Commissary Court to confirm as executor-dative, and then to assign to them.

II. COMPETITION BETWEEN THE CREDITORS OF THE DECEASED AND THOSE OF THE EXECUTOR.—Although the words of the statute 1695, c. 41, seem almost to infer that the preference of the ancestor's creditor was introduced by that Act, it is a preference which existed at common law, and which the statute restricts. This subject was formerly alluded to in commenting on the statute of 1661, c. 24, relative to the preference of the ancestor's creditors on the heritable estate; and reference may be made to that discussion as illustrating the principles of the preference now to be considered.³

1. As the executor is a trustee for the creditors and legatees of the deceased, and is on the 2d September 1788. On 15th January 1789, Russell, a creditor of Litster's, brought an action against his widow, who had been decerned executrix, and on 11th March he obtained decree in absence. Other creditors raised an action by Simes, their trustee, on 9th March 1789, but did not obtain decree till December, having been opposed by the executrix. The funds were still *in medio*, and the executrix raised a multipoleinding that the preferences might be decided,

and that she might pay safely. The judges were unanimously of opinion, that while the funds are undivided, every creditor who cites the executor has a title to a share, although the six months should have expired, and although the other creditors should have obtained decrees within that term.

¹ [Macleod v Wilson, 1837, 15 S. 1043.]

² 1695, c. 41.

³ See vol. i. p. 764 et seq.

admitted to the administration only in that character, his own creditors must at all times be postponed to those of the deceased, unless in so far as by special regulation this right has been restricted. Accordingly, effect was given to this preference by many decisions of the Supreme Court,¹ and the principle on which they proceeded has been uniformly approved [90] of by all our authors.² But it appeared to the Legislature that injustice might attend the unlimited exercise of this preference; and accordingly, in the statute already alluded to, the preference is declared to subsist for a year.

2. The statute applies only to the case where the executor is not confirmed, and the creditor is forced to take indirect means of getting at the executry; and therefore, if the preference depended on the statute alone, it might perhaps be denied where the executor has confirmed. But as it is a preference at common law, grounded on the fiduciary nature of the executor's office, it follows, 1. That even where the executor is confirmed, the creditors of the deceased have preference over those funds of the deceased which can be distinguished and identified; and, 2. That this will subsist even after expiration of the year, in whatever way the executry has been taken up, provided the fund can be clearly identified.³ If the executor have obtained bonds from the deceased's debtors, assignments of such bonds to his own creditors, granted within the year, may, it would seem, be effectually challenged by the creditors of the deceased. Bills granted to the executor, and endorsed by him to his own creditor, would probably, however, be held effectual to the endorsee taking them in *bona fide*. Nor does it seem to be a good ground for subjecting the debtor a second time, that he ought not to have given a bill within the year, for he has no right to refuse payment or a bill.

It may occur as a question in practice, how best to make arrangements for the vesting and distribution of the executry on the sudden death of an insolvent debtor leaving his executor in infancy or abroad. There is in the Commissary Court a public officer, whose functions might be turned to useful purpose by the Legislature in providing for the more easy and economical division of the estates of deceased insolvents.⁴ The procurator-fiscal might be appointed, in cases of insolvency, to act as executor and trustee for all the creditors. In practice, as there is no danger of incurring a passive title by confirming, the relations of the infant executor may proceed to confirm; or the widow may administer as executrix; or a trustee may be appointed by the creditors, and by assignation be vested with their debts, and so confirm as executor-creditor, and raise a multipoleinding.

CHAPTER IV.

OF SECURITIES OVER MOVEABLES, IN THE NATURE OF REAL RIGHT RESULTING FROM POSSESSION.

THE securities comprehended under this class correspond with the Equitable Liens and Set-off of the English law. The terms used in this country are RETENTION and COMPENSATION.

¹ *Town of Edinburgh v Ley*, 1664, M. 3123; *Kelhead v Irving*, 1674, M. 3124; and especially *Hall v Thomson*, 1675, M. 3125.

² *Stair* iii. 8. 71; *Ersk.* iii. 9. 43, 46.

³ See *Dirlerton, Executor*, 92. *Tait v Kay*, 1779, M. 3142.

⁴ By the instructions to Commissaries, 1666, Acts of Sederunt, p. 100, the procurator-fiscal is appointed to be decerned executor-dative, in case no one else shall claim, and to find security to all concerned. And we have seen this officer made use of on one occasion. 1695, c. 41. See above, p. 85.

Retention operates as a pledge constituted by tacit or implied consent; Compensation as an extinction of reciprocal or mutual claims of debt. But though there is thus a difference of operation and of principle, these two grounds of preference may not improperly [91] be comprehended under the same class, as both resulting from possession, and as equally available in competition with the personal creditors. This chapter will consist of two sections: *first*, Of the doctrine of Retention, or Lien; and, *secondly*, Of the doctrine of Compensation, or Set-off.

SECTION I.

OF THE DOCTRINE OF RETENTION, OR LIEN.

The right of Retention, or Lien, is of two kinds; namely, Special and General.

1. SPECIAL RETENTION, or LIEN, is the right of withholding or retaining property or goods which are in any one's possession under a contract, till indemnified for the labour or money expended on them.¹ This sort of retention is a favourite of the law.

2. GENERAL RETENTION, or LIEN, is a right to withhold or detain the property of another, in respect of any debt which happens to be due by the proprietor to the person who has the custody; or for a general balance of account, arising on a particular train of employment.

These rights are either founded on express agreement, or are raised by implication of law; which again may be from the understood and accustomed construction of particular contracts and connections, or from the usage of trade, or from the course of dealing between the parties. In all these cases the real right depends entirely on the fact of possession: it begins with possession, and with the loss of it expires.

In the further prosecution of the subject, it will be proper to treat separately, 1. Of Special Retention, or Lien (*infra*, p. 92); and, 2. Of General Retention, or Lien (*infra*, p. 100). But as applicable to both, it may be proper, FIRST, to speak generally of the REQUISITES of possession, of the EFFECT of retention, and of its DISCHARGE.

SUBSECTION I.—OF RETENTION, OR LIEN IN GENERAL.

The POSSESSION on which retention or lien depends must be actual, legitimate, and subsisting at the time the security is claimed.

1. The person who claims retention must have ACTUAL POSSESSION of the subject over which he demands security.²

It is not sufficient that goods or money have been sent, with orders to be delivered to the person claiming the lien, if they have not actually come into his custody. Neither is it sufficient that a bill of lading has been endorsed and transmitted; the goods not having proceeded on their voyage, or reached the hand of the consignee. The first of these points was established by a decision of the Court of King's Bench, affirmed in the House

¹ [This implies that there must be privity of contract between the parties, or at least that the possession is derived from a person entitled to give it, and that the expenditure is made on a contract, express or implied, with that person. Therefore goods which the depositor holds in pledge are not subject to lien for advances made to him without the knowledge of the owner. *Stuart v Macgregor*, 1829, 7 S. 622. So also, goods cannot be withheld from the owner in respect of work performed on the employment of an insurer. *Castellain v Thompson*, 13 C. B. N. S. 105, 32 L. J. C. P. 79. And see *Baxton v Baughan*, 6 C. and P. 674.]

² *Heywood v Waring*, 1815, 4 Camp. 291. This was an issue directed from Chancery to try whether Humble & Holland had any lien, at the time of their bankruptcy, on the proceeds of the cargo of a ship called the *Elegante*, then in the hands of certain persons using the firm of James Waring & Co. Lord Ellenborough: Humble & Holland can have no lien on the proceeds of this cargo. They never were in possession either of the cargo or of the proceeds, and without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed?

of Lords.¹ The second was decided by the Court of Session: it was thought unnecessary [92] to enter an appeal, after the judgment of affirmance in the English case;² and the doctrine has since been confirmed in many cases.³

If a trader has written to his factor, saying that he is to convey goods to him, on the credit of which the factor accepts bills drawn by the trader, the factor has no possession to ground lien, although the goods shall have been actually shipped, if this has been done in the trader's name, without directions to whom they are to be delivered.⁴

But it is not necessary that the person claiming retention should in his own person take possession of the goods. It is sufficient if the possession be with some one who may be considered as identified with him; as his servant, clerk, or special agent. Even the possession of third persons holding under him will in this question be considered as his. Thus, a factor who, in the course of his duties as factor, places the goods of his principal in the hands of a bleacher, printer, packer, or warehouseman, will not be held to have yielded the possession: in the same way as where a factor sells, his lien is continued over the price. See below, p. 90.

It is not enough that, without altering the custody, an intention to place goods or securities with a creditor should be expressed, or even executed, so far as to set them apart.⁵

2. The possession must be LEGITIMATE, and acquired previous to bankruptcy.

In England, a bill of sale of a ship being void on the statutes, it was attempted to support a security for the advances on the footing of lien; but this was rejected both in the Court of King's Bench and in Chancery.⁶

So, if one gets possession of a thing by misrepresentation, he cannot retain it on the [93] ground of lien; although, under the circumstances, he might have done so had he come

¹ *Kinloch v Craig*. Stein had sent a cargo of spirits to Sandeman & Graham of London, his factors, and they had accepted bills on the faith of it to a great amount. It was the practice of Stein to send bills of lading, sometimes endorsed, sometimes without endorsement. The bills of lading of this cargo were not endorsed. They were, with the invoices, received by Sandeman & Graham. By the practice of trade, a shipmaster does not scruple in such a case to deliver the goods to the holder of the bill. He cannot, indeed, deliver to him as an owner, but in the character of factor. But Sandeman & Graham had failed the day before the ship arrived; and though they paid six guineas to the captain in part of freight, they would not give any orders for unloading. The question arose between the trustee on Stein's estate, who had stopped the goods in the shipmaster's hands, and the assignees on Sandeman & Graham's estate, who claimed a lien for the general balance on the factory accounts. The Court of K. B. held, that here the property was not passed by endorsement of the bill of lading, as in a case between vendor and vendee; but that the goods sent, and not actually delivered, were not in the factor's possession. And they adjudged that no lien could attach till actual possession, which was never attained by the factor. 1789, 3 T. R. 119, 783; aff. in H. L. 1790, when Eyre, C. B., said, 'that the bankrupts (Sandeman & Graham) could have no lien in this case, as the special verdict found that the goods never got into their possession.'

The same doctrine was, on general principles, established in France, after a solemn hearing, 20 June 1770, between Le Sieur Fontaine, a factor, and Bidaut, trustee for the creditors of the principal. The points fixed were: 1. That the factor had lien over the goods actually in his possession. 2. That goods sent by the principal, put into a waggon, and a letter

despatched informing the factor of this, but the goods still undelivered at bankruptcy, were the funds of the bankrupt, not subject to the factor's security. *Denizart*, ii. 392, s.v. *Facteur*.

² *Young v Stein's Tr.*, 1789, M. 14218. A bill of lading had been endorsed and transmitted by Stein to Sandeman & Graham of London; the ship had sailed, but had been obliged to put back; and the question was, Whether the consignees Sandeman & Graham could, on the ground of the legal possession, and of a consequent lien, vested by the bill of lading, insist on the ship proceeding on her voyage? The Court found them not entitled so to do, and preferred the trustee of Stein.

³ See *Sweet v Pym*, 1 East 4; *M'Combe v Davis*, 7 East 5. In *Harvey v Liddiard*, 1815, 1 Starkie 123, an order to receive the contents of a discounted bill which was sent by a carrier, but still in the carrier's hand at bankruptcy of the holder of the order, was held not equivalent to possession. See also *ex parte Heywood*, 3 Rose 355.

Callum v Ferrier, 1822, 2 S. 102, aff. 1 W. and S. 399; *Petrie v Geddes*, 1823, 2 S. 562, N. E. 485.

⁴ *Nichols v Clent*, 3 Price 547.

⁵ *Wilson v Balfour*, 2 Camp. 579. Here a banker had, as a collateral security to a customer whose bonds he had secretly misapplied, enclosed certain bonds in an envelope, marking them as collateral securities for him, and deposited them in an iron chest among the securities of other customers. No lien, as the whole rested in intention, and the possession was never out of the bankrupt, the customer being ignorant of the transaction, and the banker not his agent for receiving bonds.

⁶ *Rolliston v Hibbert*, 3 T. R. 406-417, 3 Br. Ch. Ca. 571.

by it fairly.¹ In Scotland it was decided in one case, that the possessor of goods obtained by an informal poiding, though not entitled to a preference on the footing of his diligence, was entitled to retain for his debt;² but this judgment has been uniformly reprobated, as against law, by all our eminent judges since that time.³

But as the possession must be legitimate, so it must have preceded bankruptcy. No trader can give a lien after bankruptcy;⁴ nor can a law agent acquire a lien on papers delivered to him after bankruptcy.⁵

3. The possession must be upon AN AGREEMENT, express or implied, in the nature of pledge, and not for a specific and limited purpose inconsistent with retention. So possession on an agreement to deliver or pay specifically will not ground retention;⁶ nor that which a banker has of bills to be discounted, or of securities delivered on a proposal that he should advance money;⁷ nor that of a writer or law agent of title-deeds, delivered for a certain purpose;⁸ nor possession of a ship's certificate for the purpose of paying duties.⁹

4. A person possessed of property, and entitled to a lien, LOSES IT the moment he quits his possession. If a ship is allowed to sail on which there is a lien, or if a shipmaster deliver a cargo, the lien is gone.¹⁰ This point was in England determined, after very careful inquiry and deliberate consideration, by Lord Hardwicke, and has since been often confirmed.¹¹

¹ *Madden v Kempster*, before Lord Ellenborough, 1 Camp. 12; *Burn v Brown*, 1817, 2 Starkie 272. Brown, factor for Burn, requested from the master of his ship to have the register to pay duties at the custom-house. He paid the duties, but detained the certificate for a general balance of £900. When the master gave the certificate, Brown said nothing of his intention to claim lien, but that if he had been aware of it he would himself have paid the duties. In an action by Burn's Assignees v Brown for detaining the certificate, Bayley, J., said: 'The defendant is not entitled to withhold the certificate, 1st, Because he had no right to the possession of it for the purpose of a lien, in the first instance; and, 2dly, Because he claimed to retain it for too large a sum. The captain was told that it was wanted in order that the defendant might pay the duties at the custom-house, and not with a view to a lien: and therefore they cannot insist on detaining it for that purpose.'

The case of *Whitehead* seems questionable on this ground. See below, p. 90, note 8.

See *Lempriere v Parry*, 2 T. R. 487.

² *Glendinning's Crs. v Montgomery*, 1745, M. 2573, 1449, Elch. Arrestm. 24. See Elchies' Notes, p. 40.

³ This was Lord Pitfour's opinion in *Hastie & Jamieson's* case in 1764 (see M. 14209, and Bell's Oct. Ca. 474, 2 Pat. App. 251); and Lord President Campbell and Lord J.-C. M'Queen pointedly expressed their opinions in the same way in *Harper v Faulds*, 1791, Bell's Oct. Ca. 432, M. 2666.

⁴ *Copland v Stein*, 8 T. R. 199; *Walker v Balfour*, 2 Camp. 579.

⁵ *Ex parte Lee*, 2 Ves. jun. 285.

⁶ *Walker v Birch*, 6 T. R. 258. [So where goods are consigned on trust to deliver to another party. *Frith v Forbes*, 32 L. J. Ch. 10.]

⁷ *Lucas v Dorrien*, 7 Taunt. 278, 1 Moore 29; *M'Kenzie v Newal*, 2 July 1824, 3 S. 206.

⁸ *Chisholm v Fraser*, 1825, 3 S. 630, N. E. 442. See *M'Kie v M'Kinnel*, 1822, 1 S. 465, N. E. 433.

⁹ *Burn v Brown*, 2 Starkie 272.

¹⁰ *Wilkins v Carmichael*, Doug. 97.

VOL. II.

¹¹ *Kruger v Wilcox*, 1755, Ambler 252, 1 Dick. 269. [Tud. Merc. C. 676.] Mico was factor for Watkins, who lived abroad, and who was in the custom of making large consignments. Mico was in considerable advance when he received a consignment. Watkins came to England before this cargo was sold, and Mico advised him to sell it himself. Accordingly Watkins employed a broker, and Mico gave orders to his warehouseman to deliver the goods to the broker. The broker sold the cargo, opening an account in his books with Watkins, and took no notice of Mico. Mico now began to suspect Watkins, and claimed a lien on the goods. Lord Hardwicke desired four eminent merchants to attend, and in delivering his judgment said, respecting this point of parting with the lien: 'The second question is, whether he has done anything to part with his lien? I am of opinion that it is for the benefit of trade to say he has. All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant come over, and the factor deliver the goods up to him, by his parting with the possession, he parts with the specific lien. Such is the law of the land as to retainers in other cases. Question—Whether this case amounts to the delivery up of the logwood to the principal? I think it does. Mico suffers Watkins to employ a broker, and tells the broker that Watkins intends to sell them himself, to save commission. Mico gives orders to the warehouseman to deliver the goods to the broker. The broker sells them, and makes out bills of parcels to Watkins, and takes no notice of Mico. It amounts to the same thing as if Mico had delivered the goods in specie to Watkins. It is safer for trade to hold it in this way than otherwise; for, by that manner of acting, Mico gave Watkins a credit with other people (for the sale was public, and by that the goods appeared to be Watkins'), which would not have been the case if Mico had retained for the balance of his account. It is better to allow that which is the public notorious transaction than that which is secret. Suppose an action had been brought by Watkins against the broker for money had and received, the broker could not have defended himself by saying so much is due to Mico.'

In *Sweet v Pym*, 1 East 4 (see above, vol. i. p. 245, note 3),

[94] But, 1. Possession is not quitted by a factor selling for his principal in the course of his employment: his lien continues on the price of the goods.¹ Neither does a shipmaster seem to quit possession who deposits goods in the king's warehouse;² and he certainly does not when he is compelled by law so to do, as in the Dock Acts.³ 2. Neither is it to renounce possession if it has been parted with by mistake, as on the supposition of a right in another which turns out to be bad.⁴ 3. Nor, finally, is it to part with the possession, if perishable commodities have been given up on agreement that the lien shall abide the event of an application to a court.⁵

The language used in cases on this point in Scotland has not always been correct. The right is indiscriminately spoken of as a lien, or as hypothec. It is not in any degree of the nature of a hypothec: it is a mere lien resulting from possession, and the general doctrine now laid down may be taken as the law of Scotland as well as that of England. The Court of Session, in a question⁶ between the owners of a ship and the general creditors [95] of the consignee, held, that the owners having permitted the goods to be landed by one who acted as agent both for the owners and consignee, the creditors of the consignee were entitled to have those goods (or the bills or proceeds of them when sold) for the consignee's behoof, only upon paying the freight and charges.⁷

5. In one case it has been decided in England, that the lien REVIVES upon the recovering of possession.⁸ But this does not seem to be law. The foundation of lien in all cases

Lord Kenyon said: 'The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by order and on account of the bankrupt, and he was to pay the carriage of them to London. The custody, therefore, was changed by delivery to the captain. In *Kinloch v Craig* (above, p. 88, note 1), where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this Court, and afterwards in the House of Lords, though there the factor had accepted bills on faith of the consignments, and had paid part of the freight of the goods arrived.'

¹ *Drinkwater v Godwin*, Cowper 251; *Houghton v Mathews*, 3 B. and P. 485. [*Hudson v Granger*, 5 B. and Al. 27.]

² *Ward v Felton*, 1 East 507. See *Wilson v Kymer*, 1 M. and S. 157.

³ *Wilson v M'Taggart*, 1 M. and S. 147. [The existing Warehousing Acts expressly reserve the shipowner's lien for freight, which was not done in the Act under which the case cited was decided. 8 and 9 Vict. c. 91, sec. 51; 3 and 4 Will. IV. c. 57, sec. 47; 6 Geo. IV. c. 112, sec. 45. Notice to any wharf or warehouse owner now preserves the lien for freight on goods discharged. 25 and 26 Vict. c. 63, sec. 68 sqq., which prescribe procedure for the discharge of the lien by payment, deposit with the wharf or warehouse owner, or sale by him.]

⁴ *Vernon v Hankey*, 2 T. R. 113; *ex parte Morgan*, 12 Ves. 6; *ex parte Doughty*, Mont. on Lien 11.

⁵ *Ex parte Okenden*, 1 Atk. 235; *Copland v Stein*, 8 T. R. 199.

⁶ *M'Caul's Crs. v Cowan & Roy*, n. r. A cargo of timber was consigned to the order of Messrs. Liffkins, who endorsed the bill of lading to M'Caul. The cargo was to be delivered at Grangemouth. Laird & Smith were M'Caul's ordinary agents there, and M'Caul employed them as agents to take this cargo on his account. They entered the cargo at the custom-house, and it was, on being landed, deposited in their

warehouse. They were empowered by M'Caul to sell, and did sell, the timber, taking bills for the price. M'Caul failed a few days after. On this occasion Laird & Smith proposed to render a general account of their factory, and pay the balance. During all this time Laird & Smith had also been employed as agents for Cowan & Roy, the owner and shipmaster of the vessel which brought the timber, being furnished with a copy of the charter-party, and empowered to settle for the freight. On M'Caul's bankruptcy the owner and shipmaster put in an oath of verity in the sequestration, claiming 'retention and preference (for the freight) upon the foresaid timber, which is in the hands of Laird & Smith, as agents for the owners of the ship.' This claim became the subject of an ordinary action before the Sheriff of Stirling-shire, who decided: 'That, by common law, the said Cowan & Roy had a hypothec over the cargo of the ship Charlotte, for payment of the freight and other usual charges: that, from letters between them and Laird & Smith, it is to be held the latter acted as agents of the former: that, in taking possession of the cargo, they were to secure payment of the freight and charges; and that, when they did dispose of the cargo, they cannot be considered as any way altering the just and legal rights of the parties: that although the property was to be considered as the property of the said Samuel M'Caul, neither he nor his trustee could claim the same, without paying the freight and charges: that, in like manner, neither can they claim the proceeds thereof, without being subjected to the same burden: that Laird & Smith are bound to deliver up to the trustee for the creditors of M'Caul, the whole bills taken by them for the value of the cargo sold for M'Caul's behoof, and to account for the contents, if recovered: that the trustee, either on finding caution for the freight and charges, or by delivering over bills to the amount taken by Laird & Smith for the cargo, is entitled to have the whole bills and proceeds delivered to him.' This judgment the Court of Session confirmed, 19 Dec. 1805.

⁷ See below, Of Lien for Freight, p. 94.

⁸ *Whitehead v Vaughan*, 25 Geo. III., B. R., Cook's B. L.

being either an express or an implied agreement, there is no ground for implying such an agreement from the second possession. It may indeed be held that the lien revives, or rather has never been extinguished, where the possession has never been assumed by the owner;¹ but where the possession is once changed, the lien seems to be extinct beyond revival. Thus, an innkeeper suffering the horse of his guest to be taken away, has no revivance of his lien on the next occasion of bringing it to the inn;² so, a tradesman sending goods manufactured to his employer by sea, and regaining possession of them, does not recover his lien;³ so, if a carriage be delivered by the coachmaker, and sent back for a particular occasion, this will not revive the lien for the price.⁴

EFFECT OF LIEN.—The effect of lien is to deprive the owner, or those in his right, of the use and benefit of the subject till the debt be paid for which it is retained.⁵ But it may be necessary for the person holding the lien to enforce payment. In the particular case of a factor having power to sell, and making advances either on his general employment or on the faith of the particular goods, he may proceed under his powers in selling the goods, that he may be relieved of the advances which may be supposed to have been made in reliance upon this power.⁶ In other cases there is no power in the creditor to sell and pay himself,⁷ though he may assign his right to the effect of raising the money on a transference of [96] the lien. Besides this, he has no other remedy than by personal action to enforce payment of the debt, or to apply for judicial authority to sell as under a pledge.⁸

WAIVER AND DISCHARGE OF LIEN.—1. Lien may be waived by agreement before the possession begins.⁹ 2. It may be waived by agreement implied from custom of dealing.¹⁰ 3. After lien is constituted, it may be discharged either expressly, by contract; or tacitly, by taking a separate document indicative of a restriction to personal credit.¹¹ Where a bill

579. Milford put a policy of insurance into the hands of Vaughan, his broker, to have it underwritten. This was done, and the policy delivered. Milford became embarrassed, and Vaughan being in advance for premiums on Milford's account, got the above policy under pretence of settling an average, intending secretly to hold it in security of the balance. Milford became a bankrupt. Vaughan settled and answered the loss. The question was, 'Whether there was not a lien for the general account, and whether this lien revived on repossession?' Lord Mansfield said: 'It is the justice of the case that there should be a general lien; and the lien revives when the policy comes again into the hands of the broker.'

This decision seems to be questionable, on the ground that the possession here was not recovered by fair and justifiable means. See above, p. 88 (2). [The author elsewhere holds that there may be such revival of *factor's* lien where possession is fairly recovered. See *Princ.* 1449. But there is no stoppage *in transitu* for lien. *Pr.* 1416.]

¹ As in *Kinloch v Craig*, *supra*, p. 88, note 1.

² *Jones v Pearl*, 1 *Strange* 556. [See below, p. 99.]

³ *Sweet v Pym*, 1 *East* 4.

⁴ *Hartley v Hitchcock*, 1 *Starkie* 408, where a coachmaker, having repaired a tilbury, allowed it to remain in his yard, the owner frequently taking it out of the yard and returning it. A lien was then claimed for the price of repairs and for standage. Lord Ellenborough held the possession to have been relinquished after the repairs, and that there was no right afterward to retain. No part of the determination seemed to rest on the ground of discharge of lien by the bill for the amount.

⁵ *Nathans v Giles*, 1814, 5 *Taunt.* 575. *Op.* of Gibbs, C. J.

⁶ *Broughton v Stewart, Primrose, & Co.*, 17 Dec. 1814, F. C. See below, Of *Factor's Lien*.

⁷ [*Thames Ironworks Co. v Patent Derrick Co.*, 1 *Johns.* and *Hem.* 93, 29 L. J. Ch. 714.]

⁸ In the case of *Pothonier v Dawson*, 1816, *Holt's Rep.* 383, there is a degree of confusion of legal principle. Whether the security were pledge or lien, the holder of the goods had no power, without judicial authority, to sell. [In the *Princ.* 1417, the author adds on this point: 'In the common case of goods prepared for the market, and useful only as commodities in trade, a court of law will authorize a sale, as in pledge; but it seems very doubtful whether such authority can be granted for disposing of a thing not of that description, to the effect of conferring on the purchaser the full property. In lien over an author's unpublished compositions, for example, it does not seem competent for a court to order publication and sale without the author's consent.']

⁹ *Davies v Bowsher*, 5 T. R. 488; *Walker v Birch*, 6 T. R. 258.

¹⁰ *Green v Farmer*, 1 *Blackst.* 651. [*Brandas v Barnett*, 3 C. B. 519, 12 Cl. and Fin. 787.]

¹¹ [See *Miller v Macnair*, 1852, 14 D. 955. According to English practice, it is held that a party waives his lien, if, on being asked to give up goods, he claims to retain them on a different ground from that upon which he rests his case of lien. *Boardman v Sill*, 1 *Camp.* 410, note; *Weeks v Goode*, 6 C. B. N. S. 367. But if he claim to retain for the sum to which he is entitled, and also for a sum to which he is not entitled, his lien for the former sum remains, and the owner ought on such refusal to tender the sum due. *Scarfe v Morgan*, 4 M. and W. 270; *Dirks v Richards*, 4 M. and W. 574. *Quære*, whether the case of *Jones v Tarleton*, 9 M. and W. 675, where it was held unnecessary for the owner to tender the sum due, can now be supported?]

is taken for the sum secured by lien, doubts have been entertained. In the sale of real estates in England, if the bill is a security by a third person, it seems to be a waiver of the lien, and the substitution of the new security for the lien.¹ But a bill of exchange by the purchaser is correctly to be regarded rather as a mode of payment than as a security,² and so not a waiver of the lien of a vendor of land.³ In the ordinary case of mercantile dealings, the taking of a bill seems to be a discharge of the lien, both as implying reliance on personal credit alone, and as giving time for payment, while the owner may have immediate occasion for his goods.⁴ Where the bill is given in payment, and dishonoured, while the party taking the bill did not specially agree to run the risk, this is not a payment which destroys the vendor's lien.⁵ Where the bargain is for approved bills, the taking of the bill without objection seems to amount to approval; and though disapproved in words, the real evidence of the bill having been negotiated has been held sufficient to discharge the lien.⁶

There is a doctrine laid down in some English books, for which there is no authority in the law of Scotland; nor, indeed, does it appear that any satisfactory principle can be assigned for it: it is said that a contract for a sum certain on account of trouble and expense of goods, defeats lien.⁷ It is quite intelligible, that where credit for a particular time is given, or where it is agreed to pay by bills,⁸ this will exclude lien; though even in that case the insolvency of the owner on whose goods the labour or service is bestowed, or [97] the dishonour of the bills, should revive the lien, and by the law of Scotland is understood to give the right to retain. But there does not appear any rational ground for saying, that an agreement personally to pay for work a particular sum, should free goods from lien, which will be subject to it if the labour is to be paid for according to the implied contract.⁹

SUBSECTION II.—OF SPECIAL RETENTION OR LIEN.

In mutual contracts, the counter-engagements of the parties meet and oppose each other; and unless credit is stipulated or given, the performance of the one engagement is conditional of the performance of the other. When a manufacturer employs a bleacher to whiten his cloth, or a shipmaster or land-carrier to transport it, the person employed engages to perform his stipulated labour, and to deliver the commodity; while the em-

¹ This has never been precisely determined. Dictum of Sir W. Grant, 2 Ves. and Bea. 309.

² *Hughes v Kearney*, 1 Sch. and Lefroy 132.

³ *Grant v Mills*, 1813, 2 Ves. and Bea. 309.

⁴ *Cowell v Simpson*, 1809, 16 Ves. 275; *Ayton v Colville*, 27 Nov. 1705, M. 6710. [A bill or other security payable at a distant date certainly discharges the lien. *Hewison v Guthrie*, 2 Bing. N. C. 755. See *Johnston v Duncan*, 16 May 1827, 5 S. 660.]

⁵ *Pickford v Maxwell*, 6 T. R. 52; *Owenson v Morse*, 7 T. R. 66.

⁶ *Horncastle v Farran*, 1820, 3 B. and Ald. 497. Here a ship was freighted to the East Indies by Campbell from Horncastle; the freight, by the charter-party, being payable, part in cash, part by a good and approved bill at six months, and the remainder by a good and approved bill or bills payable in hand, or at three months after date from the day of delivery being completed. The ship completed her voyage, and delivered her cargo partly into the East India Co.'s warehouses, partly into the East India Dock Co.'s warehouses. A notice given to both not to deliver till freight paid. The balance unsatisfied was £3273. This paid by bills, among which was one at three months for £1200. The stop on the goods in the

East India warehouse was taken off; but the other was refused to be taken off, on the ground that the bill for £1200 could not be negotiated. The East India Dock Co., on an indemnity, gave up the goods to Campbell; and it appearing at the trial, before Abbot, C. J., that the £1200 bill, as well as the others, had been negotiated, he held this to discharge the lien, and directed a nonsuit. A rule to set aside this nonsuit having been obtained, the Court of King's Bench discharged the rule, Abbot, C. J., and Bailey, Holroyd, and Best, JJ., concurring. [A mere right to set off against the debt does not destroy the lien unless it be specially so agreed. *Pinnock v Harrison*, 3 M. and W. 532; *Clarke v Fell*, 4 B. and Ad. 408.]

⁷ *Brenan v Currint*, Buller's N. P. 45, Say. Rep. 224. See the cases in Christian, vol. ii. p. 340. See C. J. Gibbs in *Wilson v Heather*, 5 Taunt. 645.

⁸ [Or where separate security is accepted as part of the contract, without reserving a right of lien. *Chambers v Davidson*, 1 L. R. P. C. 296, 36 L. J. P. C. 17.]

⁹ See *Hutton v Brag*, where C. J. Gibbs questions the doctrine laid down so broadly. 2 Marsh. Rep. 349, 7 Taunt. 25. [*Brenan v Currint* is 'not law'—*per cur.* in *Chase v Westmore*, 5 M. and S. 180, Tud. Merc. Ca. 679.]

ployer engages, on the other hand, to pay the hire. The execution of the former obligation cannot be demanded without tender of the other. Thus, in all such contracts, there results to the possessor of the goods a right to retain them for the price of his labour, and the expense advanced upon them while in his keeping, and in the fair line of his employment or trust.¹

This doctrine corresponds with the result of the *actio directa* and *actio contraria* of the Roman law. And to this extent retention or lien never can be attended with injury to third parties; since every person, in giving credit on the faith of the ownership of particular funds in another's possession, must deduct from the value of such funds the amount of the charges bestowed upon them, and which, in truth, make a part of the actual cost.

This general rule is so clear, and so well settled in the common case of a mutual contract, that it does not seem necessary to enter into any minute detail: it will be sufficient to take notice of a few cases.

I.—SPECIAL LIEN ON SHIP FOR REPAIRS AND OUTFIT.

It has been urged generally against the existence of indiscriminate liens for repairs of a ship, that ships are subjects of too great value, compared with the amount of the repair in general required, to leave any reasonable ground to presume an intention of impleading the whole ship; and that they are so necessary in the active prosecution of trade, that an intention is not to be presumed of laying an embargo on a vessel in order to secure the shipwright for his repairs. It is said, besides, that delay of payment of the amount of repairs and furnishings is reasonably to be expected, proportioned to the slow returns in that trade from which the owners are to derive the means of payment. But although these considerations have in some places given rise to a usage for personal credit without lien (unless by special agreement), and have led to the absolute rejection of lien by workmen, into whose entire possession the ship has not been taken, this usage never has influenced the general law, so as to prevent a shipwright who has taken a ship into his dock from retaining her till payment or security be given.

1. There is no *hypothec* on a ship for home repairs;² but a shipwright employed to make or to repair a vessel has, like any other manufacturer to whom moveables are delivered, [98] and who is employed to bestow on them his labour, skill, and materials as an artisan, a *lien* on a ship, provided he has taken her into his dock, or entirely within his own possession; and this lien subsists while the ship continues in his possession.³

2. This rule suffers exception by local usage. Thus, by the custom of the Thames, there is no lien for repairs on a ship; the custom being to give personal credit, differing according to the length of the voyage, as in the India trade, eighteen months;⁴ in other trades, fifteen months. But this is not a part of the general law-merchant.

¹ [See *Harper v Faulds*, 1791, M. 2666, Bell's 8vo Ca. 440.]

² See above, vol. i. p. 572 et seq.

³ *Franklin v Hosier*, 1821, 4 B. and Ald. 341. Lord Hardwicke had denied to a person who had repaired a ship in a home port the benefit of a specific lien, 'because he had delivered the ship to the bankrupt, who had employed him.' *Ex parte Shank*, 1754, 1 Atk. 234. In *Ward & Co. v Crs.*, 31 Jan. 1810, n. r., in the Second Division of the Court of Session, an attempt was made to re-establish a preference for repairs of a ship, which had been delivered to the owners by the repairer on the footing of an extension of the lien by possession continued animo. But it was unanimously rejected. [See *Thames Ironworks Co. v Patent Derrick Co.*, *supra*; *Somes v British Emp. Ship. Co.*, 30 L. J. Q. B. 229.]

⁴ *Raitt v Mitchell*, before Lord Ellenborough at Nisi Prius,

1815, 4 Camp. 146. This was a claim to retain an India ship, taken into the dock of a shipwright on the Thames, and on which he had made repairs to the extent of £3000. It was proved that, by the usage of trade in the river, where there is no express agreement, credit is invariably given for repairs to the owner of the ship repaired: that the credit varies in different trades, being generally fifteen months; in the India trade eighteen months; and that, without a previous stipulation for that purpose, neither a ready money payment nor security is ever required. Lord Ellenborough held the proof sufficient against the lien: that the invariable usage being to give credit, it must be taken as the basis of the contract between the parties: that lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security

There is a strong inclination, however, in England to deny the right of lien, wherever it is the custom of the trade to give delay of payment, as lien is quite inconsistent with such delay. Whatever weight may be given to this in our practice, at least the right of lien will always be held to subsist to the effect of entitling a shipwright to insist for security where the employer is *vergens ad inopiam*.

3. As the lien of a shipwright in a home port depends merely on possession, wherever he shall not have taken the ship into his own possession, there is no lien. Repairs on the hull or rigging, and apparel, which he performs in open harbour or in a roadstead, are not secured by lien, the carpenters working upon the ship without taking possession.¹

4. So there is no ground on which a lien can rest in favour of those who furnish stores and outfit to a ship. They have no possession; and without possession there can be no lien: and we have already seen that there is no hypothec but for foreign repairs.

5. It has been attempted indirectly to raise a lien, through the shipmaster engaging his personal credit for repairs and furnishings, and then claiming a lien on ship or freight to secure himself. But this has not been successful.²

II.—LIEN ON GOODS FOR CARRIAGE.

[99] The contract of *locatio operis mercium vehendarum* in the Roman law gave the *actio directa*, and the *actio contraria*, out of which resulted the right to retain the goods until the price of the carriage was paid. The English law seems much to rely on another principle, viz. that all common carriers, as they are bound to take such goods as may be offered to them for transportation, without inquiring into the title of the person who delivers the goods, may retain them against the owner until the carriage be paid. In the Scottish jurisprudence, both principles may be held to combine in favour of a lien for the price of the carriage.

I. LIEN FOR FREIGHT OF GOODS CARRIED BY WATER.—1. Whether the goods be sent in a general ship, or in a ship freighted for their carriage, the master has undoubtedly a lien for security of the freight. The contract may be referred either to *locatio rei*, the hire of the ship to transport the goods; or *locatio operis mercium vehendarum*. But there does not seem to be any very essential difference in the doctrine, whatever view be taken.³

2. A distinction has been contended for in England, and sanctioned by some opinions and judgments entitled to the highest respect, which excited a very general alarm among shipowners. As lien rests on possession alone, it was doubted whether, in the case of a ship hired for a voyage, or on time, not merely to carry a particular cargo, but 'demised' to the freighter, the possession of the goods could be said to be with the shipowner. In several cases it was held, from the peculiar terms of the charter-party, that the entire pos-

shall be given the moment the work is completed. His Lordship added: 'I do not say that a shipwright has not a lien on a ship in his dock, when he is to be paid in ready money as soon as the repairs are finished. But there can be no lien without an immediate right of action for the debt, and it does not arise till the period of credit has expired.'

¹ Abbot on Merchant Ships, p. 118. Sir J. Jekyl in *Watkinson v Bernardiston*, 2 P. Will. 367. [*Wood v Hamilton*, 1788, M. 6269, 3 Pat. 148. See above, vol. i. pp. 574, 575.]

² *Wilkins v Carmichael*, Doug. 101. This was a case where the captain claimed a lien over the ship for stores and repairs, ordered before the ship set off upon her voyage. Lord Mansfield, in delivering the opinion of the Court of K. B., said: 'If there was any lien originally, it was in the carpenter. The captain could not, by paying him, be in a better situation than his; and he had parted with the possession, so that he

had given up his lien, if ever he had one. The other creditors (the biscuit-baker, etc.) had none. If the captain is liable to the tradesmen, it is by his own act. The defendant might have told the tradesmen that he only acted as agent, and that they must look to the owner for payment.' In *Hussey v Christie*, 1808, 9 East 426, this was confirmed; and the Court of K. B. certified to the Lord Chancellor, on a case sent for their opinion, 'that the master of the ship had not any lien on the ship for money expended or debts incurred by him for the repairs done to the said ship on her voyage.' The repairs were done in a foreign port.

Smith v Plummer, 1 B. and Ad. 575, where it was determined that the master has no lien over the freight for wages or disbursements on account of the ship, or for premiums abroad for procuring a cargo.

³ See Pothier, *Charte-partie*, No. 103, vol. ii. p. 404.

session was with the hirer of the ship.¹ But afterwards, in several cases, both in Common Pleas and King's Bench, the doctrine was restricted to cases where the possession is parted with; where the ship is *demised over*, and the disposal of it, and appointment of master and crew, are given to the hirer; or where the right to lien is excluded in express terms. Where the instrument contains only matter of contract and covenant, and the ship continues under the master as servant of the owners, the possession is held to be with the owners to the effect of giving a right of retention.²

3. The freight which is agreed to be paid (or, where no special agreement has been made, the usual and accustomed freight) may be demanded by the master before the goods are taken possession of by the consignee. To this, on the one hand, is to be added the average contribution which may be due on those goods either to the owner of other goods or to the ship; while, on the other, the freight will suffer deduction of what may be due for average contributions from the ship, or rest of the cargo, to the owner of those goods.³

4. There is no lien for dead freight or demurrage, those being claims which are [100] made effectual by personal action.⁴ And although it is not impossible to stipulate lien for those claims, the contract must be conceived in clear and unambiguous terms, and a power distinctly stipulated to detain the goods.⁵

5. The lien extends over every part of the goods in a bill of lading, for the freight of the whole.⁶

6. It has also been held, that where two parcels of goods have been consigned in the same ship to the same person, though in different bills of lading, the master may retain one

¹ *Hutton v Brag*, 2 Marsh. 339, 7 Taunt. 14. Here the ship was let out to hire for a voyage from London to the Cape of Good Hope, and thence back to London. On her return to the Thames several of the bills for freight were dishonoured; and the freighter being insolvent, lien was claimed. The Court held the ship to be let like a hired room for rent, and that the freighter, not the owner, had possession, and therefore lien could not be. The peculiarity of the terms does not appear in the report, but was admitted in *Saville's* case.

Trinity House v Clark, 4 M. and S. 288, where a similar decision was given under Lord Ellenborough.

² *Saville v Campion*, 2 B. and Ad. 503. See also *Tate v Meek*, 1818, 8 Taunt. 360; *Yates v Bailton*, 8 Taunt. 293; and *Christie v Lewis*, 1821, 2 Brod. and Bing. 410.

[In the *Princ. sec. 1423*, the author makes the distinction rest on the question whether the contract be *locatio rei* or *locatio operis*; and he says, that though not expressly so decided, 'retention would seem not competent where a ship is hired on time, and at the disposal of the freighter.' In truth, the question whether the owner has so parted with the possession of his ship as to lose his right of retention depends in all cases on the construction of the whole charter-party. *Belcher v Capper*, 4 M. and Gr. 502, 5 Scott's N. R. 257; *Campion v Colvin*, 3 Bing. N. C. 17. The case of *Marquand v Banner*, 6 E. and B. 322, 25 L. J. Q. B. 313, in which the owner was held to have no lien, has been questioned by *Cresswell and Willes, J.*, in *Gilkison v Middleton*, 2 C. B. N. S. 134; but it may be held to proceed not on the ground that the possession had been surrendered, but that the entire right to the freight, payable under bills of lading, and consequently to lien therefor, had been given up by the terms of the charter-party. See *Shee's Abbot*, 252. The appointment of the master by the owners does not seem to afford any presumption that they retain possession of the vessel.

Campion v Colvin and *Marquand v Banner*, *supra*; *Newberry v Colvin*, 7 Bing. 190, 1 Cl. and Fin. 283. The case of *Kirchner v Venus*, 12 Moore P. C. Ca. 361, depends on a different principle. There the freight was payable at the port of shipment, lost or not lost; and this was held to be not *freight*, but money payable under a special contract in consideration of an undertaking to carry. Under such a contract, it would seem, a lien for the price of carriage may be constituted by express convention. *Gilkison v Middleton*, *supra*.]

³ See below, *Lien for Average Loss*, p. 99.

⁴ *Phillips v Rodie*, 1812, 15 East 547. *Birley v Gladstone*, 1814, 3 M. and S. 205. Here the parties bound themselves—the owners, the ship, her tackle and appurtenances; the freighter, the goods and merchandise—each unto the other in the penal sum of £3000, to be forfeited by the party delinquent to the party observant. But this was held to give no lien for dead freight or demurrage, as it was not distinctly expressed that the shipowners should have a right to detain the goods until all their demands under the covenants were satisfied. [It has been attempted, but unsuccessfully, to convert this right into a general lien. *Ridley v Sloan*, 1837, 15 S. 469.]

⁵ After the determination in *Birley v Gladstone* (preceding note), an attempt was made to maintain the lien in equity, or at least what may be equivalent to lien—a right to be satisfied in preference to other creditors out of the proceeds. But Sir W. Grant, M. R., discountenanced the idea of any difference between the rule of decision in courts of law and in courts of equity as to liens on the goods of one man in the possession of another. *Gladstone v Birley*, 2 Mer. 401.

⁶ *Bannatyne v Malcolm*, 15 Nov. 1814, 16 F. C. 5. Here a cargo of wood had been partly delivered when the consignor failed. The lien was held effectual over what was still on board for the freight of the whole.

This accords with the doctrine of Valin, vol. i. p. 622.

of them for the freight of both.¹ It would appear, however, that if either the bills of lading are taken specially to the use of different persons, or if the bills of lading have been disposed of to separate persons, the lien on each parcel will secure only its own freight.²

7. The contract of affreightment is frequently to deliver, on receiving payment of one-half in cash, the rest in bills at three or six months. This agreement is so far covered by lien, that the goods cannot be demanded without paying the stipulated money, and delivering the bills. But although the shipmaster will not be entitled to anything more than the promissory note or acceptance of the freighter in the ordinary case, the right of lien will revive if the freighter is *vergens ad inopiam*.

8. There is no lien on a passenger, or the clothes which he is wearing, for his passage money; but there is a lien on his luggage.³

9. The shipmaster cannot insist on payment of freight before the goods are put out of the ship, the delivery of the goods and payment of the freight being concomitant acts.⁴ [101] The delivery may take several days, and this raises a difficulty which is met by landing the goods in the master's name. The practice is to send the goods to a wharf, with orders to the wharfinger not to part with them till the freight and other charges are paid;⁵ or if they are bond goods, they may be lodged in the king's warehouse in the master's name.⁶ Where bills are to be given, to bear date from the day of delivery, the difficulty may be avoided by landing the goods in the master's name, and tendering a bill for the whole, dated from that day.⁷

10. The lien, as against the consignee of a bill of lading, is only for the sum specified in the bill of lading, but does not cover all that may be due under the charter-party.⁸

¹ *Sodergreen v Flight & Jennings*. A cargo of tar and iron was consigned to Hippius by Scherling & Co. on two bills of lading,—one containing the iron and 850 barrels of the tar, the other 900 barrels of tar. Hippius sold the whole of the tar to Flight & Jennings, and endorsed to them both bills of lading. The iron he sold and delivered to another person, and no question arose as to it after the ship's arrival. Of the tar, 721 barrels were delivered when Hippius failed, on which the captain stopped delivery. The captain had a verdict, under Lord Kenyon's direction, for the freight of the whole tar belonging all to the same person and under the same consignment. But Lord Kenyon thought that it would have been different if the tar had been sold to different persons. In that case the captain could not have made one pay for the freight of what had been delivered to another. Cited in *Hansons v Meyer*, 6 East 622. See Shee's *Abbot*, 256, 377. [Neither, it seems, is there a lien for a general balance. *Stevenson v Likly*, 18 Nov. 1824, 3 S. 291, Princ. 1424. See below, p. 97, note.]

² See, in preceding note, the dictum of Lord Kenyon. [*A fortiori*, the consignee is not subject to a general lien for freight of cargo under charter-party. *Fry v Bank of India, London, and China*, 1 L. R. C. P. 689. The principle of this decision is, that the consignee is only bound by the charter-party in relation to the *rate* of freight, not as to any special conditions. The principle, therefore, fails of application when goods are consigned to the charterer himself, or to an agent cognizant of the terms of the charter-party stipulating for a lien over each parcel for freight of entire cargo. *Kern v Deslandes*, 10 C. B. N. S. 205, 30 L. J. C. P. 297.]

³ *Wolfe v Summers*, 1811, 2 Camp. 631. Wolfe had returned to England from the Brazils, and came ashore at the first English port, the ship being bound for the Thames. He left behind him, to come round with the ship, a trunk filled

with wearing apparel and a writing-desk. These he sent to demand, but the captain refused to deliver them till he should receive £15, the unpaid half of the passage money. The action was trover for the trunk and desk. A verdict was given for the defendant, the shipmaster, under the direction of Mr. Justice Lawrence.

⁴ *Tate v Meek*, 1818, 8 Taunt. 360; *Yates v Railston*, *ib.* 293; *Yates v Meynell*, *ib.* 302.

⁵ *Abbot on Shipping* 261. [The shipowner's lien on goods unloaded is now preserved by notice in writing to the wharf or warehouse owner, in terms of 25 and 26 Vict. c. 63, sec. 68 sqq. See *Lawther v Belfast Harbour Commissioners*, 16 Ir. C. L. R. 182.]

⁶ *ib.* p. 332. Mr. Whitaker states this with a degree of caution which seems not very necessary. *Law of Lien*, p. 99, note. [See above, vol. i. p. 201.]

⁷ See *Tate v Meek*, above, note 4. [There is no lien for freight during the currency of an approved bill, where the agreement was for payment in that manner. *Tamvaco v Simpson*, 1 L. R. C. P. 363, 35 L. J. C. P. 196; *Horncastle v Farran*, 3 B. and A. 497.]

⁸ *Mitchel v Scaife*, 1815, 4 Camp. 298. By charter-party, £3300 was to be paid for a voyage from Liverpool to Jamaica and back; £300 one month after sailing, £300 to the master at Kingston, the remainder on delivery of the homeward cargo, by London bills at three months. The freighter ordered his correspondent at Kingston, Mitchel, whom he informed of the charter-party, to procure a homeward cargo, which he did, the bill of lading to the order of the shipper or assigns, he or they paying freight at the rate of twopence per pound weight for cotton, and three guineas per ton for wood. Mitchel being a creditor of the freighter, sent the bill of lading to his brother and correspondent, and drew bills for the price of the cargo. The freighter becoming insolvent,

11. Delivery of the goods divests the shipmaster of his lien, for it subsists only by possession. But it may sometimes be doubtful when the possession is terminated. Thus, 1. It was much questioned at what point of time the delivery of timber was completed, which is launched from the hold, and made up into rafts that are fastened to the ship's side. It rather appeared to be the understanding of the Court, that the delivery was not complete, so as to extinguish the lien, till the raft was finished, and the connection with the ship cut away.¹ 2. It is laid down by an English author, that a captain was allowed a lien on a part of the cargo which had been received into a lighter alongside of the ship, sent by the vendee, and which the captain afterwards fastened to the ship's side, to prevent its final removal; and he refers to the case of *Sodergreen*.² But certainly the case referred to (as reported by East in the course of the argument in *Hanson v Meyer*, 6 East 622) does not authorize this doctrine; for there the lien was found to apply only to the goods on board, holding, as it would seem, those in the lighter to be delivered. 3. The lien once created for wares and merchandise on board, continues after the goods are landed and warehoused, under the 54 Geo. III. c. 228, sec. 18, at the East India Docks; or under the 6 Geo. IV. c. 112, sec. 45, as to docks generally.³ But the regulations of the Dock Statutes have been held not to apply to docks in which the landing is not compulsory, such as those of Leith.⁴

12. WHARFAGE DUES are not a burden on the goods, but on the ship, being for the benefit derived to the ship from the wharf; and the goods cannot be detained for them.⁵

II. LIEN FOR PRICE OF LAND-CARRIAGE.—1. Common carriers by land, including [102] proprietors of waggons and of stage-coaches, who take hire for the carriage of goods,⁶ are bound to carry all goods presented to them for that purpose, and have a lien on them for the price of their conveyance.⁷ But they have not without special agreement or settled usage any general lien for more than the carriage of the particular goods.⁸

2. As goods are not chargeable with wharfage if delivered over the side, so, if a person to whom goods are sent by a carrier is ready to receive them at the waggon, there is no warehouse rent due, and therefore no lien for it.⁹

3. The lien allowed to a shipmaster on the luggage of a passenger for the passage money, would probably be admitted in land-carriage also.¹⁰

Mitchel's correspondent paid the bills, and, without notice of the charter-party, demanded the goods on tender of the freight in the bill of lading; but there being a large sum due under the charter-party, the shipowner insisted on a lien for the whole. The action was trover, and the plaintiff had a verdict. Lord Ellenborough held the plaintiff, as payer of the bills, to be the purchaser and owner of the cargo, and entitled to trust to the bill of lading, as chargeable only with the specific freight expressed in it. [*Forth v East India Co.*, 4 B. and Al. 630; *Gilkison v Middleton*, 2 C. B. N. S. 134; *Foster v Colby*, 3 H. and N. 705; *Shand v Sanderson*, 4 H. and N. 381, 28 L. J. Ex. 278; *Small v Montes*, 9 Bing. 594; *Mitchenson v Begbie*, 6 Bing. 190.]

¹ *Bannatyne v Malcolm*, 15 Nov. 1814, F. C. See above, p. 95, note 6.

² Whitaker on the Law of Lien, p. 99, note *t*.

³ See above, vol. i. p. 203.

⁴ *Johnson v Duncan*, 16 May 1827, F. C., and 5 S. 660, N. E. 615.

⁵ *Bishop v Ware*, 3 Camp. 360. A package of files shipped at Hull for London, deliverable on payment of freight. Ship moored off Custom-house Quay, and a barge was sent for the goods, which were required to be put over the ship's side, the freight being tendered. The master refused to deliver but on payment of wharfage. It was proved that in such cases half-

wharfage is generally paid. Sir James Mansfield held wharfage to be a charge to be paid by the ship for the benefit derived from the wharf. Verdict for the consignee. See *Stephen v Costa*, 1 Bl. 413 and 423.

⁶ As where they charge passengers for overweight of luggage.

⁷ *Skinner v Upshaw*, Lord Raymond 752.

⁸ [It is not settled in England whether carriers have a lien for a general balance, but the prevailing opinion seems to be that they have. *Smith's Merc. Law*, 564. Usage or agreement may of course be established, as to which see *Aspinall v Pickford*, 3 B. and P. 44, n.; *Rushforth v Hadfield*, 6 East 519, 7 East 224. Special agreement or notice by the carrier to the employer or consignee does not affect ignorant third parties. *Wright v Snell*, 5 B. and Al. 350; *Oppenheim v Russell*, 3 B. and P. 42; *Leuckhart v Cooper*, 3 Bing. N. C. 107. It is a condition of the assertion of the right of lien, that the carrier must keep the goods for a reasonable time at the place of destination. *Great Western Railway Co. v Crouch*, 3 H. and N. 183, 27 L. J. Ex. 345, Exch. Cham. No charge can be made for warehouse room. *Lambert v Robinson*, 1 Esp. 116. See *infra*, p. 100, note 3.]

⁹ *Lambert v Robinson*, 1 Esp. Ca. 119.

¹⁰ See case of *Wolfe v Summers*, above, p. 96, note 3. [*Middleton v Fowler*, Salk. 282; *Higgins v Bretherton*, 5 C. and P. 2.]

III.—LIEN FOR SHIPMASTER'S ENGAGEMENTS.

1. Besides the engagements he may have undertaken, or the sums he may have advanced for repairs, etc. during the voyage, the shipmaster is bound to the seamen for their wages, as well as the owners for his reimbursement; but he has no lien either on the ship or on the cargo, or on the freight, for his own wages. He is the servant of the owners, and has it in his power to protect himself against loss from non-payment of wages, or for advances, by a specific bargain and security. But it is not expedient that he should endanger the free use of the ship on every dispute with his owners.¹ In Scotland as well as in England, the master is understood to contract upon the faith of the owners.

2. The master has no lien on the ship for wages, stores, or repairs in England;² and none for money expended, or debts incurred for repairs, during the voyage.³

3. The master is not entitled to retain the REGISTRY, any more than the ship itself. By statute he is liable to punishment for wilfully retaining the registry, and he cannot plead lien as a defence.⁴

[103] 4. It has sometimes been supposed that the master, though he has no lien on the ship or cargo, has a security on the FREIGHT. This came recently to be tried in England, when a lien on the freight was negatived.⁵

¹ See above, p. 94 (5), *White v Baring*, 1 June 1801, 4 Esp. Ca. 22. A note, however, at the end of the case, though ambiguous, throws some doubt upon the authority of the opinion. The older cases, which denied any recourse against the body of the ship to the master, went upon this consideration, that although mariners had by custom been admitted to sue in Admiralty, the same indulgence was not due to masters who contracted at land, and not within the Admiralty jurisdiction; and thus masters came to be regarded as engaging merely on the personal credit of the owners. Lord Mansfield, in *Wilkins v Carmichael*, Doug. 101, said: 'Notwithstanding the strongest inclination that the defendant should have satisfaction before the value of the ship is paid over by him, we are not able to find a ground upon which we can give judgment in his favour.' 'As to wages, there was no particular contract that the ship should be a pledge. There is no usage in trade to that purpose, nor any implication from the nature of the dealing. On the contrary, the law has already considered the captain as contracting personally with the owner. On this ground, prohibitions have been granted, and the case of the captain has in that respect been distinguished from that of all other persons belonging to the ship. This rule of law may have its foundations in policy, and the benefit of navigation; for as ships may be making profit and earning every day, it might be attended with great inconvenience, if on the change of a captain for misbehaviour, or any other reason, he should be entitled to keep the ship till he is paid.'

[But in a question with mortgagees who had taken possession of the ship, the master was held in equity entitled to be reimbursed, out of the freight earned under a charter-party entered into by himself abroad, for expenses which he had necessarily incurred in order to fulfil that charter-party. *Bristow v Whitmore*, 28 L. J. Ch. 801, 31 L. J. Ch. 467, 9 H. L. Ca. 391. And for recovery of wages, the master has now, by 17 and 18 Vict. c. 104, sec. 191, the same rights, liens, and remedies as ordinary seamen.]

² *Wilkins v Carmichael*, Doug. 101.

³ *Hussey v Christie*, 9 East 426.

⁴ 6 Geo. IV. c. 110, sec. 21.

⁵ *Smith v Plummer*, 1 B. and Ald. 575. Kilpatrick, owner of the Albion, employed Little as master. At St. Christopher's the master received on board rum and sugar consigned to Plummer, freight £620. On arrival, the goods were warehoused in the West India Docks. The master drew bills for disbursements abroad, and for premiums for procuring cargo, amount £526. They were dishonoured. He had wages due £260. And for those several claims the master ordered the West India Dock Co. to detain the cargo. Plummer advanced £150 to the master for charges; and Kilpatrick becoming a bankrupt, his assignees gave notice to Plummer, the consignee, not to pay freight to the master. In an action for the freight by the assignees of Kilpatrick, the consignees claimed, 1. Deduction of £150 advanced to the master; and, 2. The balance as under lien for the master's wages, etc., the consignees being authorized by him to retain it. The Court of King's Bench held there was no lien. Lord Ellenborough said that he has no lien on the ship, and so he can have no lien on the freight, as the lien on the freight is consequential to the lien on the ship. Bailey, J., concurred in this. Mr. Abbot, J., said it has already been decided that the master has no lien on the ship for wages or other disbursements, and he has no right to lien for those in Admiralty. This seems to lead to the conclusion that he has no lien on the freight, for the right to receive the earning of the ship must follow the right to the ship itself. Holroyd, J., was of the same opinion, that the master has no lien on the cargo, on the freight, or on the ship.

[As to the modification of this rule, where the master enters into engagements beyond the ordinary scope of his duties, on behalf of his principals, see *Bristow v Whitmore*, 9 H. L. Ca. 391, 31 L. J. Ch. 467.]

IV.—LIEN FOR WAGES OF MARINERS.

Seamen have in England a lien for wages, for labour in rigging and fitting out, or for bringing a ship from port to port in England.¹ The seamen may seem to have in Scotland also something very like a lien for their wages (vol. i. p. 562); but it is more properly a privilege on the price of the ship when sold, with a right to apply in Admiralty, if the wages are not paid, to have decree for their wages, and a sale of the ship if necessary.

V.—LIEN FOR SALVAGE, AND FOR AVERAGE LOSS.

1. We have already considered the doctrines of salvage.² One of the most natural of all burdens is that to which ships or goods saved from shipwreck, dereliction, or capture are liable, for the reward or recompense due on account of the labour or danger incurred in preserving them. There is in such case a personal action also; but the first and most proper remedy is *in rem*.³

2. General or gross average, as already explained,⁴ is the contribution to be levied from each person having property at hazard in a sea-voyage, whether the ship itself, the freight, or the cargo, for indemnifying the person whose property has been advisedly sacrificed for the general safety, against any greater share of the loss than others sustain. This contribution is to be adjusted and paid before the cargo is landed, or at least while it is still undelivered, and in the possession of the shipmaster, under a lien for average.⁵ The shipmaster is in this the factor for the sufferers. He is charged with the duty of making their claim effectual against the property liable in contribution; and an action will lie against him and the owners if he should neglect this duty.

VI.—LIEN OF INNKEEPERS.

An innkeeper keeps a house of public accommodation for lodging travellers, and is by his employment bound to entertain them. This description is not confined to country [104] innkeepers, who have stabling for horses; nor to those inns in town to which stage-coaches and waggons resort.⁶ Such person is liable to responsibility for the traveller's luggage, and has a lien for his demand. He has a lien on his luggage or goods for the price of his entertainment.⁷ He has also a lien on his horse for its provender and stabling. This lien operates even against the true owner of the horse, though it had been stolen by him who brought it to the inn; the lien being strictly confined to the keep of the horse itself. It is lost, and does not revive, if the horse have once been allowed to go away.⁸

¹ Abbot 510. [The *Chieftain*, B. and L. 212; the *Edwin*, B. and L. 211.]

² See above, vol. i. p. 632.

³ Lord Stowell in the *Two Friends*, 1 Robin. 277.

⁴ See vol. i. p. 635.

⁵ [The doctrine of the master's lien, or hypothec on cargo for average, underwent elaborate discussion in a case in the Privy Council. The result seems to be, that the Court of Admiralty will not recognise the right as one of hypothec, but will enforce the lien when secured by possession. *Cargo ex Galam*, 2 Moore P. C. Ca. N. S. 216. The Court has refused to give the benefit of this lien to a ship's agent who had paid the expenses. The *Soblomstein*, 32 L. J. Adm. 41. As to insurers, see *Dickinson v Jardine*, 3 L. J. C. P. 689.]

⁶ *Thompson v Lacy*, 1820, 3 B. and Ald. 288. Here the Globe Tavern and Coffeehouse in London, where beds, provisions, etc. are furnished, and which was not frequented by

stage-coaches, etc., was held an inn, of which the owner is liable as an innkeeper, and has a lien on the goods of his guest.

⁷ See Whitaker on Lien, p. 117, and the authorities there quoted. [In England this lien attaches to the goods of another person brought to the inn by the guest without notice, and in any case to a hired carriage or horse for their standing-room or keep (*Turrill v Crawley*, *cit.*; *Johnson v Hill*, 3 Stark. 172; *Turrill v Crawley*, 13 Q. B. 197; *Snead v Watkins*, 1 C. B. N. S. 267), but not to such goods brought for temporary use, as a piano hired by the guest (*Broadwood v Granara*, 10 Ex. 417). Occasional absences *animo revertendi* during a long stay do not defeat the lien (*Allen v Smith*, 12 C. B. N. S. 638); but it is lost if the guest be allowed to depart altogether, taking his goods with him (*Jones v Pearle*, *cit.*; *Jones v Thurloe*, 8 Mod. 172; *Warbrook v Griffin*, 2 Brownl. 254).]

⁸ *Jones v Pearle*, 1 Strange 556, and 6 East 25, n. A

A keeper of a livery stable has in England been held to have no lien; but this seems to proceed on a very narrow principle, as if lien were given only when there is a public employment, which obliges the person to accept the charge.¹

In Scotland, it would seem that lien would be given on the broad principle that it is the resulting security for the *actio contraria* in all cases.

VII.—LIEN FOR GRASS-MAIL.

Cattle which are sent to graze are under lien to the proprietor or tenant of the field for the amount of the grass-mail. And it would seem that this lien would attach to all the cattle belonging to the person sending them to graze.²

VIII.—LIEN TO WORKMEN.

In all contracts for work, the payment of the price of the labour and the delivery of the thing are concurrent acts; and this whether the price is stipulated or implied.³ But the lien, or right of retention, is not to be exercised where time of payment is given, or a special mode of payment is settled.⁴ But in Scotland this exception would not hold if the employers were *vergens ad inopiam*.

A PRINTER has a lien on the printed sheets of a book for the price of his labour, and on the last sheets undelivered for the price of the whole. But there seemed room to doubt whether the lien subsisted over subsequent volumes or numbers, for the price of those which had already been printed and delivered. This was decided unanimously in favour of the printer, in a case where the numbers he was employed to print were not consecutive.⁵

[105] The same point has arisen in regard to other workmen, as bleachers; and by force of a custom of trade, the lien has been extended to a sort of general lien. See below, p. 104.

A bookseller agreeing with an author to publish his works, and to advance money on interest and a share of the profits being paid to him, has been held to have a lien on the copyright for his disbursements.⁶

carrier who had been used to set up his horses at an inn, owed £36 for their keep, and the innkeeper seized three of his horses. He sold them, the debt being equal to their value. Redress was given on two grounds: 1. No power to sell, but only to detain; 2. No lien after the horses were once out for what was due before.

¹ *Hunter v Barkley*, in 1792, 2 Espinasse N. P. 583. See 2 Christian, p. 345. [See *Princ.* 1428; *Smith v Dearlove*, 6 C. B. 132; *Parsons v Gingell*, 4 C. B. 545. Compare *Jackson v Cummins*, *infra*.]

² [In England it is held that there is no lien in such a case, on the ground that the service is not one conferring an additional value on the chattel. *Jackson v Cummins*, 5 M. and W. 342.]

³ *Wolfe v Summers*, 2 Camp. 631; *Chase v Westmore*, 5 M. and S. 180, Tud. L. C. 679.

[An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labour and materials, has no claim against the owner for taking care of the chattel

while detained. So held with reference to the detention of a ship in a graving dock in a claim of lien for repairs. *Somes v British Empire Ship. Co.*, 8 H. L. Ca. 338, 30 L. J. Q. B. 229.]

⁴ Preceding note. [See above, pp. 91, 92.]

⁵ *Blake v Nicholson*, 3 M. and S. 167. Nicholson, a printer, was employed by Stratford to print separate, and not consecutive, numbers of Dr. Hawker's Commentary on the Bible. He printed 8750 copies, and delivered 5987, and the residue remained in his warehouse. A separate charge was made for the printing of each number, amounting in whole to £494, 2s., of which Stratford had paid £185 when he failed. His assignees applied for the undelivered copies, tendering the expenses of printing them. The defendants claimed a lien for the whole balance. Lord Ellenborough, and Le Blanc and Bayley, Justices, held this to be an entire work, for the balance of the printing of which there was a lien. [He has no lien on stereotype types given to print from. *Brown v Somerville*, 13 July 1844, 6 D. 1267.]

⁶ *Brook v Wentworth*, 3 Anst. 881.

SUBSECTION III.—OF GENERAL LIENS.

While the special or particular lien is admitted, as the natural result of the mutual contract on which possession proceeds, and as circumscribed by that contract, so as to produce little danger of false credit; there is an obvious objection to the indiscriminate admission of general liens, either for the whole balance that happens at that time to stand in account between the parties, or for the balance due on a particular train of employment, of which there is no obvious limit. This objection is somewhat analogous to that which has operated so strongly on the doctrine of hypothecs. But the establishment of general liens gives great facilities in many cases to the preparation of goods for the market, and to the advance of money in the way of accommodation. Thus, a bleacher, who has only a specific lien, may prove troublesome to his employer when he is led to conceive any suspicion of his circumstances, for he knows that if he part with the goods his security is gone; whereas he will without scruple deliver the goods as they are manufactured, if for his whole balance a lien attaches on the next parcel that comes, so as to secure him against his employer's insolvency. So a factor will have little hesitation in advancing money where his principal is in the way of making remittances, or where he is employed frequently in receiving goods for him, while he knows that, upon any embarrassment in his principal's affairs, he may retain for his general balance whatever may happen to be in his possession.

The inclination of the English law has on such considerations been very much in favour of liens, especially since the time of Lord Hardwicke, who was distinguished as peculiarly inclined to encourage them. Lord Mansfield, who took perhaps a still more comprehensive view of the whole system of commercial jurisprudence, declared that 'the convenience of commerce and natural justice are on their side.'¹ And of late years courts lean that way, *first*, Where there is an express contract; *secondly*, Where such contract is implied from the usage of trade, or from the manner of dealing between the parties in the particular case; or, *thirdly*, Where the defendant has acted as a factor. But perhaps this inclination of the law has been followed far enough in England; and some advantages seem to have been taken of it, and some consequences to have arisen, which may prevent the further extension of the principle.

Retention or Lien is so far different from hypothec, and analogous to pledge, that the security and the possession in lien are inseparable. But while the possession in pledge has for its sole object the securing of the debt, so that one who sees the possession is called on to inquire respecting the debt for which it stands pledged, and to estimate its value as a fund of credit to the pledgor; the possession, out of which lien springs as a resulting right, begins upon a different footing, not necessarily suggesting the existence of a debt, but showing merely a temporary possession, for the purpose of manufacture or custody, naturally chargeable only with the expense of the operation, or the cost of the keeping. Where goods are in a manufacturer's hands for the purpose of being prepared for the market, a person intending to purchase, viewing those goods as a part of the proprietor's general stock, has complete information for estimating the charge of manufacture for which [106] there is a *specific* lien, but does not think of examining the accounts between the proprietor and possessor, to know the amount of any *general* lien; or he has no means of doing so. These opposing views lead to the true principles of this doctrine; by which, on the one hand, the mere possession of goods is not held to confer a lien for all debts due to the proprietor; while, on the other, the usage of trade, or specific agreement, or an established rule of law, is held effectual to qualify the right of those who claim as deriving right from the bankrupt.

There is also in the case of money obligations a right more analogous in its appearance

¹ Green v Farmer, 4 Burr. 2221.

and effects to Compensation, but in principle more correctly referable to the doctrine of Retention, which, on the bankruptcy of one of two parties mutually indebted, entitles the other to refuse payment of more than the balance. This right will be considered under Compensation.

The foundation of general lien is agreement, either express or implied.

1. EXPRESS AGREEMENT will raise a lien for the general balance of debt between the parties. The mere circumstance of temporary possession, on another account, does not deprive the owner of his power to constitute a pledge; and a general lien, by express agreement, is in the nature of a pledge.¹

2. IMPLIED AGREEMENT may rest on the footing of usage prevailing generally in the country, by which dealings are regulated in a particular line of trade; or on local custom, upon which persons in that district rely; or on the footing of advertisements, for particular undertakings, under the condition of a general lien; or on the admitted legal construction of particular contracts and connections, as authorizing a credit on general lien. Independently of these grounds of general lien, the mere fact of possession does not authorize that species of security. In England, Lord Hardwicke had first decided in favour of a general lien, in the case of a packer who had lent money to a merchant, from whom he afterwards received goods to pack: he held him entitled to retain both for the price of packing and for the prior debt.² This determination has since been disapproved of, as at that time there was no usage establishing such a lien; and Lord Hardwicke himself adopted afterwards the true principle. He determined, in the case of a miller possessed of corn, that he had no lien but for the expense of grinding it; although the miller urged that a larger credit and a freer delivery of goods manufactured was given, on the idea that the lien would attach to any parcel that should happen to be in the miller's possession when bankruptcy should threaten.³ A similar decision was pronounced in another case by the Court of King's Bench, in Lord Mansfield's time.⁴ In Scotland the general question, when brought to trial, was [107] after a very full discussion solemnly determined against the general right of retention. It was decided that a bleacher has security by specific lien on goods for the price of his manufacture, but not for other debts that may be due to him by the owner.⁵ It has some-

¹ See below, p. 104.

² *Ex parte Deize*, 1 Atk. 228.

³ *Ex parte Ockenden*, 1 Atk. 235. In March 1754 Mathews became a bankrupt, indebted to Ockenden, a miller, in £286 for grinding flour. Ockenden had in his possession, partly grinded, partly grinding, 36 loads 3 bushels of wheat; the price of grinding which was £19, 5s. The question was, Whether Ockenden had a lien for the general balance, or only for the price of grinding the wheat in his hands? Lord Hardwicke held that there was, 1. No agreement; 2. No general custom of a lien to millers; and, 3. No lien but what arises from that kind of bailment in law proceeding from a delivery of the goods for a particular purpose.

Lord Mansfield, in mentioning this case (in *Green v Farmer*, 4 Burr. 2221), says: 'This case was well considered. Lord Hardwicke's bias was strong in behalf of liens, and his own determination in the case *ex parte Deize* had been almost in point, yet he took time to consider of and search for precedents; and, after consideration, he thought he could not construe it within the mutual credit clause of the Bankrupt Act, etc. He rested upon there being no room in that case to imply a lien from usage of trade, or from the particular manner of dealing.'

⁴ *Green v Farmer*, 1768, 4 Burr. 2214.

Henzleman bought from Green several parcels of serges by a packer. They were delivered to Farmer, the vendee's dyer,

on his account. Afterwards it was agreed that Green should have his goods back; but the dyer would not deliver them till paid his balance on the general account with Henzleman. The question stated was, 'Whether, under the circumstances of the case, the defendants have a lien upon those goods for more than the price of the dyeing?' Lord Mansfield, in delivering the judgment of the Court, after tracing the history of the law and determinations, said: 'In this case the defendant acts in no respect as a factor, but merely as manufacturer, to dye. There is no express contract to pledge; no usage of trade; no argument from their particular dealing. On the contrary, it appears that he trusted to Henzleman's personal credit only. The defendants never detained any goods to answer their debt; but from 1st January to 10th June gave all back, for the dyeing of which they now claim to detain, without having any new cloths sent in. After notice of the failure, they delivered eleven pieces to Aston and Hodgson without a claim. It is sufficient that no contract can be implied to give a lien for the balance from any usage of trade or manner of dealing. But it is much stronger where the manner of dealing shows the contrary, and that the defendants relied on personal credit only.'

⁵ *Harper v Faulds*, 1791, Bell's 8vo Ca. 440, M. 2666. [*Aberdeen & Smith v Paterson*, 1813, Hume 127; *Brown v Sommerville*, 13 June 1844, 6 D. 1267; *Laurie & Co. v Denny's Tr.*, 17 Feb. 1853, 15 D. 404.]

times been contended that, according to the genuine principles of Scottish law, encroached on by too ready an adoption of English notions, there is a general right of retention in all cases in which the person holding the goods might have arrested them had they been in the hands of another. There does not appear to be either authority or principle for such a doctrine. The only extent to which the retention arising on the mutual contract has been enlarged, is to admit of a general lien by usage and implied agreement over successive parcels of goods sent during a particular period for manufacture in a course of dealing. See below, p. 104.

In the further prosecution of this subject, it may be proper to consider, 1. Usage of trade, or special custom, as a ground for general lien; 2. Special agreement, or the particular usage or course of dealing between the parties; 3. Attempts by advertisements to raise general liens; and, *finally*, The settled liens of the common law.

I.—GENERAL RETENTION OR LIEN, BY USAGE OF TRADE OR SPECIAL CUSTOM.

A general usage of trade, when clear and well established, will ground a right to retain generally, beyond the debt contracted in the execution of the purpose for which the property was entrusted. In this way, several branches of manufacture in England enjoy the benefit of a lien for the balance arising generally on the account of work done. Some of them rest on proof of usage; in others the lien, though originally without any such proof, being once admitted, the decision has served as a ground for usage.¹

1. CALICO PRINTERS have in England been found entitled to a lien for a balance on account of work done in that line of manufacture.²

2. DYERS, in like manner, were held to have acquired a lien by usage, notwithstanding an older decision while yet no such usage existed;³ yet this has since been negatived [108] in a district of the country where there are more dyers than anywhere else in England.⁴

3. WHARFINGERS have also been found entitled by usage to a lien for their balances.⁵

¹ [Bock v Gorissen, 2 De G. F. and J. 434; 30 L. J. Ch. 39. A special (inconsistent) contract between the bailor and bailee is a good answer to a claim of general lien. *Ibid.*]

² *Ex parte Andrew*, 1764, Cook's B. L. 460. Mr. Christian's remark on this case seems to be perfectly well founded, —That, as there is no mention in the case of usage or agreement, the decision seems to have been bad, in so far as it proceeded on general grounds.

Weldon v Gould, 1801, 3 Espin. 268. The lien was here held as established. Weldon delivered calicoes to Pearce to be printed, and he again to Gould, a calico printer. Gould was not apprised that the goods were Weldon's, but received them as Pearce's; and he kept them for a balance on his general account with Pearce. Lord Kenyon, at Nisi Prius, held, 'That the defendant had a lien for his general balance; and that the same point had been decided before, that calico printers had such a lien; but that it must be for work done in the course of that business for which the lien was claimed, not for money lent, or any collateral matter.' He also held that Gould, receiving the goods *in bona fide*, was entitled to his lien over them.

³ *Green v Farmer*, 1 Blackst. 651, 4 Burr. 2214.

Savill v Barchard, 1801, 4 Esp. 53. Witnesses were here brought to prove the usage. Lord Kenyon said, that in *Green and Farmer's* case Lord Mansfield said there was no evidence of lien on any of the grounds; 'but here there is strong evidence to prove the general course and practice of the trade, and to establish a lien founded on them. It is a question

of great general importance. He was of Lord Mansfield's opinion in *Green and Farmer's* case, that a lien was established by the general course and practice of the particular trade;' and he left it for the jury to find the usage. The verdict was in favour of the lien.

The question seems to be held as unsettled. *Montagu on Lien* 29.

⁴ Such a usage was negatived at Halifax. *Close, etc. v Waterhouse*, 6 East 523, note. [And at Manchester was affirmed only on the ground of advertisements and notice. *Kirkman v Shawcross*, 6 T. R. 14. See Smith, Merc. Law, 562; *infra*, p. 105; Cross on Lien, 336 sq.; *Smith v Aikman, infra.*]

⁵ See *Olive v Smith*, 5 Taunt. 60; *Humphreys v Partridge*, 2 Montagu's B. L. 186. In *Naylor v Mangles*, 1794, 1 Espin. Ca. 109, Lord Kenyon said: 'That liens are either by common law, usage, or agreement; that a lien from usage is matter of evidence; and that the usage in this case has been proved so often, it should be considered as a settled point that wharfingers have this general lien.'

[In *Laurie & Co. v Anderson*, 1853, 15 D. 404, the right of retention for a general balance was denied to storekeepers; and in *Smith v Aikman*, 1859, 22 D. 344, to scourers.]

In *Spears v Hartly*, 1800, 3 Espin. Ca. 81, referring to the above case, Lord Eldon, at Guildhall, said: 'It has been ruled by Lord Kenyon that a wharfinger has a lien for the balance of a general account, and it is considered as a point completely at rest. I shall therefore hold it settled law on

4. PACKERS have in England a general lien.¹ It would be very inconvenient were such a lien given to carriers, considering the dependence of one transaction on another, and the reliance which in the course of trade is placed on the correct delivery of goods or parcels. Such general lien has accordingly been denied to carriers both in England² and in Scotland.³

In Scotland there does not appear in our books any case in which a general lien by usage of trade has been claimed or established. And although the rules settled in England, where they rest on special usage, or on decisions, perhaps erroneously pronounced, but which have served as the groundwork of a rule of trade, may not be entitled to adoption; yet wherever (as in the case of a wharfinger) the usage and the rule are general, it would appear that the settled law in England would have great influence here, provided it were not opposed by the principles of common law.

II.—LIEN GROUNDED ON SPECIAL AGREEMENT, OR THE COURSE OF DEALING BETWEEN THE PARTIES.

Lien in its proper sense is a right which the law gives as the result of possession and of opposite demands.⁴ But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge. Such agreement will be effectual to raise a security, which is generally called a lien.⁵ But it must be stipulated in clear and unambiguous terms.⁶ Such bargains, in the course of dealing between parties, afford a very rational ground of general lien by acquiescence or implied contract in individual cases. Where the employment of a workman is not in one solitary act of manufacture, but in a course of work, the payments [109] being made not on the delivery of each parcel of goods, but periodically, once a year or half-yearly, it may fairly be presumed that the renunciation of the undoubted lien which the workman has on each parcel has in contemplation the continuance of the custom, and the renewal of a lien upon other goods. Wherever the understanding of the parties fairly accords with this view of their connection, there seems to be a just ground for lien, not confined to each parcel for the price of its own manufacture exclusively, but extending to all the goods on hand at any particular time, for the general balance at the previous periodical terms of settlement. Accordingly the Court of Session have given their sanction to this extent of lien,⁷

the subject, that he has such lien.' See also *Richardson v Goss*, 3 B. and P. 124. [But in this case, as in others, the usage in one place may vary from that which prevails in another; and where there is any question as to the usage, the wharfinger, or other person desiring to avail himself of a right of retention, 'should give notice to his employer of the extent to which he claims a lien.' Per Bayley, J., in *Holderness v Collinson*, 7 B. and C. 216. Where harbours and docks are subject to the Harbours, etc. Clauses Act, 10 and 11 Vict. c. 27, the special remedy thereby provided for wharf dues, etc., is held to exclude the wharfinger's lien. *Dresser v Bosanquet*, 4 Best. and Sm. 460.]

¹ *Ex parte Deize*, 1 Atk. 228; *ex parte Ockenden*, *ib.* 235. See *Green v Farmer*, *supra*. [See p. 102.]

² *Kirkman v Shawcross*, 6 T. R. 14; *Aspinall v Pickford*, 3 B. and P. 44; *Openheim v Russell*, *ib.* 42; *Rushworth v Hadfield*, 6 T. R. 519. [See above, p. 97.]

³ *Stevenson v Likly*, 1824, 3 S. 291, N. E. 292. [This was the case of a carrier by water. See above, pp. 96, 97.]

⁴ See *Wilson v Heather*, 4 Taunt. 642; and *Gladstone v Birley*, below, note 6.

⁵ *Kirkman v Shawcross*, 6 T. R. 15. See also *Openheim v Russell*, 3 B. and P. 42; *Butler v Woolcot*, 2 B. and P. N. S. 64. [See *Morris v Williams*, 1 C. and M. 842; *Richards v Symons*, 8 Q. B. 90, 15 L. J. Q. B. 35; *ex parte Watts*, 32 L. J. Bank. 35.]

⁶ See *Gladstone v Birley*, 2 Merivale 403. [See *Jones v Starkey*, 16 Jur. 510, Chan.]

⁷ 1. *Hunter v Austin & Co.*, 25 Feb. 1794, n. r. Austin & Co. were manufacturers and dealers in linen and muslin in Glasgow. They bleached with Hunter at Craigton. Their practice was to send the pieces to be bleached, to get them back as soon as they were ready, and to settle the bleaching account of the year in spring. The account for 1792 was not settled, owing, as Austin & Co. said, to Hunter not having returned all the pieces which he received. In 1793 more cloth was sent, but still disputes arose as to the returns; and though neither party was bankrupt, they contrived to raise the point of retention: for Hunter brought an action for £57 as the price of bleaching for 1792, and £29, 3s. 6d. as the price of bleaching for 1793, and insisted on keeping the pieces in his hand in security of his whole account; while Austin & Co., though they might have brought it to a short point by offering security to Hunter, on his giving up the goods, to pay his account when duly settled, went into the question of Hunter's right to retain. The Sheriff of Lanarkshire, 'in respect the debt libelled on is not denied, held the same as proved: found the pursuer (Hunter) had, and still has, a right of retention over the goods admitted to be in his custody, till payment of the debt libelled; and as it is not alleged that payment was ever offered, and delivery of the goods refused, repels the defences, and decerns against the

and intimated their opinion of the effect of acquiescence as sufficient to raise such a lien.¹

III.—LIEN RAISED BY ADVERTISEMENT.

In England, where a class of manufacturers, not under an absolute obligation to [110] labour for a reasonable reward, published in the newspapers a declaration that thereafter they should detain goods placed in their hands as a security for their general balance, this was sustained as sufficient to create a general lien by usage in their trade. In the year 1788 great losses were sustained in the neighbourhood of Manchester; and many bleachers, dyers, etc., employed by the manufacturers, and who had been in the custom of delivering their work when finished, and settling periodically for the general amount, suffered great losses from the bankruptcy of their employers, and the refusal of a lien over the goods that happened to be in their hands. They met, and entered into resolutions that they would never thenceforth take goods to be manufactured, unless under the express condition of a lien for the unpaid balance of the price of work of the same kind. This was published in the Manchester newspapers, and in 1794 the validity of this lien came into question. The Court of King's Bench held that the resolutions were lawful, as the makers of them lay under no obligation to work for one person more than another; and that those resolutions being known to the bankrupt, against whose creditors the lien was claimed (he having actually read them in the newspapers), they formed a part of the agreement between him and the bleacher, as a general rule of the trade, which the manufacturers had declared was to be a condition with their employers.² Doubts have been entertained since, whether the general principle was not in this case carried too far, and whether this power of creating liens by notices in handbills and newspapers be consistent with the true interests of trade.³

defenders.' This judgment was confirmed first by the Lord Ordinary, and afterwards by the whole Court.

2. *McCulloch v Pattison & Co.*, 4 March 1794. Wilson, a manufacturer, had been in the custom of employing Pattison & Co. as his bleachers, and a debt of £100 arose in the course of 1793 for bleaching. In September that year, Wilson sent 100 pieces of muslin to be bleached; in October, 157 pieces; and failed while there remained of the former parcel 30, and of the latter 139 pieces—in value altogether about £500. The trustee on Wilson's sequestrated estate demanded the pieces in Pattison & Co.'s hands, and they claimed retention for the whole balance. This action having come into court near the end of a session, the trustee applied to the Court to take up the question summarily, as if it were a point on which it was impossible to entertain a doubt, after the decision in the case of *Harper and Faulda*. On this occasion, Lord J.-C. M'Queen said: The right of retention of any particular parcel, for the hire of bleaching that parcel, is a right at common law. But as to the hire of bleaching other parcels, this right can be maintained only as an extraordinary and equitable extension of the common law right, founded on the view of hardship in the situation. Being introduced in that way, it must be also limited by equity, and so is subject to be loosed on caution for the just amount of the claim. Lord President Campbell said that the question tried in *Harper's* case was the general question. Retention was there claimed for a bill which was said to be, but which might or might not be, for the hire of former years' bleaching. And thus the decision was merely to the extent that retention of the goods cannot be claimed for other separate and unconnected debts. But as to the hire of bleaching, where parcels are always coming in, and parties are settling annually, I hold the whole parcels of

the year as one parcel, and the retention as competent on every part for the whole year's account. The Court ordained the petitioner to find caution for the bleaching account of the year, and that on such caution the goods must be given up.

It may be observed that, strictly, the bleacher was here entitled to retain till he should receive payment, and that security was not enough where there was no challenge to the claim of the bleacher. In such a case as *Hunter v Austin & Co.*, security was all that the bleacher could demand, his claim or balance being challenged.

3. *Aberdeen & Smith (for Dunbar's Crs.) v Paterson*, 20 Nov. 1812, Hume 127. Dunbar was in use to send yarns to Paterson's bleachfield: they were returned when finished, and the price of bleaching entered to his debit. Their accounts were settled in December 1810. Yarn still continued to be sent, accompanied by a note of the quantity, and what was to be done. Dunbar became insolvent, and a trust was executed. Paterson claimed retention for the prices due since September, amounting to £34. This was refused, and £1, 8s. tendered as the bleaching of the parcel in question. The Sheriff of Forfarshire found Paterson entitled to retain for the whole balance. Lord Gillies adhered, and the Court (First Division) affirmed both sentences. Reference was made on the bench to the case of *Hunter*, as one which ought to rule this decision, as all the goods for which the lien was claimed were sent within the season. [*Lawrie & Co. v Anderson*, 17 Feb. 1853, 15 D. 404.]

¹ See *Stevenson v Likly*, p. 104, note 3.

² *Kirkman v Shawcross*, 1794, 6 T. R. 14-19.

³ *Openheim v Russell*, 3 B. and P. 46-55. 'I think,' says Chambre, J., 'that this modern doctrine of altering the liability to which the common law subjects parties, and vesting

In deciding the above-mentioned case of Kirkman, the judges distinguished between the case of a workman's engagement, and that of a common carrier or innkeeper: in the former the engagement being optional, and so admitting of the annexing of conditions to the undertaking; the latter being a *munus publicum*, attended with an obligation to act for any one who applies—to receive guests, or to carry goods for the price of the carriage. In this latter class of cases it is not, perhaps, to be affirmed absolutely that such a constitution of usage is in all circumstances to be disregarded; but the evidence will require to be extremely strong in support of the general lien, and to amount to a specific contract. In a late case in England a carrier claimed such a lien, upon the footing of an usage of the carriers on the west road, with a particular notice published by himself. And having set up this defence, not only against the person to whom he carried the goods, but against him who sent them, and who had stopped them in his possession as *in transitu*, the Court of Common Pleas was unanimous in refusing to sustain the lien as against the consignor stopping *in transitu*; and in holding that, even against the consignee, it could not have been admitted without great reluctance, and, as it would appear, only on the clearest proof of usage.¹ In a later case, the Court of King's Bench required very strong and clear evidence before they would sanction such a claim on the part of a common carrier.²

[111] Even on the supposition of such a lien being effectual against the real owner of goods sent for the general balance due by him, it seems very doubtful whether goods sent to a factor (whether in his own name or as factor) can be subject to a lien against the true owner for the debt due to the factor.³

IV.—CONSTRUCTIVE LIENS ADMITTED AT COMMON LAW.

These liens have gradually been established by legal construction of particular contracts or connections. It may be proper to take notice of each separately.

in them new rights, by presumed agreements arising from the publication of certain notices, has been extended as far (or rather further) than it ought to be upon principles of policy.' And the same opinion seems to have been entertained by the other judges. [This mode of raising a general lien seems to be negatived by the decision in *Bowman v Malcolm*, 11 M. and W. 833.]

¹ *Openheim v Russell*, 1803, 3 B. and P. 42-55. [See *Ridley v Sloan*, 2 Feb. 1837, 15 S. 469.]

² *Rushworth v Hadfield*, 9 East 519. Lord Ellenborough said: 'There was no sufficient evidence on which the jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded in the common law: for, by the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward *to be therefor paid*; by force of which he has a lien only for the carriage price of the particular goods. Then what proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage, for the carrier to let out of his hands the particular parcel on which his common law lien attaches, without receiving the carriage price of it at the time, upon a general agreement, of which such usage would be evidence, that he may retain any other parcel belonging to the same party for the whole of his demand; but such a general usage ought to be proved by stronger evidence than was offered in this case, especially as

it trenches upon the common law right of the subject. But if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the jury on this view of it. There had been previous dealing between these parties; and there might have been evidence to show, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered. But that was not resorted to; but it was left to the jury, as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularized was not above five years ago; and but one instance, and that only two years ago, of the exercise of the claim to any considerable amount, so as to make it worth while to resist it. To justify, however, so extensive a claim upon the ground of general usage, there ought to be evidence of instances more ancient, more numerous, and more important.' The rest of the judges concurred.

See also *Hussey v Christie*, 9 East 432, for the unwillingness in the courts to recognise new liens.

Wright v Snell, 5 B. and Ald. 350.

³ *Wright v Snell*, 5 B. and Ald. 350.

1. LIEN OR RETENTION TO LAW AGENTS.

Partly by the force of usage, and partly by judicial creation, a writer or law agent has a general lien for his business account, on any papers of his clients which happen to be in his hands in the course of his employment. The hypothec of a law agent over the claim which he has been employed to recover, for securing the costs and charges of that particular employment, is a security which should have been ranked as a *special lien*, had it been accompanied with possession. What is now to be considered, is a security, in its operation more extensive, accompanied with possession, and properly a general lien.¹

1. This security does not cover advances and loans of money unconnected with the particular employment in which the writer has been engaged;² but, as in those trades where a lien for the price of manufacturing renounced over one parcel of goods attaches, in consequence of the usage of trade, to the next that comes, a writer's retention covers his professional account for previous business done. Under the term professional account, it has been held that the duties paid by the agent to Government—feu-duties, and com- [112] position for an entry—are advances of money not within the necessary or reasonable and ordinary disbursements of a law agent in carrying on his business.³

2. This lien includes all title-deeds, securities, and documents of debt belonging to the client, and which have come into the writer's possession as his agent, or by deposition from him. So, 1. He seems to have no lien on papers the property of third persons, coming into his hands accidentally or necessarily.⁴ 2. He has no lien on deeds not coming into his possession professionally.⁵ 3. This lien seems not to include title-deeds delivered to the agent, in order to judge whether he would accept of a security over the subject for the debt due to him.⁶

3. Lien expires with possession; but it may be doubted how far the producing of deeds in a process terminates possession, the agent being *quasi dominus litis*, and the clerk custodian for all parties. Accordingly, in the note of the opinion of the Court in the case of Callman,⁷ it is said, that 'if the titles come into the writer's hands prior to their production, he will not on that account lose his hypothec (lien or retention) over them;' and reference is made to a case which is not reported.⁸ But the writer cannot claim retention over the

¹ It has been customary to call this a *hypothec*, not only in vulgar law language, but also in our books; and accordingly all the cases of writer's retention are in the Dictionary classed under *hypothec*.

² [Where the directors of a company carried on a business not authorized by their deed of settlement, and costs were thereby incurred, it was held that the papers of the company in their solicitor's hands were not subject to a lien for those costs. *Re Phoenix Life Assurance Co.*, 1 Hem. and Mil. 433.]

³ *Skinner v Paterson*, 1823, 2 S. 354, N. E. 312. [See *Gray v Wardrop's Trs.*, *infra*. The lien does not cover commission (*Paul v Dickson*, 1839, 1 D. 867) nor cash advances (*Cuthbert v Ross*, 1697, 4 Br. Sup. 374; *York Buildings Co. v Dalrymple*, 1738, Elch. Hypothec, No. 9). It seems to cover costs paid by the agent to the agent of the adverse party in a private transaction (*Inglis v Renny*, 1825, 4 S. 114), but not costs of action (*Kemp v Young*, 1838, 16 S. 500).]

In *Lidderdale's Crs. v Nasmyth*, 1749, M. 6248, the Court refused to comprehend under this lien a sum of £160 paid by the writer as non-entry and relief duties to the Crown, for a charter in favour of his client. The Court were afraid to authorize a general right which might be extended as plausibly to a cautionary engagement in a suspension.

In *Moncreiff v Colvil of Ochiltree's Crs.*, 1 Dec. 1799, Fac.

Coll., the heir of a writer claimed in a ranking preference, on the ground of retention of certain title-deeds which, having been in the writer's hands, had been given up to the creditors, with a reservation of the right. The debt was composed partly of the balance of a business account, partly of cash advances in managing the bankrupt's business. The Court refused the preference, on the ground that this right of retention has no effect in securing cash transactions.

Grant v Robertson, 1801, M. Hypoth. 1, confirms the doctrine.

⁴ *Esdaile v Oxenham*, 3 Barn. and Cress. 225.

⁵ See *Stevenson v Blakelock*, 1 Maule and Selw. 535. [The right rests on the acting of the party as a law agent. *Allan v Sawers*, 1842, 4 D. 1356; *Renny & Webster v Myles*, 1847, 9 D. 619. In a question with heritable creditors, it was held that the agent could not maintain this preference for the expenses of an action brought to enforce payment of his account. *Gray v Wardrop's Trs.*, 13 D. 693; *aff.* 1855, 2 Macq. 435.]

⁶ See *Chisholm v Fraser*, 1825, 3 S. 630, N. E. 442.

⁷ *Callman v Bell*, 1793, M. 6255. See also *Forsyth v Sym*, 18 Feb. 1791, not reported, but referred to in *Callman's case*.

⁸ *Scott v Lothian*, 28 Jan. 1784. I have not been able to find the papers in this case.

proceedings in a depending action, or the titles or documents which he finds in process.¹ His only security in such a case rests upon the hypothec already explained.²

In the course of employment as law agent, it is frequently necessary that papers should be sent from a country agent to an agent in town, and questions may arise as to the right which the country agent or the town agent has in those circumstances. It would appear, 1. That the country agent has not, by sending the papers, thus quitted possession, so as to defeat his lien against his client.³ 2. That the town agent has the ordinary writer's retention or lien for his bill of costs, as against the client. 3. That he has a lien against the country agent for what may be due by him to the town agent for his client; so that the country agent cannot demand those papers without paying the balance. And, 4. That on the bankruptcy of the country agent, the town agent will be entitled to withhold the papers against the client, for payment to himself of the whole debt incurred by the client.⁴

4. There is no active right conferred on the writer; it is a mere right of retention and [113] security. The consequences of this are: 1. That if the debt be disputed on plausible grounds, or the claim unliquidated, the writer cannot use his right as an engine of oppression, but must give up the papers, if there be pressing occasion for them, on security being found for payment of the debt when ascertained.⁵ It does not, however, appear that a writer would be bound to give up the papers for any such pressing occasion, on security merely *to restore them*; for, this purpose served, the papers may be comparatively useless.⁶ Where the claim is liquidated, the writer is not bound to give them up without payment; unless in bankruptcy, where a consent to preference over the fund, when recovered, or a decree to that effect, will be deemed equivalent.⁷ 2. A distinction was attempted to be taken between the demand of papers for any ordinary purpose, and a demand under a diligence issued for recovering them to be produced as evidence in an action; the latter being pleaded as on the same footing with the obligation and duty which lies on every man to give testimony. The Court, however, refused to order such production of papers at the call of the client.⁸ But it has been ordered when called for by a third party, not for the client's benefit.⁹ 3. This right of retention has no effect in stopping prescription of the debt.¹⁰ 4. This right gives a preference over all creditors whatever, whether real or personal, in so far as they have occasion to use the deeds under lien: the deeds can be procured only by paying the debt, or by finding security for it. But it is a question of some nicety, whether this right can prevail against creditors who have, prior to the existence of the writer's claim or possession, a real security constituted over the subjects in the title-deeds? To give such effect to the right, is to extend the lien beyond its legitimate terms, and entitle the agent to withhold the deed of a third party. It defeats the security of an inhibition, hitherto held to be absolute against all subsequent debts and voluntary securities;¹¹ or if not, it makes an inhibition more effectual than a real right in security, completed by infestment on the faith of the records. And, in every view, it is to be lamented that the course of decisions has

¹ See *Callman's* and *Scott's* cases, as above.

² See above, vol. ii. p. 34.

³ [Nor is the lien lost where the titles are lent by the agent to another agent employed by the client (*Renny v Kemp*, 1841, 3 D. 1134); nor by taking a partial payment and giving up the titles to a part of the client's property, and retaining the other titles (*Gray v Wardrop's Trs.*, as revd. on this point, 2 Macq. 435).]

⁴ See, in England, a case of this kind, *Bray and others v Hine & Fox*, 1818, 6 Price Exch. Cases 203.

⁵ *Hotchkis v Thomson*, 1794.

⁶ [*Ferguson & Stewart v Grant*, 1856, 18 D. 536.]

⁷ *Crs. of Newlands v M'Kenzie*, 1793, M. 6254. See also *Scott*, *infra*, p. 109, note 4.

⁸ *Finlay v Syme*, 1773, M. 6250, Hailes 516.

⁹ *E. of Sutherland v Couper*, 1738, M. 6247; *Elchies, Hypothec* 8. [But the agent's lien may be maintained against a demand by a purchaser or heritable creditor deriving right from the client or his representative. *Paul v Meikle*, 1868, 7 Macph. 235. See *Montgomery v A B*, 1845, 7 D. 553. The lien seems not to be effectual at the instance of an heir of entail's agent against an adjudging creditor of the entail. *Callander v Laidlaw*, 1834, 12 S. 417; *Scott & Gillespie v Thomson*, 1854, 17 D. 124. As to the case between an heir's agent and the creditors of a defunct, see *Cameron v Burns*, 1824, 3 S. 118.]

¹⁰ *M'Adam v Foggo*, 1780, M. 6252, Hailes 875. See also *E. of Aberdeen v Thomson*, 26 Nov. 1709.

¹¹ [*Menzies v Murdoch*, 1841, 4 D. 257.]

run so strongly in favour of this lien. Till an opportunity, however, shall arise of bringing this question under the cognizance of the House of Lords, the law must be held as settled by the following cases. In the first case that occurred, the Court found the writer's lien effectual to give him a preference in a ranking, even over creditors by heritable bond prior to his claim.¹ The decision was not generally approved of.² But, by a later decision, the Court has held the doctrine of Provenhall's case as law; that it affords a direct authority on the point; that it had not been denied by any subsequent determination; and that there appeared to be no good reason for unsettling the rule fixed in that case after mature deliberation.³ And still more recently, and in a case much more favourable for the heritable creditor, the decision has been confirmed.⁴

5. The agent's right of retention may be waived by agreement. In England it [114] seems to be held, that it is a sufficient waiver if the attorney take promissory notes payable at a distant day, on the ground that such contract or security is inconsistent with the lien.⁵ In Scotland, the question has generally been considered on the principles of the law of novation. But the consideration which has weighed with the English courts is never to be lost sight of; and, 1. If the security be not inconsistent with the lien, the principle of novation may be applied (as where a bill or note payable on demand, or one day after date, is given for the debt), and the presumption then is for the preservation of the security. 2. If time be given, as by a bond or bill at a distant day, it will require some strong indication of an intention to preserve the lien in order to keep it in force; either an express reservation,⁶ or at least a plain purpose of accommodating the client, without weakening the security, by enabling the agent to raise money at market, and to forbear from insisting on immediate payment.⁷ 3. In a doubtful case, or where there seems ground to imply a waiver of the lien, if the papers have been allowed to remain with the agent until the client fail, the agent will still be held to preserve his lien.⁸

2. FACTOR'S LIEN.

Both in England and in this country, a general lien has been allowed to factors for the balance due on their general account with the principal.

The principle upon which this lien proceeds seems to have been originally this: that as a factor, possessed of the goods of his principal in order to have them sold for his behoof, or who is in the course of receiving consignments, or who holds general powers to receive money or property for behoof of the principal, will easily be induced to engage his credit, or to lend money on the faith of reimbursement from the means in his own hands, or likely to come into his possession, it is unjust to deprive him of this security, and impolitic to cut off those facilities which trade derives from admitting a lien in such cases. A lien is therefore allowed to factors, not only for their advances in the course of their employment, but also for their engagements and advances of cash to their principal.⁹

The leading case in England is one in which Lord Hardwicke, after the most careful

¹ *Hamilton of Provenhall's Crs. v Wilson*, 1781, M. 6253.

² I remember Lord Justice-Clerk M'Queen (distinguished equally for strength of expression and for habits of close and logical reasoning) saying, that 'the decision in Wilson's case made his hair stand on end.' See Hailes 876.

³ *Campbell v Smith*, 1 Feb. 1817, 19 F. C. 271. Lord Pitmilley had decided the case in the Outer House on the sole ground of the former decision. See his note subjoined to his interlocutor. The Court proceeded on general grounds.

⁴ *Scott v Campbell & Clason*, 1822, 2 S. 16. Here the heritable security, created and complete prior to the origin of the writer's right, was not by separate deeds, but by the very deed over which the writer claimed retention, viz. a disposition qualified with a real burden. [See *Grant v Bain*, 1840,

2 D. 618; *Findlay v Macintosh*, 1842, 4 D. 1450; *Clason v Jones*, 1847, 9 D. 1512.]

⁵ *Cowell v Simson*, 1809, 16 Vesey 275. Lord Ch. Eldon's argument embraces the whole doctrine.

⁶ *Linning v Douglas*, 1821, 1 S. 87, N. E. 89. Here there was a reservation of the right of retention. Had there been no such reservation, the question would have been more difficult.

⁷ This purpose was urged strongly in *Linning's* case, and was aided there by the words of the bond.

⁸ *Skinner v Paterson*, 1823, 2 S. 354, N. E. 312.

⁹ In France this is laid down by Valin, with some expressions of surprise and asperity against those who were capable of denying so plain and so just a doctrine. 1 Valin, p. 576.

and anxious inquiries, both into the law and into the practice, decided 'that the factor has a lien on goods consigned to him, not only for incident charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession;' and in a case a few months afterwards, this was held as a point settled.¹ Lord Mansfield, on the authority of these cases, said, in a case in 1758: 'I hold it to be now a settled point, that a factor, to whom a balance is due, has a lien upon all the goods of his principal so long as they remain in his possession.'²

[115] In Scotland, the earliest notice of a factor's lien seems to be in a case reported by Lord Stair, wherein the Court of Session held a factory revocable; 'the factor being always refunded of what he profitably expended upon consideration thereof, before he quit possession.'³ In his Institutions, Lord Stair speaks of retention only as a right arising from the *actio contraria* of the contract, for 'the necessary and profitable expenses wared out upon the things possessed.'⁴ The above decision seems to imply something more; as if the factor were entitled to security for what he had been induced to advance in consideration of the possession. And before the time of Erskine the factor's right was fully recognised, on the same broad footing which we have seen established on the Continent and in England.⁵

SUBJECTS OF FACTOR'S LIEN.⁶—1. The factor is entitled to retain the property and goods of the principal which he has in actual possession received as factor, until he is paid the balance on his accounts. But there is an exception of such goods as have been placed with the factor, or sent to him, under a specific appropriation. Formerly there was occasion to consider special appropriation, as connected with the claim of a principal on the bankruptcy of his *factor*:⁷ it is now to be considered relatively to the bankruptcy of the *principal*. The doctrine is laid down thus broadly in England: 'That, as the lien which a factor has on the goods of his principal arises upon an agreement which the law implies, if there be an express stipulation to the contrary, it puts an end to the general rule of law.' And this was applied to rule the case stated in the notes.⁸

¹ *Kruger v Wilcox*, 1754, Ambler 252, Tud. L. C. 676; and *Gardiner v Coleman*, 1755, cited 1 Burr. 494.

² *Godin v London Assurance Co.*, 1 Burr. 494. [The principle applies to the case of a broker making advances. *Pulteney v Keymer*, 3 Esp. 182. The circumstance that the factor undertakes a *del credere* commission makes no difference, except that he must debit himself with the price of goods sold, whether paid for or not, and he has then a lien for surplus advances. *Graham v Ackroyd*, 10 Hare 102, 22 L. J. Ch. 1046.]

³ *Chalmers v Bassily*, 1666, M. 9137.

⁴ Book 1, tit. 18, sec. 7.

⁵ 'A factor,' says Erskine, 'may retain his balance, not only till he recover payment of his expenses (for in so far the right arises from the nature of the factory), but also till he be relieved of the separate engagements he hath entered into on his constituent's account, which retention will be effectual against all diligences that may be used by the constituent's creditors to attach the balance due by the factor to the common debtor' (iii. 4. 21).

⁶ Relative to this right, there are some cases already discussed which ought to be kept in view, where goods are derived from factors consigning in their own name. See above, vol. i. p. 517.

⁷ See above, vol. i. p. 280.

⁸ *Walker v Birch*, 6 T. R. 258. *Caldwall & Co. of London*, finding themselves in difficulties, wished to raise money on a quantity of cotton pledged with them for debt. Their agent, J. Forbes, was sent to Liverpool to place those goods in such

a state as to be a fund of credit for raising money. He accordingly put the cotton into the hands of Greaves & Co., in order to have brokers' certificates made out as a fund of credit, and a receipt was granted by Greaves & Co. for so many bags of cotton 'for sale, for the net proceeds of each parcel, when, and as received, they promise to be accountable, and to pay to the said Mr. J. Forbes, or his order.' J. Forbes returned immediately to London with his bills of parcels and brokers' certificates, and endeavoured on the credit of them to raise money among the friends of *Caldwall & Co.*; but difficulties arose, and *Caldwall & Co.* and all the companies with which they were connected became bankrupts, and Greaves & Co. failed among others. Greaves & Co. were indebted to *Caldwall & Co.* for advances of bills, which having been dishonoured, were claimed against *Caldwall & Co.*'s estate; but bills to five times the amount had been endorsed by Greaves & Co. at the request of *Caldwall & Co.*, and though not yet claimed against Greaves & Co., would certainly be so, as all the parties were bankrupt. The Court of K. B. held Greaves & Co. bound to give up the goods without any lien. There were here two circumstances to perplex the case a little: 1. That some doubt might be moved whether Greaves & Co. were proper factors; and, 2. That in England a contingent debt is scarcely considered as a debt at all: it does not support a claim in bankruptcy. The Court, however, proceeded on the general ground: 'Here the parties are bound,' said Lord Kenyon, 'by their express stipulation, which excludes all idea of a lien; and the goods in question not having been sold, are to be returned to the plaintiffs (the

Where goods are sent to a factor or consignee (as in the cases stated on a former occasion¹) for the benefit of other creditors, and so received, the limitation of the factor's right is unquestionable. Those other creditors have a real and preferable right, which, [116] as an appropriation, will exclude the factor's lien, should the principal become a bankrupt. And although, at first sight, there appears to be some difficulty in admitting the rule, where nothing has been done in consequence of the directions, where no right is acquired by another creditor to the goods in question, and where the competition lies between the factor and the general creditors, it must be recollected that a factor who holds goods coming into his hands on particular appropriation, is, by the very terms of that appropriation, excluded from the privilege of a lien. He stands precisely in the same situation with any other person holding goods in the course of a legal contract; entitled to retain only for the charges on that particular engagement, but not to detain them as a security for any general balance.

It is not equivalent to an appropriation when, bills being lodged generally with a factor or banker, the subsequent advances are applied in discounting particular notes out of the general mass; but the lien continues over the whole of the bills.²

2. The lien extends not only over goods themselves, but over the price of goods sold by the factor, if the price be payable to him, and still unpaid; or if the bills for the price are in his hands blank endorsed; or even if he have powers as factor to levy and discharge the debt. The difficulty here is this, that a lien exists only while there is possession; but possession of the goods is given up, and the money is in the hands of the buyer, and not in the possession of the factor. This difficulty, however, is removed in England upon the following principle, viz. that not only has the factor a right to recover the price from the buyer, but the principal cannot deprive him of this power where there is any balance due upon the account.³ This doctrine was, to a certain extent, established also in the Court of Session against the principal and his creditors arresting in the factor's hands. 'If a factor,' says Lord Kames, 'sells his constituent's effects, and takes the price payable to himself, he will be preferable in a competition to his constituent so long as he has anything to claim by the *actio contraria*.'⁴ The doctrine is not restrained, however, to the narrow limits of this decision.

3. Where the factor has a *del credere* commission, he stands more nearly in the situation of a purchaser from the principal, to whom he guarantees the payment of the price; and that price is more fully in his power, and may be said to be more clearly in his possession.⁵

assignees), who represent Caldwell & Co.' The other judges had the same view of the case.

¹ See above, vol. ii. p. 12 et seq.

² So it was clearly held in England in *Davis v Bowsher*, relative to a banker's lien. 5 T. R. 488. See below, p. 114.

³ *Drinkwater v Goodwin*, 1775, Cowper 251. Dowding, a clothier, employed Jeffreys as his factor. Jeffreys sold clothes to Goodwin generally, and in his own name, though known to be factor for Dowding, and in this transaction known by Goodwin to be acting in that capacity. The principal became a bankrupt, while Jeffreys stood deeply engaged for him, and the price was unpaid by Goodwin. A competition arose for this price; and though after the dispute arose, and notice was given of it to Goodwin, he paid the price to Jeffreys, the Court took up the case as if this, which was improper, had not been done. Lord Mansfield said: 'We think that a factor who receives clothes, and is authorized to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debt, yet he has a right to receive the money: his receipt is a discharge to

the buyer, and he has a right to bring an action against him to compel the payment. And it would be no defence for the buyer in that action to say that, as between him and the principal, he, the buyer, ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him.' And judgment accordingly went for the factor.

See also *Atkins & Batten v Amber*, 2 Esp. Ca. 493. [See opinions in *Miller & Paterson v M'Nair*, 6 July 1852, 14 D. 955.]

⁴ *Stephens v Crs. of York Buildings Co.*, 1735, M. 9140. See *Broughton's case*, *supra*, p. 91, note 6.

⁵ [In this case, 'he may be entitled to retain or to stop *in transitu* against the purchaser, the price being unpaid. But if the bill for the price has been paid, or has been endorsed to the principal, and settled by him with the purchaser by composition or otherwise, the factor cannot retain against the purchaser on pretence of the guarantee to cover his general balance.' *Princ. 1447*. See *Stirling & Sons v Duncan*, 1 S. App. 389.]

4. Bills sent to the factor are in the same situation with goods. This happens most [117] frequently in the case of bankers, who are money factors, and considered in law as factors to all intents and purposes.¹ This is taken in Scotland as a settled point.²

5. Policies of insurance in the hands of the factor are subject to this lien.³

EXTENT OF THE SECURITY.—1. The factor's lien covers all salary, expenses,⁴ guarantees, and advances of cash subsequent to the commencement of the factory.

2. The factor's lien covers also advances made, or engagements entered into, on the faith of the consignments coming into the factor's possession, though paid or undertaken previously to the actual possession or the commencement of the factory. Should the consignment never be made, the mere expectation, not followed by possession, will vest no lien or real right; but the subsequent possession gives effect to the lien which had begun to exist on the mere footing of expectation.⁵

3. The factor's lien will not secure debts which are assigned to him by the creditors of his principal, after his possession under his factory commenced.⁶

4. The factor's lien does not cover debts due to the factor prior to the existence of the factory, unless such debts have originated on the faith of a promised consignment. In an English case in the Court of Common Pleas, this question occasioned a difference of opinion on the bench; but the majority of the judges were very decidedly in favour of the rule as now laid down.⁷

5. The factor's lien does not cover an engagement by the factor for the principal, entered into unknown to the principal.⁸ Yet if it were an engagement in the ordinary course of the employment, though not specifically known to the principal, the reverse would seem to hold.

DISCHARGE OF THE LIEN.—1. The factor's lien ends with possession. This has already been explained as part of the general law of lien.⁹

2. If the factor have procured the goods on his own credit, he is to be held as the consignor, and may stop *in transitu* after a shipment to the principal.¹⁰

3. Where, in the course of employment by the factor, he places the possession of goods with another, the possession is still with the factor, and his lien continues. So where he places the goods with a manufacturer for some operation of his art, or delegates his own lien.¹¹

4. If the lost possession is regained, the lien revives; or, more correctly speaking, this new possession gives a new lien.¹²

5. A broker is considered as a factor, and has a general lien on any property that is in [118] his hands in the course of that employment, for the advances, engagements, and charges on account of his principal.¹³

See afterwards, Of Insurance Brokers, separately.¹⁴

¹ *Jourdaine v Le Fevre*, etc., 1 Espin. 66. See below, p. 113, note 1.

² *Curtis v Chippendale*, 1794, M. 2589.

³ 1 Burr. 493, 494, where this is delivered collaterally by Lord Mansfield.

⁴ [And commission. *Sibbald v Gibson*, 11 Dec. 1852, 14 D. 217.]

⁵ In *Hammonds v Barclay*, 1802, the Court of K. B. drew this distinction in very plain and clear terms. 2 East 227, 237.

⁶ *Pearson v Orichton*, 1672, M. 2625. This was the case of a steward or chamberlain. See *Marsh v Chambers*, 2 Strange 1234.

⁷ *Houghton v Mathews*, 29 June 1803, 3 B. and P. 485, 499. [Generally, a factor cannot retain the price of goods sold by him for debts due to him by the principal, arising out of other than factorial transactions. *Dixon v Stanfeld*, 10 C. B. 398; *Miller & Paterson v M'Nair*, 1852, 14 D. 955.]

⁸ *Gurney v Sharp*, 1812, 4 Taunt. 242. Here a merchant at

Lynn, in Norfolk, ordered Sharp, a Russian broker in London, to buy hemp for him, payable by his bill at six months. He bought twenty-eight tons, but the sellers required a guarantee, and the broker guaranteed his principal for the usual commission from the sellers. This was not told the principal. The principal failed after accepting bills for the price; and the goods having been delivered to the broker some time before, he claimed a lien. The Court refused it, holding the delivery to have been for the use of the bankrupts, and the possession to be theirs.

⁹ See above, vol. ii. p. 89.

¹⁰ *Feise v Wray*, 3 East 93.

¹¹ *M'Combie v Davies*, 7 East 5.

¹² *Whitehead v Vaughan*, Cook's B. L. 547. [See above, p. 90, note 8.]

¹³ [See *M'Call & Co. v Black & Co.*, 1824, 2 Sh. App. Ca. 188; *Pulteney v Keymer*, 3 Esp. 182.]

¹⁴ See below, p. 115 et seq.

3. BANKER'S LIEN.

Referring to the explanations already made relative to bill transactions between bankers and their customers,¹ it may be observed, that the view in which those transactions were then considered did not lead to any explanation of the doctrine of lien, but merely of the effect of the several transactions in passing the property of bills on the failure of the banker. In looking to such transactions, with a view to the banker's lien on failure of the customer, the chief distinction to be attended to is that between bills discounted and bills deposited or pledged.

Bankers are in the nature of money factors; and by law they have a general lien upon all unappropriated paper securities in their hands, belonging to their customer, for the general balance due on the account between them.²

This lien affects no bills or notes which are not strictly speaking the property of the customer.

1. If the banker has *discounted* a bill, he has *bought* it.³ It is no longer the property of the customer, and is not with the banker under lien for the general balance. This decides a case which frequently occurs in practice, and in which the notions of bankers and mercantile men are much at variance. A banker receives from his customer a bill with several names on it, and discounts it. All the parties fail, and the banker is entitled to rank on each for the whole sum. This gives him a right, however, to draw no more than the full contents of the bill, considering it as a single transaction, and the bill as discounted; and so, if he has received from any of the other obligants on the bill nineteen shillings, he can demand no more than one shilling in the pound from his customer's estate. If the banker receives the bill from his customer as a collateral security, or holds it under lien for his general balance, he may rank for the whole sum of the debt or balance, reserving the bill to cover what he shall not draw under his ranking.⁴ It is important, then, to mark what is the criterion by which a transaction of discount is distinguished from a deposit of bills on general lien. In the ordinary transaction of discounting a bill, the banker pays over to the holder of the bill the sum expressed in it, after deducting the interest to the day of payment. But there may be a discount without actual payment. The bill-holder may be allowed credit in account for the amount of the bill, deducting the interest; and when he has drawn on that credit, and the banker has paid or accepted the draft, the bill, for the discounted amount of which he was allowed to draw, is held as discounted, and taken out of the general account. Even where he has not so drawn, but the banker having discounted the interest enters the bill in account to the bill-holder's credit, it would appear that he has thereby lessened the general balance; that on the banker's failure the bill will go to [119] his estate; and that on the customer's failure it will remain with the banker as his own, not as under lien for the general balance.⁵ It is not enough to make a bill be considered as discounted, that it has been endorsed to the banker by the customer; for the banker

¹ Vol. i. p. 290. [Note, that bankers have also a lien over their own stock for advances made to a shareholder. *Burns v Laurie's Trs.*, 1840, 2 D. 1348; *Hague v Dandesan*, 2 Exch. 741, 17 L. J. Ex. 269; *London, Birmingham, etc. Bank*, 34 L. J. Ch. 418.]

² *Jourdaine v Le Fevre*, 1793, 1 Espin. 66. Nowlan employed Le Fevres as his bankers. He placed with them a promissory note, which, in usual course, was written short in his cash account. The parties had, at the same time, a discounting account; and some time before Nowlan's bankruptcy, Le Fevres had discounted fifteen bills, five of which turned out bad. On the bankruptcy, Le Fevres claimed a lien on the note; and at the Guildhall Sittings, 1793, it was allowed. Lord Kenyon was of opinion, 'That a banker, in a transac-

tion such as the present, had lien on a note so paid in, and of course a right to retain it for his balance, or as a security for a general account between him and the party who had paid it in; and that although in this case the discounting and cash accounts were distinct and separate, there being a balance due to the defendant, they might retain generally in order to cover it.'

³ See vol. i. pp. 290, 291.

⁴ [See *Patten v Royal Bank*, 1853, 15 D. 617.]

⁵ There seems to be a distinction between this case and those of *Giles & Perkins*, and of *Sergeant*. Vol. i. p. 291, note 1. There the bills seemed to be entered generally for the whole sum, which was nothing more than charging the bankers as agents.

may be entrusted as his agent to recover the money. Still less is it sufficient that the bill has been placed with the banker, blank endorsed, without the name of the customer.

2. Whether a factor be held to have no power to pledge the *goods* of his principal, as in England, or, according to the law of Scotland, he be considered to have such power, it may be held as law that there is no restriction as to his power over *bills* and *negotiable instruments*. In England this has been judicially recognised very often. It has been adjudged that a banker receiving bills from his customers, blank endorsed, and depositing them in the same state with the bank in which he does his business, constitutes an effectual pledge or lien over them.¹

This lien covers no bills which are in the banker's hands under special appropriation.²

Where the banker, in making his advances, has appropriated particular bills, as in discount, to answer those advances, it would appear that although the lien is extinguished in respect of those bills, it will remain over the rest of the bills to the effect of securing the banker even against the failure of the discounted bills. In England, the advance of money on such appropriation of certain bills out of a number has been held not to invalidate the general lien over the rest.³

¹ *Collins v Martin*, 1 Bos. and Pull. 648. In the Scottish case of *Inglis v Bruce, Simson, Freer, & Co., Crs. of Smith, M'George, & Co.*, Second Division, 17 June 1817, a manufacturing house in Glasgow employed a London factor; and the bills drawn for the price, and remaining in the factor's hands, were placed by him with his banker, and held to be effectually pledged with him.

² See vol. i. p. 290. [So where Exchequer bills are placed in a banker's hands to get interest, or to have them renewed. *Brandao v Barnett*, 3 C. B. 519. An agreement that documents shall be held in security of a special account does not exclude the general lien (*Jones v Peppercorne, Johns*, 430, 28 L. J. Ch. 153), unless the special contract be inconsistent with it (*re Meadows*, 26 Beav. 588, 28 L. J. Ch. 891).]

³ *Davis v Bowsher*, 5 Term. Rep. 588. Cook, a trader at Bristol, kept an account with Davis, a banker. The course of dealing was, that Cook lodged bills at future days, and drew for money in advance as he required it. The banker charged no interest on advances, but used to select such of the bills in his hands as were nearest the sum advanced, and discount them, debiting Cook with the discount. Bills were (27th February) paid in to the amount of £3000; afterwards he had an advance of £1400, and the banker entered the discount on some bills which he selected. The banker refusing to advance any more, Cook required his undiscounted bills to be delivered up to him, which the banker refused, alleging a right to detain them *all*, in case any of the discounted bills should prove bad. None of the discounted bills had at this time been dishonoured, and the sum of advances was considerably more than covered by the amount of the discounted bills, in the event of their proving good. Cook became a bankrupt, and the banker proved under the commission, swearing that he had these bills as securities. The action was by the banker as endorsee of one of the bills which had not been discounted. A verdict for the banker. The Court of King's Bench confirmed the judgment. Lord Kenyon said: 'I disclaim grounding my opinion upon any particular law applicable to the city of Bristol only. I am clearly of opinion, that by the general law of the land, a banker has a general lien upon all the securities in his hands, belonging to any particular person, for his general balance, unless there be

evidence to show that he received any particular security, under special circumstances, which would take it out of the common rule. But it is taken for granted by the counsel in support of the rule, that the party had a right to demand of the banker certain bills, which were not discounted, without paying their general balance; and the whole argument is built on that mistake. I think he had only a right to demand this bill *sub modo*, namely, on paying all that was then due to the bankers; for wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance. It has been urged that bankers abandoned their general lien in this case, by applying the money advanced to the discount of a particular bill; but nothing appears to warrant such a supposition. So long as they were in advance upon the general account, they had a right to charge interest, whether in one shape or another. But whether they could charge interest upon any particular bill, provided they were not in advance upon the general balance, is a question not necessary to be decided now, but upon which they may possibly find themselves mistaken whenever it comes to be fully canvassed. I see nothing, however, in this case, contrary to the general rule of law and the practice amongst bankers. It is very proper that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker without paying him his general balance, unless such securities were delivered under a particular agreement which enables him so to do. If we were to set aside this verdict, we should unsettle that which has always been considered as the law on this subject, and the constantly received course of trade founded upon that law. I am therefore clearly of opinion that we ought not to treat this even as a doubtful question, but that we should discharge the rule for a new trial.'

Ashhurst, J.: 'I entirely concur in opinion with my Lord, that the general rule is, that bills paid into a banker's hand generally, can at no time be taken away from him until the party has paid him his general balance. Here the bills were paid in upon the general account; and the balance not being settled at the time when they were demanded, the party had

A banker can claim no lien on bills left for discount, for which he refuses to give [120] money;¹ nor on muniments casually left with him, on which he has refused advances;² nor on bills endorsed for the special purpose of negotiation.³

The lien covers the balance on the banking accounts, including all acceptances, endorsements, and bill transactions, but not debts due to the banker in another capacity.

A banker may, on bankruptcy, retain money due as a balance on his account against the contingent debt due on a discounted bill not yet due.⁴

4. LIEN OF POLICY BROKER.

The whole business of the insurance contract is conducted by the broker; and the broker holding the policies which are effected in his office for the benefit of the insured, is entitled to retain them under a lien, not merely for the premiums due on those policies, but for the general balance due by the insured.

1. He has not, in the ordinary case, any power to recover the amount of the loss under those policies.⁵ But if he hold a special commission, or power to settle and receive the [121] amount of the loss, he is entitled to the full benefit of a lien on the sums so to be recovered from the underwriters.⁶ And it has been held to amount to a power of settling the loss, and receiving the amount, if he has a *del credere* commission under which he guarantees the payment of the loss to the insured.⁷ The broker having had the policy made out in his own name as agent, is held entitled to a preference on the sum to be recovered.⁸

2. It has been determined in England, that the recovery of the policy, after having been delivered by the broker to his principal, reinvests him with the lien. The case is

no right to insist upon receiving them. It would be inconvenient to commerce in general, and injustice to the plaintiffs in this particular case, to set aside the verdict which has been given.'

Grose, J.: 'The question is, whether, under the circumstances of this case, the bankers had not a lien upon all the paper securities in their hands for the amount of the general balance? The evidence goes to show that they had, according to the general dealing and understanding between the parties; and the jury having given credit to this evidence, I see no reason to find fault with their verdict, more especially as it is according to the real justice of the case.' 5 Term. Rep. 488. [See *Glen v National Bank*, 1849, 12 D. 353.]

¹ [*Borthwick v Bremner*, 1833, 12 S. 121.]

² *Haig v Buchanan*, 1823; 2 S. 412, N. E. 368. See *Lucas v Dorrien*, 1817, 7 Taunt. 278.

³ *Matheson v Anderson*, 1822, 1 S. 486. [*Farrar v North British Bank*, 1850, 12 D. 1190.]

⁴ *The British Linen Co. v Ferrier, Tr. for the Crs. of G. Robinson & Co.*, 20 Nov. 1807. In this case retention was sustained to the British Linen Co. against the creditors of G. Robinson & Co., who, as drawers, had discounted a bill with their agent at Forres, although the bill had more than two months to run at the date of the sequestration. The following is a note of the case by Mr. Baron Hume:—

The British Linen Co. had a series of transactions with George Robinson & Co. on which there arose a balance of £542 against the British Linen Co. Robinson & Co. were sequestrated on 21st June 1803; and Charles Ferrier, the trustee under the sequestration, brought an action against the British Linen Co. for payment of said balance. On the other hand, the agent at Forres for the branch of the British Linen Co.'s Bank established there had, on 2d June 1803, discounted to Robinson & Co. a bill for £242 drawn by them on Allan

Robertson, dated 30th May 1803, and payable three months after date. This bill, when presented for payment at the end of the three months, was dishonoured. The British Linen Co. in consequence pleaded retention to the extent of £242, as a defence against Mr. Ferrier's action for the said balance. The Lord Ordinary (Methven) 'finds the defenders entitled to retain the amount of the bill discounted by their agent for £242.' On advising a reclaiming petition for Ferrier, with answers, the Court unanimously adhered. The Court were of opinion, that though the bank agent at Forres had not at the time communicated this transaction to the bank, yet still, as he had discounted the bill with the bank money, they were equally entitled to retain the contents as if the bank itself had discounted it at Edinburgh.

Lord Newton said at advising, that if the British Linen Co. had *not* pleaded the retention or compensation, it would have founded their agent at Forres in a plea to be free of his responsibility to the bank for the contents of the bill.

⁵ Marshall on Insurance 293. *Wilson v Crichton*, as there cited.

⁶ [A broker or insurance agent seems, independently of special powers, to have a lien over the policy itself, of the nature of a law agent's lien over papers. *Wilmot v Wilmot*, 1841, 3 D. 815.]

⁷ *Grove v Dubois*, 1 Term. Rep. 112; Marshall, p. 293.

⁸ *Leslie & Thomson v Linn*, 4 July 1783, 7 Fac. Coll. 173. *Leslie & Thomson* were applied to by M'Lean to effect insurance. For security, they had the policy underwritten in their own name; and a loss having happened, the underwriter granted a bill in favour of Leslie & Thomson, but sent it to M'Lean, who had previously got the policy into his custody. He endorsed and delivered it to Linn. In a multiplepinding, Leslie & Thomson were competitors against Linn for the contents of this bill; and the Court preferred Leslie & Thomson.

quoted below, both as proving the general lien of a broker according to the English law, and also the point now mentioned.¹

3. Neither the broker nor the insured have a lien or right to retain the premiums on the bankruptcy of the underwriter, or to employ them in a second insurance, to secure themselves against the effect of the failure.²

[122] 4. Where the broker effects insurance for one who, in the character of an agent, applies to him, he will have a lien effectual against the principal for the particular transaction in question, but not for the general balance on the agent's insurance accounts.³ But if the application to the broker give no notice that the person who applies is acting as agent, the broker seems to be entitled to consider it as an insurance of the applicant's

¹ *Whitehead v Vaughan*. A policy was underwritten for Milford in May 1781. It was in the hands of Vaughan, his broker, when in May 1784 he became creditor of Milford's for £136 of premiums. An average loss arose in the meanwhile; and Milford's credit becoming suspicious, Vaughan contrived to get from him the policy, to receive the average, without explaining his intention. Soon after Milford became a bankrupt. The average loss was settled, and received by Vaughan. Lord Mansfield said: 'This is an item of the mutual account; and I think there is a lien. It is the justice of the case that there should be a general lien, and the lien revives when the policy comes again into the hands of the broker.' And Mr. Justice Buller held it as a settled point, 'that there is a general lien on policies in the hands of an insurance broker;' and it was accordingly allowed. Cook's B. L. 579. This was in King's Bench.

The general lien also found in Common Pleas, *Parker & others v Carter*. Williams directed an insurance, which was effected, and notice given 3d December. On 6th December there was a balance due by Williams to Carter, his broker. On 22d, Williams committed an act of bankruptcy. The ship after this was captured, and a loss adjusted and paid to the broker. A commission having been issued against Williams, the question was, Whether, as policy broker and general agent, Carter was not entitled to retain the money? He was found to be so entitled. 1 Cook's B. L. 580.

Levy v Barnard, 8 Taunt. 149.

² *Selkrig v Pitcairn & Scott*, 1805, M. App. Insurance 10. Hay Smith, an underwriter, failed. He had underwritten policies at Pitcairn & Scott's office, of which the premiums were unpaid. Pitcairn & Scott, to secure the insured, made second insurances, and at settling with Smith's creditors claimed for the insured a right of retention over the premiums, and a consequent right to apply them in a second insurance. A case was ordered for the opinions of English counsel; and Sir V. Gibbs, and Park, and Marshall, were consulted. They agreed in holding the contract as complete, and the right of the underwriter to his premiums as good. They held the premiums by the English law to belong to the underwriter's estate, and the insured to have no other remedy but a claim under 19 Geo. III. c. 32, sec. 2, on the bankrupt estate. On the bench, it was strongly contended by Lord Meadowbank, that by the law of mutual contract in Scotland, the insured are in such a case entitled to an option to claim such implement as may be possible, or to rescind the contract. The retention claimed by the insured is merely this: the underwriter is bankrupt, the loss is depending, and the insured acquits him of his obligation, and keeps the premium which is still in his pocket. The subsequent application of

this premium, in procuring another insurance, is truly not a part of the question. It is not an answer to say the premium is the underwriter's estate, because it is in the broker's hand; no such fiction can be allowed. If the broker is bankrupt, the underwriter goes direct against the insured for premiums, if not already paid to the broker. This demonstrates the insured and underwriter to be the true parties, and the former, on the principle of mutual contract, resists fulfilment on his part till the other party is in a capacity to fulfil: he would be entitled to lay his hand on the broker, and stop him from paying the premium, even if the broker had received it. Lord Newton assented to this doctrine, if by the conception of the contract the premium had still been with the insured. But the policy shows it in the hands of the broker, the agent of the underwriter. Lord Meadowbank begged him to observe that the broker was agent for both. Lord President Campbell held the underwriter to be creditor only of the broker, who by the conception of the contract had or should have had the premiums in his hand. He has no direct action against the assured; and if assured fails with premium unpaid, broker suffers—underwriter is safe. No contract or ground of action by the underwriter against the assured. Then the question is, Whether the broker can give a preference to the assured against the creditors of the underwriter? If the assured has a lien, it will be good, but otherwise he can have no preference. The Court adhered to this judgment of Lord Hermand: 'That though by subscription of the policy the underwriter becomes creditor to the broker for his premium, yet the broker does not become his creditor for any loss, averages, or returns that may become due, so that there is no *concursum debiti et crediti* entitling the broker to retain and apply the premium to a second insurance.'

³ *Maanss v Henderson*, 1 East 335. Maanss, a Prussian, consigned a ship to Jennings, with orders to insure. Jennings in consequence employed his broker to effect the insurance in Jennings' name, but told him that the interest was *neutral*. The broker received the amount of the loss, and claimed a lien on it for his general balance against Jennings. A verdict was given for the Prussian, under the direction of Lord Kenyon, on the ground that there was sufficient indication that Jennings was only an agent; and the Court refused a new trial. [See this principle applied to a case where a proprietor insured (per agreement) for behoof of creditors to whom he had granted an *ex facie* absolute conveyance. *Ladbroke v Lee*, 4 De G. and Sm. 106. So, where the agent insures in his own name, but the broker knows that the insurance is for behoof of a principal who is his debtor, the broker may retain against the principal for a general balance. *Losh, Wilson, & Bell v Douglas*, 1857, 20 D. 58.]

own, coming under the general lien. This was first held in the case of an agent acting under a *del credere* commission.¹ It is stated as very doubtful, where there is no *del credere* commission, on the analogy of several cases respecting a factor's power to pledge.² But this analogy seems not to be applicable; and although in one case Lord Ellenborough appears to have denied the benefit of the general lien to a sub-agent, who did not know of his employer being an agent,³ he afterwards admitted the lien to the full extent.⁴

5. The underwriter has a claim for the premiums against the broker, who generally receives, as already mentioned, a commission in the nature of *del credere* to guarantee these premiums; but he has also a claim against the insured, where the premiums have not been paid to the broker, and the broker has failed.⁵ That the broker's lien, notwithstanding his bankruptcy, is effectual to cover his general balance, is unquestionable. But [123] should both he and the insured be bankrupt, it may happen indirectly that the lien of the broker may be available to secure to the underwriter a preference for the whole premiums due to him. Suppose that a broker has effected many policies for a merchant, and that one underwriter has due to him premiums to the amount of £500, for which he has both the insured and the broker bound to him, and both are bankrupt; the broker has a lien on all the policies on his hand for his general balance, and for relief of premiums for which he stands engaged: the underwriter ranks on the broker's estate for £500 of premiums, and also on the estate of the insured; and drawing from each 5s. in the pound, there remains unpaid of his premiums £250: is the broker obliged to give up the policies to the estate of the insured, on being repaid the dividend of 5s. on £500? It appears that, as the broker has his lien for protection against every form of the demand, and as he may be *personally* liable to a demand, and exposed to diligence for the balance left unpaid by the dividends from his sequestrated estate, he will be entitled to hold the policies till relieved, which will have the effect of conferring indirectly a preference on the underwriter.

5. LIEN TO TRUSTEES.

Without any custom of trade, but resting on the general principle of a credit presumed to be placed on the right established in his person, a trustee has a lien on the trust-fund for advances or engagements subsequent to the constitution of the trust. Thus, a trust-estate being vested absolutely, but under a backbond of trust, the trustee was, in competition with an adjudger, allowed to retain for all sums advanced by him for the truster, though not liquid, and so not capable of compensation; for the trustee being feudally vested, could

¹ *George v Claggett*, 9 Term. Rep. 357.

² See Mr. Campbell's note on *Snook & Davidson's case*, 2 Camp. 220.

³ *Lanyon v Blanchard*, in 1811, 2 Camp. 597. It may be observed that there was here at least an indication of agency. See *Westwood v Bell*, 4 Camp. 349, 354.

⁴ *Mann v Forrester*, 1814, 4 Camp. 60. Mann, at Rostock, ordered a cargo from White & Lubbern of London. They, in doing so, employed Forrester, their broker, to effect an insurance on it, without mentioning to whom it belonged. He effected the policy, and debited White & Lubbern with the premiums. A loss happened, and the policy was allowed to remain in Forrester's hand; and before having notice of Mann's interest, he received £650 from the underwriters, and £200 afterwards. He was held entitled to apply the whole to the debt due by White & Lubbern. Sittings before Lord Ellenborough at Guildhall.

Westwood v Bell, 1815, 4 Camp. 349. Westwood of Leeds ordered Hebden of that place to insure on two ships. Hebden ordered his London brokers, Robinson & Son, to effect the

insurance; and they wrote they had done it in their own names, which Hebden communicated to Westwood. But Robinson & Son had directed Clarkson, a broker, to effect the policies; and he again applied to Bell to insure for him, concealing that he was an agent, and assuming the character of principal. Bell insured in his own name as agent, and debited Clarkson with the premiums, retaining the policies. Westwood tendered to Bell £77, 3s. 9d., the amount of the premiums on this insurance; but Bell claimed a general lien for a balance due by Clarkson of £215. The action was trover for the policy. Lord Chief Justice Gibbs held, that Clarkson having applied as principal, and Bell having no reason to disbelieve him, Bell was entitled to his lien. He distinguished between this case, where in its very creation the policy was burdened with the lien, and the English doctrine denying to a factor the power to pledge a policy actually existing and in his hands. Plaintiff was nonsuited.

⁵ *Smith v Richmond & Freebairn's Tr.*, 14 May 1812, Fac. Coll.

not be divested without reimbursement; and the adjudger could take nothing by his diligence but the reversionary right of calling the trustee to account.¹

This doctrine is only a part of the more comprehensive doctrine already alluded to in treating of securities by absolute disposition.²

6. CAUTIONER'S LIEN.

Where a person indebted to another engages as his cautioner or guarantee, it is presumed that he has done so on the faith of the security which the retention of the money due by him will afford; and on this principle a lien is given to him on his debt for relief.³ The same principle may give retention of goods pledged, but not of goods in the cautioner's hand for manufacture, etc. But although the principle now pointed out seems to have been the original ground of retention on the part of the cautioner, his right has come gradually to be extended to a general lien or retention over all debts due to the person for whom the cautioner has bound himself, although posterior to the engagement as cautioner.⁴

[124] There is a remarkable distinction between the English and Scottish laws, which must be attended to in all questions of this kind, either where the case involves a *conflictus legum*, or where the analogy of English cases is resorted to in illustration of a Scottish argument. In England, so far as contingent debts do not rank upon a bankrupt estate, there can be no set-off or lien on account of debts which have not fallen due prior to the commission of bankruptcy, or at least which are not payable, at all events, on a day certain. In Scotland a creditor is entitled to proceed with diligence for attaching funds to secure to himself an eventual debt, or relief of a demand that may eventually be made upon him; and under a sequestration, he is entitled to have a dividend set apart for him. If the case, then, be supposed of a bankruptcy, where the bankrupt stands guarantee for a creditor, the bankrupt estate will, according to the Scottish law, be entitled to retention against such creditor claiming on the fund, till relieved from the guarantee. In England, the person giving the guarantee will not be so entitled.

The most common form of guarantee engagement in trade is by cross paper, as it is called; but this is a subject which will be discussed afterwards.

SECTION II.

OF COMPENSATION, OR SET-OFF, AND OF THE BALANCING OF ACCOUNTS IN BANKRUPTCY.

Where two parties are mutually indebted, it is expedient, in order to prevent the multiplication of lawsuits, that the one debt should be held as payment of the other, both the debts being presently due, and both liquid. It is not only expedient, but required by the plainest principles of equity, that where one of the parties becomes unable to pay his debt to the other, he should not be entitled to require payment from that other of an equal debt that is due to him. Thus, the settlement of mutual debts may be referred to two distinct principles: the one is virtual payment and extinction; the other, retention till counter performance.⁵ The former proceeds on a principle entirely different from the doctrine of retention already

¹ *E. of Bedford v L. Balmerino*, 1662, M. 9135. The same doctrine was held in a competition among the Crs. of Dr. Dougall, 1794. Bell, Fol. Ca. 41. [*Brodie v Wilson*, 1837, 15 S. 1195; *Henderson v Norrie*, 1866, 4 Macph. 691.]

² See above, vol. i. p. 714.

³ *Strachan v Town of Aberdeen*, 1709, M. 2570. Here it was decided, 1. That one being a debtor in a bond to another, and having afterwards engaged as a cautioner for him, he had right of retention till relieved of his cautionry;

2. That this right was available to his creditors as well as to himself; and, 3. That it was good against an onerous assignee to the bond, as liable to all personal exceptions established in writing against the cedent.

⁴ See the case of *Murray's Crs. v Chalmers*, 1744, M. 2626; and *Brough's Crs. v Jollie*, 1793, M. 2585.

⁵ See *Paterson's Crs.*, 1742, M. 2646, Elch. Compens. 9; Elch. Notes, p. 103.

explained; the latter is truly the application of that doctrine to the case of money obligations. The former is effectual, without any regard to the solvency or insolvency of the parties; the latter operates only in bankruptcy. The former is known by the name of COMPENSATION (in England SET-OFF), and is amply discussed by our authors; the latter, sometimes vaguely called Retention, but which may be distinguished as the BALANCING OF ACCOUNTS IN BANKRUPTCY, has hitherto been little attended to, and is mentioned very briefly in the books.

As the latter and more important branch of the doctrine is not merely an arrangement of convenience, but an equitable adjustment of mutual debts and credits, to avoid gross and manifest injustice, it ought to form a part of the system of jurisprudence in every country where law is entitled to the name of a science; at least, from the period when insolvency becomes so frequent as to rise into importance as an object of law.¹ But there has perhaps in every country been a time when the judicial arrangements were so imperfect as to [125] deny the benefit of Compensation, or Set-off, properly so called, as a defence against a demand of debt.

It was comparatively late in the progress of English jurisprudence that Set-off came to be admitted in ordinary cases. In bankruptcy, and on grounds of equity prior to any statute, the Court of Chancery gradually allowed mutual debts to be set off against each other, and the balance to be struck as the debt between the parties. It was held to be against equity, that the assignees of a bankrupt should be entitled to demand payment from any of the debtors of the bankrupt, while at the same time the bankrupt stood indebted to them, without allowing the counter demand to be deducted; and this equitable construction was given to the statute of Elizabeth, relative to bankrupts, whereby creditors are declared entitled to a portion of the bankrupt's estate, 'rate and rate alike, according to the quantity of their debt;' the quantity of the debt being held to be the balance.² This was in the seventeenth century; and in the beginning of the eighteenth the first statute was enacted, directing the commissioners of bankruptcy, where there had been mutual credit, to strike the balance as the debt with the bankrupt's estate.³ These statutes expired, but the enactment was renewed in a more complete form in 1732 by a permanent statute, in which mutual credits as well as mutual debts are ordered to be stated in account between the parties, and the balance to stand as the debt.⁴ It will be observed that the use of the word mutual credit is intended to comprehend a great deal more than mutual debts: it gives to this rule somewhat of the effect of the Scottish doctrine of retention, as extended to money obligations, entitling the parties to resist payment of a proper debt on the ground of a

¹ 'The provision for setting mutual debts one against another,' says Lord Mansfield, 'is highly just and reasonable at all times.' Burr. 1230.

In England, however, the influence of the common law for some time restrained the operation of this obvious equity. 'Where there were mutual debts unconnected (says again the same eminent judge), the law said they should not be set off, but each must sue. The court of equity followed the same rule, because it was the law; for had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked with this in the case of bankruptcy, and it was provided for by 4 Anne, c. 17, sec. 11, and 5 Geo. II. c. 30, sec. 28. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that Parliament interposed by 2 Geo. II. c. 22, and 8 Geo. II. c. 26.' Burr. 2221.

² The first example which I have seen of this is in 1689. Reference is by Vernon made to a determination of Lord C. J. Hale, adjudging 'that, in case of a bankruptcy, where there

were dealings on account, a man should not be charged with the account on the credit side, and be put to come in as a creditor for the debt owing to himself, but should only answer to the bankrupt's estate the balance of the account.' *Chapman v Derby*, 2 Vernon 117.

³ 4 Anne, c. 17, sec. 11, which, being a temporary statute, was renewed by 5 Geo. II. c. 30, sec. 28. Similar provision was made for the case of insolvents under the Lords' Act, by 32 Geo. II. c. 8, sec. 23.

⁴ 5 Geo. II. c. 30, sec. 28. That where it shall appear to the said commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against each other, and no more, shall be claimed or paid on either side respectively.

counter claim, though not yet proved as a debt, or, as we say, liquidated.¹ These provisions of the Legislature, following the rule of equity, applied only to the case of bankruptcy; but statutes were also passed to give the benefit of set-off in cases of mutual debts, even where no bankruptcy had taken place, as a remedy against the injustice of multiplied suits.² By a statute introduced by Sir Samuel Romilly, set-off was established notwithstanding a prior act of bankruptcy, provided the credit was given two months before the date of the commission, and without notice of insolvency or act of bankruptcy.³ By the late statute it is provided, 1. That the account may be taken down to the date of the commission; and, [126] 2. That the notice by which the party is to be affected is confined to notice of an act of bankruptcy.⁴

The progress of the law in Scotland has been different. In the early jurisprudence of a country of narrow commerce, bankruptcy was not frequent nor important; and the doctrines of set-off were first settled, as in the Roman law, without any particular regard to insolvency. From the prevalence of the Roman jurisprudence in Scotland, one should not expect to find a period in her law where the doctrine of compensation was unknown; and yet in the Collection ascribed to Balfour there is recorded a case in which it seems to have been denied.⁵ Were it of any consequence to discuss this matter, it might be observed, that the original record of the case to which these authors refer bears no evidence of any such plea or judgment.⁶ In 1592 a statute was passed in the Scottish Parliament, by which,

¹ See Lord Hardwicke in *ex parte Deize*, 1 Atk. 228; Lord Mansfield in *French v Fenn*, Cook 634; Lord Kenyon in *Atkinson v Elliott*, 7 T. R. 378; Lord Ellenborough in *Cumming v Forrester*, 1 M. and S. 499.

² 2 Geo. II. c. 22, sec. 13, enacts generally, 'That where there are mutual debts between the parties, one debt may be set against the other:' made perpetual by 8 Geo. II. c. 24, sec. 4, and further explained by sec. 5.

³ By 46 Geo. III. c. 135, in all cases of mutual debt and credit, there may be set-off, notwithstanding a prior act of bankruptcy before the credit or debt, providing the credit was given to the bankrupt two calendar months before the commission of bankruptcy, and without notice of prior bankruptcy or of insolvency.

⁴ 6 Geo. IV. c. 16, sec. 50. [See 12 and 13 Vict. c. 106, sec. 50.]

⁵ *The Queen v the Bishop of Aberdeen*, 1543. 'Compensation beand objectit be the defendar by way of exceptioun in any action or cause, sould not be admittit, albeit it be *de liquido in liquidum*; because be the law of this realm, na exceptioun of compensatioun sould be admittit, bot actioun sould be reservèd to the proponar thair of to persew for the debt auchtand to him, as accordis of the law.' Balfour 349.

In Sinclair's MS. the case is also stated thus: 'The Lords decerned the B. of Aberdeen to answer before them in a cause movit upon an obligation of his receipt of a certain sum of money borrowed be him, at the king, queen, and laird of —'s instance, as his donator to the said debt, because that of the practiques of Scotland, as the Lords alleged, *et clerici in omnibus civilibus actionibus pro delictis quibuscunque regis debent coram Dominis Concilii reddere*. And attour in the said cause the Lords reducit and decernit, *exceptionem compensationis oppositam ex parte Episc. Abredon. de alia summa sibi per regem debita et quoad efferebatur liquide non admittend.*; because of the practiques the exception had now na place, and was oft times proponed before them in uther causes, and not admittit: and swa in *causa compensationis liquentia coram Dominis Concilii in hoc regno locum non habent.*' P. 50. M. 2545.

⁶ Mr. Thomson, to whom Scotland is so much indebted for the restoration of her records, has ordered the following extract to be furnished to me:—

'Quinto Maij anno R.C. xliij.

'Anent ye summondis rasis at ye instance of our souerane lady James erle of arrane hir tutour gider & gouvernour & James Dowglace of Drumlanrig hir grace donatour & assignay In & to ye sowme of five hundreth pundis Aganis ane lent be *vmqle* our souerane lord *quehlm* god asselze to the said Reuerand fader in god William bischop of Aberdene To heir him be decernit be decrete of ye lordis of counsale to refund content and pay to ye said James Dowglace as assignay & donatour forsaid ye said sowme of v^{eli} borrowit be him fra our said *vmqle* souerane lord as said is lik as at mair lenth Is contenit in ye said summondis, Master Henry Lauder compearand for our said souerane lady & hir gouvernouris Interes The said James Dowglace being personally present The said Reuerand fader compeirand be maister Thomas m^ccalzeane his procuratour Allegit yat ye said Reuerand fader had maid contentatioun & payment of all ye sowmes of money contenit in ye obligatioun maid be ye said Reuerand fader to our said *umqle* souerane lord sen ye dait of ye said obligatioun and before ye moving of this pley to ye thesaurer clerk In ye kingis grace name and of his special command and offerit him to preve ye samin sufficientlie Therfor ye lordis of counsale assignis to the said Maister Thomas procuratour forsaid ye xxviiij day of Maij instant with continuatioun of dais for proving thereof And ordanis him to haue lettres to summond sic witnesses and probatiouns & to produce sic writtis rychtis resonis & documentis as he has or will vse for preving of ye said allegeance agane ye said day And in ye mene tyme continuis ye said mater In ye samin form force and effect as It now Is but preiudice of partij And ye partijs & their prors are warnit heirof *apud acta*.

'Maister Thomas m^ccalzeane allegit that the Lordis war na competent Jugis In the actioun movit be our souerane lady hir grace gouvernour & James Dowglace of Drumlanrig anentis ane certane sowme of money lent be *vmqle* our souerane lord

in ordinary cases of mutual debt, the necessity of several remedies was superseded, and [127] the mutual debt allowed to be set against the pursuer's demand by way of exception or defence.¹ This statute is in no degree exclusive of the operation of equity in cases naturally falling under its rules; and in Scotland, the insolvency of a party has always been admitted as a ground for administering an equitable remedy unknown to the ordinary course of law. Thus, although a creditor is entitled to diligence in execution only when the debt is actually due, if his debtor be *vergens ad inopiam* he may have recourse to the equitable remedy of inhibition, or adjudication in security, to avoid the injustice of losing his remedy against the heritable estate; and to arrestment in security, to prevent the transference of the moveables to his prejudice. The same principle serves as an equitable ground for extending a remedy in the shape of retention to mutual debts and credit, which would not fall under the strict or ordinary rule of compensation. It is not, indeed, laid down in a statute as in England, that the share of a creditor in the bankrupt estate of his debtor shall be rate for rate, according to the quantity of his debt; or that, in mutual debt and credit, an account shall be stated, and the balance only shall be the debt. But the same effect is produced by retention in the common law of Scotland; and in estimating the debt accounts are stated between the parties, and the balance set out as the debt against the estate.

In the further prosecution of this subject, it might perhaps be more correct to divide the discussion into two parts; considering under the first the pure doctrines of compensation; and under the second, the extended doctrine of retention, or the extension of the rule of compensation to all cases of mutual debts and credits in bankruptcy. But it is, on the whole, better to explain the matter without running distinctions too curiously; marking, at the same time, distinctly the line of discrimination in each particular case. It may not, however, be improper, in order to clear the several rules and distinctions of the doctrine, to consider under two distinct divisions, 1. The debts and credits which may be set off; and, 2. The parties between whom compensation may be pleaded.

quhom god assoilzie to ane Reuerend fader in god William bischope of Aberdene Aganis ye said Reuerend fader because he is ane sperituale man and aucht to be callit before his Juge competent, The Lordis be sentence interlooutour decernis thame competent Jugis in ye said mater vpoun quhilk ye said James Dowglace askit instrumentis.

'Ultimo Maij.

'Sederunt domini sessionis ut in die precedentj.

'Anent ye Summondis rasis at ye instance of our Souerane lady James erle of arrane lord hamiltoun hir grace tutour & gouernour of this realme And James Dowglace of Drumlanrig hir grace donatour In & to ye sowm of v^{li} vnderwritten Aganis Ane Reuerend fader in god William bischope of abirdene to here him be decernit be decreit of ye lordis of counsale to refund content & pay to our said souerane Lady & to ye said James hir grace donatour ye forsaid soume of five hundreth pundis lent be vmq^{le} our souerane lord to ye said Reuerend fader in ye moneth of december ye zeir of god In.v^c.xlj zeiris & promittit to haif payit ye samin again to his grace at ye fest of alhalloumess nixt thereftir as his obligation subscriuit with his hand & vnder his signet proportis Lik as at mair lenth is contenit In ye said summondis Maister Henry lauder aduocat to our souerane lady for hir grace Interes & for my said lord gouernour being personaly present And the said Reuerend fader comperand be Mr thomas m^ccalzeane his procuratour The Lordis of counsale Decretis & deliueris that ye said Reuerend fader sall refund content and pay to our said souerane lady hir grace gouernour fore-

said And to the said James Dowglas ye forsaid soume of five hundreth pundis gude & vsuale money of this realme Becaus ye said Reuerend fader ye said moneth & zeir of god In.v^c.xlj zeiris forsaid borrowit from our said vmquhile souerane lord & ressaut fra his grace thesaurer ye soume of iije & lv cronis of the sone extending to v^{li} x.s. & promittit to haif pait ye samin at ye fest of alhalloumess nixt thereftir as his obligation subscriuit with his hand and vnder his signet schewin & productit before the Lordis proportit & bure and as zit hes maid na pament thereof as was clerlie vnderstand to ye saidis lordis And als becaus It was allegit be ye said maister thomas procur^r forsaid the said Reuerend fader had maid full contentatioun & payment of all soumes contenit In his obligation sen ye dait of the samin and befor ye moving of this pley to thesaurer clerk In the kingis grace name & of his grace command And ane terme being assignit to him for preving therof failzeit therin As was Inlikwise clerlie vnderstand to the saidis lordis And lettres to be direct to compell poynd & distrenzie ye said Reuerend fader for ye said soume In forme as effeiris.

Reg. of Acts and Decrees, vol. June 26, 1542—Feb. 13, 1543, fol. 325, and fol. 360.

¹ 'Our Sovereign Lord, with advice, etc. that onie debt *de liquido in liquidum*, instantly verified by writ, or oath of party, before the giving of decree, be admitted be all judges within this realm by way of exception, but not after the giving thereof in the suspension, or in reduction of the same decree.' 1592, c. 41.

SUBSECTION 1.—OF THE NATURE AND CIRCUMSTANCES OF THE DEBTS WHICH MAY BE SET OFF AGAINST EACH OTHER.

[128] Compensation is defined by Modestinus, '*Debiti et crediti contributio*,'¹ which Lord Stair justly observes is neither clear nor full. The principle on which it proceeds, as expressed by Pomponius, is, '*Quia interest nostra potius non solvere, quam solutum repetere*.'² According to the strict rules of this doctrine, several cases would be excluded, which under the bankrupt law admit of being set off in account. These cases it will be proper to distinguish as we proceed.

1. The debts in compensation must be of the same nature; as money debts, or debts reciprocally for a quantity of the same fungible indefinitely. So compensation cannot be pleaded of a money debt, or against such debt cannot be set off a claim for delivery of wine or corn; nor can a demand for the delivery of a pipe of wine be answered by setting off a money debt. But money may be set off against money, wine against wine, or corn against corn, if neither of the demands be for a specific parcel or of a specific quality.³

But when one of the parties is bankrupt, and the maxim applies, '*In loco facti imprescabilis subest damnum et interesse*,' it would seem that compensation would be pleadable by the debtor to a bankrupt estate, on the claim for a pecuniary indemnification on account of failure to deliver goods.⁴

2. In compensation the debts must both be due at the same time. One who is due money presently payable, cannot defend himself against the demand by setting off money due to him six months after, or the payment of which depends on a condition.⁵

But this is a rule which holds strictly only while the parties are solvent. If one of them become bankrupt, the other may defend himself against a present demand, by setting off a debt that is future or contingent, although the term of payment be after the bankruptcy. He cannot so plead, however, on a debt *arising* after bankruptcy.⁶

3. In compensation the debts must both be liquid, or capable of immediate liquidation.⁷ A debt is deemed liquid when it is actually due and the amount ascertained, '*Cum certum an et quantum debeatur*.' But if the debt itself be contested, and the creditor has not his proof ready; or if the amount be disputed, and it depend on a long discussion what is to be adjudged due; the debtor will not be allowed to avoid payment of what is liquid and due till that litigation be terminated.

This, however, does not hold as to the balancing of accounts on bankruptcy. If one party have failed, and a demand be made on the other, he will not be obliged to pay the liquid debt, and come in as creditor only for a dividend. The immediate necessity for payment of the liquid debt is taken away by the bankruptcy; and there is no impediment to the equity which holds the one debt an extinction of the other.⁸

[129] 4. Money deposited must be restored in specie, and cannot be retained on the plea of compensation. This applies both to the proper and to the improper deposit. In the

¹ Dig. lib. 16, tit. 2, De Compensatione, l. 1.

² De Comp. *ut supra*.

³ [This is one of the cases where the distinction between a penalty and liquidated damages becomes important. The former cannot be set off against the contract price of the work; the latter can. *Fletcher v Dyche*, 2 T. R. 32; *Duckworth v Alison*, 1 M. and W. 412; *Legge v Harlock*, 12 Q. B. 1015. *Sed quære*, whether this is compensation, or merely a deduction from the price?]

⁴ The effect of bankruptcy in such cases is in some degree illustrated in *Barclay v Clerk*, 1683, M. 2641; *M'Laren v Bisset*, 1736, M. 2646. Yet these are scarcely to be quoted as authorities on the point.

⁵ Ersk. iii. 4. 15. [*Richards v James*, 2 Exch. 471.]

⁶ *Mill v Paul*, 1825, F. C., 4 S. 219, N. E. 221. Here a debt due by the bankrupt before his failure was pleaded in compensation of expenses awarded to the trustee of the creditors subsequent to the bankruptcy. This was rejected.

⁷ Ersk. iii. 4. 16. *Lillie v M'Kessock*, 24 Nov. 1818, F. C.; *Edwards v Adam*, 1821, 1 S. 27; *M'Niel v Falconer*, 1824, 3 S. 204, N. E. 143; *Monro v Monro*, 1823, 2 S. 300, N. E. 263. [*Hamilton v Wright*, 1839, 2 D. 86; *Cullen v Dykes*, 1852, 14 D. 370; *Dickson v Porteous*, 1852, 15 D. 1; *M'Intyre v Macdonald*, 1854, 16 D. 485; *Drew v Drew's Trs.*, 1855, 17 D. 559.]

⁸ This is a reasonable extension of that rule of equity by which a short delay is given in ordinary cases for liquidation. Ersk. iii. 4. 16. [*Logan v Stephen*, 1850, 13 D. 262.]

proper deposit, where money marked and separated is placed with a creditor, compensation is excluded, both because it is a deposit, and because there is no compensation between a general debt and a demand for a specific subject. In the improper deposit, it is on the former ground alone that compensation is denied, viz. that the law of deposit excludes compensation; but this is quite sufficient as an answer to compensation, when pleaded by one with whom a sum has been lodged as a provision for a particular payment, as for retiring a bill,¹ etc. On a similar principle, money paid to an agent for behoof of his constituent is not liable to a plea of compensation.²

But where the mandate or trust to apply the money is extinguished by the death or bankruptcy of the mandant, it would seem that, against the representatives or creditors of the owner of the money, compensation may be pleaded on a debt due to the mandatory.³

5. A debt which is extinguished by the negative prescription cannot be pleaded in compensation against a debt which is not prescribed; and this even where the concurrence has arisen before prescription has run.⁴ The same holds even with respect to the short prescriptions.⁵ But where the debtor is alive, the prescribed debt seems not to be in a worse condition than an unliquidated debt; for both may instantly be liquidated by a reference to the oath of the debtor. In England, however, a debt barred by the statute of limitations cannot be set off.⁶

6. The debt and credit between the parties must mutually exist before bankruptcy.⁷ In England, this is provided for by statute;⁸ in Scotland, on the ground of equity. 1. A debt which is contracted after notice of bankruptcy cannot be set off against a debt due to the bankrupt estate. So a note endorsed to the claimant after the bankruptcy cannot be set off. In such cases, however, great difficulty may arise as to the evidence respecting the time when the debt arose. Thus, if a banker should fail, and the trustee pursuing for debts should be met by the notes of the banker payable to bearer, the debtor will be entitled to set off those notes only if he has got them before bankruptcy, not if he should have bought them in afterwards at one shilling perhaps per hundred.⁹ 2. If the claimant be a [130] party before bankruptcy to a bill or other obligation, which is not due till after the bankruptcy of the person who is the proper debtor, he may plead compensation, or insist for an account after bankruptcy; and this whether the obligation be absolute or contingent. In England, this is held with some limitation. Thus, one who had endorsed the bankrupt's note, and afterwards retired it, was not allowed an account, he having retired the note

¹ *Stewart v Bisset*, 1770, M. App. Compens. 2; *Exra.-Crs. of Steuart v Steuart*, 1709, M. 2629. [*Walshe v Provan*, 8 Exch. 848, 22 L. J. Exch. 355.]

² See *Campbell v Little*, 1823, 2 S. 484, N. E. 429. [In general terms, if the defender is debtor and creditor in different rights, he cannot plead compensation. See *Gale v Luttrell*, 1 Y. and J. 180; *Harvey v Wood*, 5 Madd. 459; *Pedder v Mayor of Preston*, 11 C. B. N. S. 535, 31 L. J. C. P. 291; *Stammers v Elliot*, 37 L. J. Ch. 353. As to joint debts, see *Vulliamy v Noble*, 3 Mer. 618; *ex parte Ross*, Buck. 125; *Owen v Wilkinson*, 5 C. B. N. S. 526; *Boswell v Miller*, 1846, 8 D. 430.]

³ *Murray's Crs. v Chalmers*, 1744, M. 2626, where money was placed with Chalmers, as an agent, to pay a debt of his principal's, Mr. Murray. Murray died insolvent before the money was paid. There was nothing equivalent to assignment or *jus quæsitum* in the creditor to whom payment was intended. Chalmers was held a common debtor to the estate of Mr. Murray. But see *Stewart v Bisset*, above, note 1.

⁴ *Carmichael v Carmichael*, 1719, M. 2677.

⁵ *Clark v Buchanan*, 1773, M. 2664; *Galloway v Galloway*, 1799, M. 11122.

⁶ *Buller's N. P.* 180; *Cranch v Kirkman*, Peake 121; *Montagu's B. L.* vol. i. p. 254.

⁷ *Maxwell v M'Culloch's Crs.*, 1739; *Elchies*, Compens. No. 6, Notes 101; *Cauvin v Robertson*, 1783, M. 2581. [*Mill v Paul*, *supra*; *Hewitt v Elliot*, 1775, 2 Pat. 381.]

⁸ See above, p. 119, note 4. In *Marsh v Chambers*, 2 Strange 1234, the question was, Whether a note endorsed by the holder to a person indebted to the bankrupt, could be set off by the endorsee against a demand for the debt due by him to the estate? This was refused, the words of the Act being mutual debts *before* bankruptcy; and the defendant having no right to stand in a better situation than the endorser, who could only come in for a dividend. Besides, it would be of ill consequence to trade, if debtors to the bankrupt estate should be allowed to buy up debts in order to set them off in this manner.

⁹ In *Dickson v Evans*, 6 T. R. 57, the debtor holding the bankrupt's cash-notes payable to bearer, was not entitled to have an account unless he could prove the notes to have come to his hand before bankruptcy.

after bankruptcy.¹ In Scotland, not only future and unconditional, but also contingent debts, are admitted in bankruptcy; *supra*, p. 122. 3. Bankruptcy, by sequestration in Scotland, or commission of bankruptcy in England, infers notice, and *mala fides* of course, in the subsequent acquisition of debts against the estate. But there may be some difficulty as to bankruptcy under the Act 1696, c. 5. The relation back, according to the law of England, is effectual to bar the set-off or account. But in Scotland, one who is indebted to another who is bankrupt under the Act 1696, and who becomes *bona fide* his creditor, would seem to be entitled to plead compensation. The only principle on which bankruptcy can operate is, that as a conveyance of the right to demand the debt bars compensation by preventing concurrence, the conveyance in sequestration, or an effectual trust-conveyance for the benefit of creditors, divests the bankrupt.² If, however, a debt is raised between the bankrupt and his debtor, in order to confer on the latter the benefit of compensation, it would seem to be challengeable on 1696, c. 5.³ 4. Wherever the debt is acquired *in mala fide*, in order to gain any undue advantage, it will not ground compensation, which is an equitable right.⁴ 5. It has been held, that money paid to a banker after notice of bankruptcy must be repaid to the estate, and that the banker cannot set off sums paid, for which that money was meant as a provision; as where money is placed with a banker to meet a bill, which he accordingly pays when due.⁵

7. Although compensation does not operate *ipso jure*,⁶ so as to stop prescription, it operates *retro* when pleaded and sustained, so as to extinguish interest from the time of concurrence. If the extinction were *ipso jure*, interest must be extinguished on a debt bearing interest, although the opposite debt should not bear interest;⁷ and according to Lord Stair, this takes place in the law of Scotland. But the ground of this opinion (the *ipso jure* operation of compensation) has been long exploded;⁸ and it may admit of doubt on the principle of law, whether interest would be extinguished where no interest was due on the opposite debt.

8. Compensation may be pleaded by any one having interest, although the principal party may be unwilling, as by a cautioner, or by a competing creditor, having interest, to enlarge the fund of competition by extinction of the debt of one of the claimants.⁹

SUBSECTION II.—OF THE PARTIES BETWEEN WHOM COMPENSATION MAY BE PLEADED.

[131] Compensation can be pleaded only where the demands are mutual; and this whether the plea be strictly compensation, or the more extended remedy of the balancing of claims in bankruptcy. To constitute this mutuality of debt and credit, the sums reciprocally due must be owing to the parties in their own right respectively.¹⁰ The detail of this rule will best be explained by taking the several classes of cases that may occur.

I. COMPENSATION IN THE CASE OF TRUSTEES OR ADMINISTRATORS.—As the parties must stand in the relation of debtor and creditor to each other in their own right, there is no compensation between a debt due by a person in his own right, and one due to him as a

¹ *Ex parte Hale*, 3 Ves. jun. 304; *Oughterlony v Easterby*, 4 Taunt. 892; *ex parte Burton*, 1 Rose 320; as to which case Mr. Montagu observes, that it clearly went on the want of set-off. Montagu's B. L. 267, note a.

² See Ersk. iii. 4. 14.

³ On this ground a decision under the Act 1696 seems questionable. *Hepburn v Bell*, 11 July 1816, n. r. See below, Commentary on the Act 1696.

⁴ Ersk. iii. 4. 18. See, in England, 46 Geo. III. and the late Bankrupt Act of 6 Geo. IV. c. 16. Above, pp. 119, 120.

⁵ *Tamplin v Diggins*, 2 Camp. 312; *Vernon v Hankey*, 2 T. R. 113.

⁶ Stair i. 18. 6; *Baillie v M'Intosh*, 1753, M. 2680.

⁷ So, accordingly, it was held in the civil law, where compensation proceeded *ipso jure*. Dig. lib. 16, tit. 2, De Comp. l. 11. See also Pothier, Des Obligations 636, vol. i. p. 222.

⁸ *M'Culloch's Cra. v Maxwell*, 1738, M. 2550; Elchies, Compens. No. 6, Notes 101-2; Ersk. iii. 5. 12. It has passed into a common maxim in the courts, that compensation *ipso jure* has no place in the law of Scotland.

⁹ See *Middleton v E. of Strathmore*, 1742, M. 2573. [See Princ. 573, and cases there cited. Lord Kilkerran in *Middleton* doubts the correctness of this practice.]

¹⁰ Ersk. iii. 4. 13, with Ivory's note.

trustee, tutor, administrator, or factor.¹ On the same principle, there will be no compensation between the debt due by an executor, and a debt due to the estate, unless the executor has the sole interest in the estate, or unless in so far as equity may interpose to the extent of any residuary interest in the executor.²

II. COMPENSATION IN THE CASE OF PRINCIPAL AND AGENT.—The class of cases in which the greatest difficulty occurs in applying this rule, is that of debts between principals and agents; where the factor deals in his own name, or where he holds a *del credere* commission.

1. Where the factor deals in his own name, sinking that of the principal, the debt so arising may be compensated by one due by the agent. This is law on the Continent.³ It is also the doctrine of the English law, as we have already had occasion to state.⁴ In Scotland there have been some late decisions fixing the doctrine in the same way.⁵

2. Where the factor deals professedly as factor, compensation is, on the one hand, [132] pleadable between the principal and the person with whom the bargain is made; and on the other, there will be no compensation between such person and the factor.⁶

¹ Ersk. iii. 5. 18; *Campbell v Campbell*, 1781; *Morrison v Hunter*, 1822, 2 S. 68, N. E. 62. Here the trustee was partner of a company, and entrusted by the creditor to wind up and collect debts.

See, in England, *Fair v M'Iver*, 16 East 136; *Montagu's B. L.* vol. i. p. 261.

² [*Cochrane v Green*, 9 C. B. N. S. 448, 30 L. J. C. P. 97; *Macfarlane v Norris*, 31 L. J. Q. B. 245, 2 B. and S. 783. In general, where the trust-estate is vested in a single person in good credit, and the beneficiary does not object, compensation seems to be pleadable in equity either by or against the fiduciary; the debtor to the trust, however, being entitled to see that the trust-estate gets the benefit of the virtual payment. But where there are a plurality of trustees who are creditors of, and one of their number is debtor to, the same person, the individual trustee cannot compensate, unless by getting an assignation for value from the trustees of their claim.]

³ One of the most eminent commentators on the mercantile law of the Continent says: 'Cum inter mercatores bona fide, ac de bono et æquo, omissis legum rigoribus, semper procedendum sit, nimium quippe confunderetur bonus mercatorum ordo, et continuò perverti deberent eorum libri vel scripturæ cum immutatione et revocationibus partitarum, vulgo *stornare le partite*, et totum commercium ac mundus perturbaretur, et sub incertitudine staret, si jus datum esset mercatoribus post solidata bona fide inter eos negotia, et computa in medium adducere, quod merces vel remissæ non spectabant jure proprietatis ad mercatores, per quos fuerint respectivé venditæ, exactæ, vel compensatæ, sed ad alios suos correspondentes mandantes.'—'Eo magis,' he continues, 'quia mercatores non solent tam propria quam aliena negotia propalare, sed ea secretò suoque sub proprio nomine agere, nusquam exprimendo nomen committentis vel sui correspondens, cui fortè quoque expedit ob motiva prudentialia sub alieno nomine sua negotia peragere, ut ponderat D. Ansald. Dis. 30, No. 32, de consuetudine mercatores solent aliena negotia proprio nomine expedire, quinimò nemini licet rimari et penetrare secreta et arcana negotiantium. Quamobrem, si non possent hujusmodi compensationes facere, adstringerentur, contra hujusmodi laudabilem stylum, tam negotia propria quam aliorum in perniciem modo suam modo alienam revelare.' After this manner he prosecutes the reasoning in support of the doc-

trine laid down in the text. Casaregis, *Discursus de Commercio*, vol. i. p. 234.

⁴ See vol. i. p. 285. [And in such a case, or where the factor or broker sells to cover advances, the purchaser cannot set off a debt due to him by the principal. *Atkins v Amber*, 2 Ersk. 493. Where the purchaser has bought through an agent, who knows (though the purchaser himself does not) that the seller is a factor, the purchaser is held to be affected with the knowledge of his agent. *Dresser v Norwood*, 17 C. B. N. S. 466, 34 L. J. C. P. 48 (in Ex. Cham.). See *Ferrand v Bischoffsheim*, 27 L. J. C. P. 302; *Alexander v Monteith*, 1846, 8 D. 810; *Miller & Paterson v M'Nair*, 1852, 14 D. 955.]

⁵ *Baxter v Bell & Maxwell*, 1800, M. App. Comp. 4. Hutcheson, factor of Baxter, sold, in *his own name*, to Bell & Maxwell a quantity of candlewicks, and died insolvent. Against the claim of the principal for the price, Bell & Maxwell pleaded compensation on a debt due to them by Hutcheson. The Court sustained compensation.

Hitchiner & Co. v Stewart & Ninian, 1803, M. 14206. Robertson was agent for Hitchiner & Co., and sold, in *his own name*, gunpowder to Stewart & Ninian. Against an action for the price by Hitchiner & Co., Stewart & Ninian pleaded that they were liable only to Robertson, and the Court sustained these defences.

Johnson v Scott & Son, 14 Nov. 1818, Fac. Coll. Here the Court unanimously, and on general principles, held a consignee entitled to compensate the debt due to the consignor, who, though a factor, made the consignment in his own name.

Gall v Murdoch, 1821, 1 S. 75. See vol. i. p. 518.

There are, however, two cases of an opposite tendency to the above. In *Alison v Fairholms*, 1765, M. 15132, a banker with whom a factor lodged money in his own name was not found entitled to set off against it a debt due by the factor on bond. But the circumstances very strongly indicated a knowledge and privity on the part of the banker that this was not the factor's own money. In *Belches v Johnston*, 1770, M. App. Compens. 1, a factor sold a cask of indigo without notice that he was only a factor; and on the price being demanded by the creditors of the principal, he set off a debt due to him by the factor, which was negatived.

⁶ This doctrine is delivered as the mercantile law of the Continent by Casaregis, *Disc.* 75, sec. 29, and the authors whom he quotes. [*Fish v Kempton*, 76 B. 687, 18 L. J. C. P.

3. Where the factor holds a *del credere* commission, he becomes responsible for the debt to his principal, whether he shall be able to recover it from the debtor or not. And in this case it is settled, in England, that he will be allowed to set off the debt which he has thus undertaken to see paid, against a debt due by himself to the person whose solvency he has guaranteed; upon this ground, that although the principal has collateral recourse against the purchaser, the factor is liable in the first instance to his principal, and has a direct claim against the purchaser.¹ But the reverse would not hold: the purchaser of goods from a factor holding a *del credere* commission could not be entitled to set off a debt of the factor's against the principal claiming payment of the price, on failure of the factor, whether with or without a *del credere* commission.²

The principal selling by his factor may, even where the factor holds a *del credere* commission, set off the price against a debt due to the buyer. Thus, a bank having a branch in the country, under the care of an agent who holds a *del credere* commission, and guarantees his discounts, may, where a bill has been discounted by the agent, set off that bill against funds of the debtor coming into their hands, without special appropriation.³

III. COMPENSATION BETWEEN PARTIES TO INSURANCE CONTRACT.—Referring to the explanation already given⁴ of the relation of the parties to the insurance contract, it may further be stated, before proceeding to the cases of compensation that may arise out of this contract, that the pecuniary interests to which it gives birth are: 1. The premium; 2. The return premium; 3. The amount of the loss.

[133] 1. As to the premium, and the nature and effect of the receipt for it, enough has already been said. Premiums, which in a single transaction would probably be settled at once according to the words of the policy, come gradually into a course of credit and account between the parties, in which questions of compensation or set-off arise.

2. The return premiums, either on account of the contract being void, or of the risk not having begun, or of some event in which a return was stipulated, are (like the premium at the first) entered as matter of account between the respective parties and the broker. The broker takes credit in account with the underwriter for the return premium, as if he had paid it to the insured. He debits himself with it in account with the insured, as if he had received it from the underwriter.

3. Where a loss happens, the broker is entrusted to settle with the underwriters the amount, but not to receive payment of the sum. This forms a debt between the insured and underwriters upon the policy, and enters not into account between the broker and his respective employers, like the premiums and returns.

Where there is no bankruptcy, the insured cannot plead compensation against the

206; *Young v Liddell*, 1852, 14 D. 647. So held even where the purchaser did not know, and had not the means of knowing, who was the real owner of the goods. *Semenza v Brinsley*, 18 C. B. N. S. 467, 34 L. J. C. P. 161. See *Miller & Paterson v M'Nair*, 1852, 14 D. 955.]

¹ This doctrine was applied in *Grove v Dubois* to the case of a policy broker, where the underwriter having failed, his assignees brought their action against the broker for premiums due. The broker, holding a *del credere* commission, pleaded a set-off for losses under the policies. Lord Mansfield said: 'The whole turns on the nature of a commission *del credere*. Then what is it? It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to resort to him as a collateral security; but the broker is liable at all events.' J. Buller: 'I remember many actions brought at Guildhall against

brokers with commissions *del credere*, and I never heard any inquiry made in such cases whether there had been a previous demand upon the underwriter, and refusal, and I can venture to say that such is not the practice. It makes no difference at the time of making the policy whether the underwriter knew the principal or not; he trusted to the broker: the credit was given to him, and not to the other.' 1 Term. Rep. 115. See also *Bize v Dickason*, 1 Term. Rep. 286.

² [The contrary held where the agent sold under a *del credere* commission, in *George v Clagett*, 7 T. R. 359, Smith's L. Ca. ii. 113; *Rabone v Williams*, 7 T. R. 360, note. Compensation held applicable where purchaser *bona fide* believed vendor sold to pay his advances. *Warner v M'Kay*, 1 M. and W. 591.]

³ *Ferrier v British Linen Co.*, 20 Nov. 1807. See above, p. 115, note 4.

⁴ Vol. i. p. 645, and vol. ii. p. 115.

demand for payment of the premiums, on the ground of a claim for loss not yet settled, but disputed.¹

Questions of compensation, and of the balancing of accounts, may arise on the bankruptcy of either of the principal parties to the insurance contract, or on the bankruptcy of the broker.

I. BALANCING OF ACCOUNTS ON THE BROKER'S FAILURE.—The broker is truly a factor between the parties, sometimes with, sometimes without a *del credere* commission. He may hold a *del credere* commission from the underwriter to guarantee the premiums, and he may also have a *del credere* from the insured to guarantee the payment of the loss.

1. In relation to the claims of the underwriter, the following points may be observed :
 1. The underwriter may recall his mandate from the broker, or the broker's bankruptcy will be a recall of it, if the balance of their accounts be in the underwriter's favour. But this will not hold if the balance be against him. The policies are in the broker's hand, with a power to recover the premiums, in order to indemnify himself for advances. 2. Payment of the premiums by the insured to the broker will be effectual to discharge the insured from the underwriter's claim. 3. The broker may also settle accounts with the insured, to the effect of discharging the insured at the hands of the underwriter. If the broker and the insured have settled and balanced accounts, and bills have been given for the balance, or that balance has been paid or passed into a new account, it will be a sufficient discharge to the insured. 4. But it sometimes is questioned, Whether, before such actual settlement, the premiums, being entered in account between the insured and the broker, are not to be held as paid? A merchant, for example, orders an insurance, and the broker having effected it, writes to the merchant that it is done, and that he stands debited in the broker's account with the premium. This does not seem to amount to such payment as will discharge the insured from the demand of the underwriter. The accounts of brokers continue open till the periodical times of settlement fixed by the usage of the trade, and are not necessarily to be taken as settled even then, if in fact they have not been so : while unsettled, the premiums are not to be considered as paid. 5. More particularly of compensation it may be questioned, Whether it is to be held as payment, so as to entitle the insured, on the broker's bankruptcy, to defend himself against the underwriter's demand for premiums? It would appear that if, on the account between the broker and the insured, the former [134] is due a balance to the latter, the premiums included in that account must be held as paid. For compensation in such a case is not only an accidental meeting of cross demands, so as to extinguish each other, but the result of a set of counter transactions, to the setting of which against each other the discharge in the policy may be considered as an assent by the underwriter. This is *prima facie* an acknowledgment of the premiums being paid; which, although not conclusive, throws the *onus probandi* on the underwriter, to show, from the relative accounts between himself, the assured, and the broker, that the premiums are still unpaid and unextinguished.² 6. There may be more doubt, perhaps, whether such compensation be admissible on debts of another description; as where a broker carries on trade also as a merchant, and has debts due to him from the insured for goods furnished. Here the plea of compensation, in so far as it rests on the mere ground of mutual demands, seems to be bad. For the bankruptcy of the broker, who is a factor, restores the parties themselves to the state of debtor and creditor directly with each other; and unless compensation were to take effect *ipso jure*, which is not the law of Scotland, the intervening bankruptcy, by recalling the mandate, destroys the concurrence. 7. If the premiums have been paid by the broker to the underwriter, the broker becomes the proper creditor of the insured; insomuch that the insured cannot thereafter, against the broker's demand, or that of his bankrupt estate, set off debts (as for losses or returns of premium) due to the insured by the underwriter.³

¹ *Lillie v M'Kessock*, 24 Nov. 1818, Fac. Coll. [*Allan & Sons v Broadfoot*, 1830, 8 S. 612.]

² See above, vol. i. p. 648.

³ *Bertrams v Hodge*, 30 Nov. 1810, Fac. Coll. *Bertrams*

2. Between the bankrupt estate of the broker and the INSURED, other questions may arise. Thus, the broker is indebted to the insured in a balance on their insurance accounts, including unpaid premiums. The underwriter, however, on the broker's bankruptcy, demands his premiums from the insured; and there seems to be no doubt that the premiums so demanded must, when paid by the insured, be taken from his debit in the broker's account. But if the insured be also bankrupt, and the broker has a *del credere* from the underwriter, the premiums may be demanded from both estates, so as to draw a dividend from each, not exceeding on the whole the amount of the premiums. How, then, shall accounts be arranged between the broker and the insured? The broker's estate pays to the underwriter a dividend, and has a claim for relief against the insured; but that claim cannot rank on the bankrupt estate of the insured, for that would be a double ranking for the same debt. Neither can it, for the same reason, stand in account between them, to enlarge the balance in favour of the broker. But if the balance on their accounts, independently of these premiums, be against the broker's estate, cannot the trustee on that estate retain, or set off against the demand by the creditors of the insured for such balance, the dividends paid on the underwriter's demand? This might, it is thought, be done as a legitimate consequence of the security against loss held by the broker over the funds of the insured.

II. BALANCING OF ACCOUNTS ON THE UNDERWRITER'S FAILURE.—1. As between the UNDER- [135] WRITER'S CREDITORS and the BROKER, questions of set-off, or balancing of accounts, may arise respecting return premiums, or respecting the account of loss. 1. If the broker should hold a *del credere* commission from the insured, and so guarantee the solvency of the underwriter for return premiums and losses, he has an interest to resist payment of the premiums; or, in other words, on the bankruptcy of the underwriter, to set off the RETURN PREMIUMS and LOSS against the underwriter's claim for premiums. The title, however, is not sufficient to enable him to plead a set-off: he must have either special authority to settle returns and loss, or the policy must be in his name.¹ But, 2. Where the broker holds an express power to settle losses and returns of premium, he is entitled to set off RETURN PREMIUMS against the demand for premiums; otherwise the return premium is a debt by the underwriter to the insured, and cannot be so set off.² In one case in England it was held, that if the broker, being the mutual agent of the parties, be allowed to continue in that capacity, and as agent of the assured to adjust and receive returns of premiums after the event which entitles to return of premiums, he may set off the return premiums against the underwriter's demand for premiums, the underwriter not being bankrupt; the difference

were insurance brokers, who, having been applied to by Hodge for an insurance, and being unable to accomplish it, employed Messrs. Butlers, brokers in London, who effected it at Lloyds. Butlers notified that the premiums and charges were placed to Bertrams' account, and they again informed Hodge that this amount stood at his debit in their own books. In consequence of an expected war with Russia, the ships on which the insurances were done, to avoid capture, returned from the Sound into port. The underwriters gave returns of premium in some cases, in others not. The London brokers settled with the underwriters on these risks by paying the whole premiums. They charged Bertrams with the amount, who allowed it in the settlement of their account, and then brought their action against Hodge for the premiums and charges. He insisted on a deduction for return of premium, and the question was, Whether he was entitled to such deduction? The Court held that there was no compensation in this case.

¹ *Morris v Cleasby*, 1816, 4 Maule and Selw. 566. After citing the case of *Grove v Dubois*, and *Houghton v Mathews*, 3 Bos. and Pul. 489, Lord Ellenborough says: 'With all the respect which is due to Lord Mansfield and those judges, we

cannot accede to those propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law on this subject. The laxity of practice mentioned by Mr. Justice Buller in *Grove v Dubois* may have prevailed; as, in the case of a foreign buyer, the broker is most probably the agent of that buyer, and the principal is seldom inquired after. But such practice cannot alter the legal rights arising on the instrument or terms of their contract. The principal must always be debtor, and that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable.'

² Mr. Marshall has been misled in his account of *Wilson's* case, p. 293, and stated it as a case concerning *return premiums* as well as *losses*. But there was no question there as to return premiums. See the case above, vol. i. p. 647, note 1. Lord Chief Justice Gibbs and Mr. Serjeant Lens correct this statement of Marshall's in *Goldschmidt's* case, 4 Taunt. 537.

being the debt demandable by the underwriter.¹ But it was afterwards held (with this determination fully in the view of the Court), that the return premiums are a debt to the insured, which the broker is not entitled to demand without special authority.² And [136] this was afterwards confirmed both in the Common Pleas³ and in the King's Bench, where it was adjudged⁴ that the broker is not entitled, against the assignees of the underwriter,

¹ *Shee v Clarkson*, 1810, 12 East 507.

² *Minett v Forrester*, 1811, 4 Taunt. 541. Barchard was an underwriter at Lloyd's, Forrester an insurance broker. Barchard underwrote two policies at a premium of 10 guineas per cent., with a return of 5 per cent. if the ship sailed with convoy, and arrived. This was done according to the custom, with a receipt at each subscription, and in the policy, for the premiums; the premium also appearing at debit and credit, as if paid, in the several accounts opened by the broker for the underwriter, and for the insured. Forrester was not interested in the property insured, and had no *del credere* commission. There were short interests on each voyage, and a return premium arose on each. The policies remained with Forrester to adjust the claims that might arise; but no adjustment had taken place. The Court of Common Pleas distinguished this case from *Shee's*. 'In the present case,' said Sir James Mansfield, who delivered the opinion of the Court, 'we are of opinion that the broker is not entitled to set off or deduct either of these sums. The broker is agent for the assured, and also for the underwriter: he is agent for the insured first, in effecting the policy, and in everything that is to be done in consequence of it. Then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter. But the whole account with respect to the premium, after the insurance is effected, remains a clear and distinct account between the underwriter and broker, exclusive of fraud and other similar circumstances: there is an end of everything with respect to the premium, I mean, between the insurer and the insured. The insurer, with respect to the insured, is supposed to have received the premium. The broker, in fact, gives the underwriter credit for it in his books, and the underwriter debits the broker for the amount of the premium in his books; and there is a running account between them. That being so, there is no doubt that at any time after the premiums have been so received by the broker, the underwriter may call upon him for those premiums, and compel immediate payment of them, without any resource in the broker's hands to answer any returns of premium, or anything else that the insurer at a subsequent time may be bound to repay to the insured. This being the case, wherever a bankruptcy has happened, whatever might be the case of *Shee v Clarkson*, where the party himself brought the action, and where he had been constantly in the habit of allowing the broker to deduct out of the premium what was due on the adjustment to the insured; yet in this case one cannot say that the broker could be in any sense an agent for the underwriter after his bankruptcy, as the authority given by the underwriter himself ceases after his bankruptcy; and when he became a bankrupt his right to the premium was immediately communicated to his assignees. They had a right to call on the broker, and compel him to pay the premium to them, for the benefit of the bankrupt's estate; and as the broker had never done any act by

which he could be considered as a broker acting for them in any transaction, either in reference to an adjustment or otherwise, we do not see how the broker can make himself the agent of the assignees, for the purpose of detaining money to be paid by the bankrupt to the insured.' Judgment for the underwriter's assignees.

³ *Goldschmidt v Lyon*, 1812, 4 Taunt. 534.

⁴ *Parker v Smith*, 1812, 16 East 382. Parker was an underwriter, and the defendants, Smith and others, were insurance brokers at Lloyd's. Parker subscribed policies effected with him by Smith. In the early part of 1810, an account was settled and adjusted up to 31st December 1809, with a balance due Parker of £798, consisting of the preceding year's balance, and of premiums of insurance on policies in 1809, on one side, and money paid to account, and returns of premium and losses, which had been adjusted, on the other. The balance was reduced by payment to £98; and in 1810 policies were signed, of which the premiums amounted to £1178. Parker then failed, and his assignees brought their action against the brokers for these two sums, deducting certain returns of premium and short interest allowed, and settled by the bankrupt with the brokers before bankruptcy. The broker claimed further deduction of £319 for returns of premium for convoy and short interest in several situations. There was no *del credere* commission. Lord Ellenborough, delivering the judgment of the Court, considered the authority to settle as countermanded by the bankruptcy of the underwriter; 'and inasmuch as the bankrupt was not competent, after his bankruptcy, to pay or apply this fund himself in the satisfaction of these claims of the assured, it follows as a consequence that he could not authorize his broker so to do, otherwise the derivative and implied authority would be stronger and more extensive than the original and principal authority of the party himself, which cannot be. The consequence is, that the authority of the agent, the broker, was virtually countermanded and extinct by that act of bankruptcy by which the bankrupt's own original power over the subject-matter ceased and became transferred to others. In conformity, therefore, with what was decided by the Court of Common Pleas in *Minett v Forrester*, which proceeded expressly on this ground, that the authority given to the bankrupt ceased by his bankruptcy, we are of opinion that the plaintiffs, the assignees of the underwriter, are entitled to recover all the three sums demanded by this action; the same not being retained by virtue of any antecedent adjustment by the bankrupt, nor of any authority from him, express or implied, extending to payments or adjustments to be made subsequent to his bankruptcy. How far these sums could have been recovered from the brokers if the bankruptcy had not happened, it is unnecessary for us to consider or to decide upon the present occasion.'

See also *Houston v Robertson*, 1816, 2 Marsh 138. [So held also where the policies were effected under a *del credere* commission. *Houston v Bordenave*, 2 Marsh. 141.]

a bankrupt, to deduct or set off returns of premiums, *first*, where, although the premiums formed a part of an account adjusted between the broker and underwriter before his bankruptcy, the events entitling to return premiums were not known till after such adjustment; nor, *secondly*, where, although the events entitling to returns of premium happened before the bankruptcy of the underwriters, the returns were not adjusted; nor, *thirdly*, where the events entitling to returns of premiums happened since the bankruptcy, though before the commencement of the action, the brokers not having a *del credere* commission, nor being personally interested in any of the insurances. The same doctrine applies still more strongly to the case of Loss: or at least it never has, in this case, been doubted that the debt is from the underwriter to the insured himself; that the insured alone can bring action for the amount of the loss; and that they alone, therefore, can set it off against a demand for premiums.¹

[137] Where, indeed, the policies are in the name of the broker, and he has a *del credere* commission, he is held to have an interest insurable, and may therefore set off the loss.²

So it has been held also where the broker, taking the policies in his own name, has accepted bills or made advances for his principal on account of the cargo insured, and has a lien.³ It seems to be held, that, by admitting the broker's name into the policy, the underwriters consent that he should be at liberty to stand in the character and situation of principal, that in case of loss he should be entitled to act in all respects as creditor of the underwriters, and to bring action in his own name.⁴

If the broker's name be not in the policy, then the action for loss must be in the name of the insured, and there is no concurrence.⁵ And therefore, even if the broker has accounted for the losses to his principal, in consequence of a *del credere* commission, he cannot without his name in the policy set off the loss against the premiums demanded by the underwriter's assignees.⁶

It is not sufficient, however, that the policy is in the broker's name *as agent*: for the underwriter who underwrites for one in his own name, may take him as principal; but if he appear expressly as agent, the underwriter knows him not to be the principal.⁷

2. As between the UNDERWRITER'S CREDITORS and the ASSURED, the intervention of a broker does not prevent the assured from meeting the demand of the underwriter's estate

¹ This doctrine was held good in *Wilson v Creightons*, which was this: Creightons had considerable dealings with Fletcher, a policy broker, as agents for various correspondents. They paid, or were indebted to him, for premiums on insurance for those correspondents. They had credit for the losses, as they happened, and for the returns of premium; but they had no commission *del credere*. The correspondents for whom the insurance was made were solvent; but to all, except one, Creightons were in advance on account of the policies. The Court of King's Bench was clearly of opinion that credit for the premiums must be given to the broker, because the underwriters knew nothing of the principal; yet that Creightons were not entitled to set off subsequent losses due to the principals, and which they alone could sue for, against a debt due from them to the bankrupt Fletcher. *Trin. 22 Geo. III. B. R., 1 Term. Rep. 113.* See also *Marshall*, p. 293.

² So it was held in *Grove v Dubois*, 1786, 1 Term. Rep. 112, where the policies were in the broker's name, and he held a *del credere* commission. See also *Bize v Dickason*, 1786, *ib.* 285. The same held as to one part of the case in *Koster v Eason*, 1813, 2 Maule and Sel. 112.

It may be observed that doubts have been entertained as to the reasons on which the first of these cases was determined.

See those grounds stated and examined in *Montagu's B. L.* vol. ii. p. 128, note 4 B.

³ *Parker v Beasley*, 1814, 2 Maule and Selw. 423. W. & J. Bell & Co. effected two policies in the name of their firm, with Parker, an underwriter, for goods. Persons in America were proprietors of the cargoes, and the cargoes were consigned to Bell & Co. for sale, or forwarding to a market. A total loss occurred by capture, but it was never adjusted. Bills of exchange had been drawn on Bell & Co. by the owners, and they had on these bills advanced money for all the parties. Bell & Co. held no *del credere* commission, nor were they personally interested further than for their advances. The underwriter failed, and his assignees brought their action for the premiums. Bell & Co. claimed a set-off for the losses. The Court of King's Bench held, that without an interest the brokers would have stood on the policies a naked name; but that they may have an interest not only by a *del credere* commission, but also by a lien; so that they might have brought action in their own name, and so they were entitled to set off the loss. [*Davies v Wilkinson*, 4 Bing. 573.]

⁴ *Koster v Eason*, 1813, 2 Maule and Selw. 112.

⁵ *Koster v Eason*, 1813, 2 Maule and Selw. 112.

⁶ *Cumming v Forrester*, 1813, 1 Maule and Selw. 494.

⁷ *Baker v Langhorn*, 1816, 2 Marsh. 215.

for premiums, by setting off not only the returns and losses on that policy, but a debt arising from losses and returns on other policies signed for him by the underwriter.¹

III. BALANCING OF ACCOUNTS ON FAILURE OF THE ASSURED.—On the bankruptcy [138] of the assured, the claim for premiums by the underwriter may be opposed by a set-off of return premiums and losses.² How far the interest of the broker interferes with the claims of the principals, has already been explained.

SUBSECTION III.—MASTER AND SERVANT.

1. DOMESTIC SERVANT.—Between master and servant there is no room for compensation or balancing of accounts on bankruptcy, further than necessarily arises out of the nature of the servant's trust. He cannot hold, as an adverse party against his master, the money placed under his care; for in this office he is identified with his master, and holds only as his hand.³

2. CLERK.—If a merchant employ his clerk to manage his money, the clerk cannot, on his master's bankruptcy, hold the money against his creditors, and insist on setting off his wages, or debts *aliunde* due;⁴ nor can he even set off guarantees undertaken on his master's account;⁵ though he certainly may set off disbursements, which properly make matter of accounting.

3. WORKMEN.—Several statutes have been enacted for regulating the payment of the wages of workmen in manufactories;⁶ and under those Acts it has been questioned, whether a workman to whom wages are due, and who has been supplied with necessaries from a store kept by the master, is liable to compensation of the one debt against the other. It has been held that, according to the true construction of those Acts, there is no such compensation.⁷

SUBSECTION IV.—ASSIGNEES, ETC.

1. The right to compensate passes against assignees, if once vested against the cedent by a proper concurrence before assignation.⁸ But if a debt be assigned, and the assignation intimated before the counter-debt arises, the concurrence is prevented, and there is no compensation.⁹ So, a demand for expenses awarded in an action may be made by the agent preferably to his client, and no compensation will be pleadable against it on a debt due by the client: the claim is held assigned to the agent in its very creation, and so to carry notice along with it.¹⁰

¹ *Kirk, & Grieve (his cautioner), v Bennet*, 1 Dec. 1812, Fac. Coll. Kirk was an underwriter, and underwrote, by the medium of a broker, various policies for merchants in Glasgow. Upon some of those policies losses had occurred. Kirk became bankrupt, and compounded with his creditors for 7s. in the pound. Kirk demanded premiums which remained unpaid; and the insured claimed a right to retain those premiums against the amount of the losses due to them. Kirk admitted the compensation to the extent of 7s. in the pound; and the question was, Whether the insured were entitled to compensate the demand for premiums by the amount of the losses? The Court held that the insured was the proper party entitled to claim for loss, as well as the party properly indebted to the underwriters for premiums unpaid; and that the claims of the parties are to be confined to the balance appearing after such a set-off has been made.

² [In the converse case of the underwriter seeking to set off a claim for premiums against an action for losses, it would seem, according to the English authorities, that the plea of set-off is bad, because the one is a liquid and the other an

illiquid claim. *Luckie v Bushby*, 13 C. B. 864, 22 L. J. C. P. 220; *Boddington v Castelli*, in Ex. Ch., 1 El. and Bl. 879, 23 L. J. Q. B. 31. *Secus*, where the value of the subject insured is estimated, so as to constitute liquidated damage. *Irving v Manning*, 6 C. B. 391; *Dalby v India and London Life Assurance Co.*, 15 C. B. 365, 24 L. J. C. P. 2.]

³ *Pearson v Sir Robert Crichton*, 1672, M. 2625; *M. of Douglas v Sommerville*, 1678, M. 2625.

⁴ [But see *contra*, *East Anglian Railway Co. v Lythgoe*, 10 C. B. 726.]

⁵ [*Logan v Stephen*, 1850, 13 D. 262.]

⁶ 12 Geo. I. c. 34, sec. 3; 1 Geo. IV. c. 93, renewed in the statutes repealing the Combination Laws, 5 Geo. IV.

⁷ *Monteith & Co. v Blackie*, 1827, 5 S. 280, N. E. 261.

⁸ *Ersk. iii. 4. 14. Paton v Barclay*, 1627, M. 2601.

⁹ *Ersk. ut supra. Ferguson v More*, 1665, M. 2652; *Susan Barham v L. Mordaunt*, 1733; *Elchies*, Compensation, No. 2; *Pitfour's MS. voce Compensation*.

¹⁰ *M'Kenzie v Ross*, 1823, 3 S. 401, N. E. 356. [See *Livingstone v Reid*, 1833, 11 S. 878.]

2. Against creditors doing diligence, as by adjudication, or by arrestment in the hands of one indebted to their debtor, compensation is sustained on a bill endorsed to the arrestee, bearing the acceptance of the debtor to whom the arrested fund is due, if the endorsement be previous to the arrestment, otherwise not.¹ But if the arrestee be called in the forth-[139] coming, and allow decree to go out, he will be barred from afterwards pleading compensation on debts in his person before the arrestment.²

3. We have seen that against a trustee for creditors completing his right to the debt by the adjudication or conveyance in sequestration, or by a voluntary trust properly completed, a debtor to the estate is not allowed to plead compensation, unless the debt has arisen previous to the transference.³ Where a debtor grants to his tenant a right to retain his rents in extinction of his debt, a question may arise between the tenant and an assignee, legal or voluntary, whether the tenant can retain or compensate? This may turn partly on the doctrine of compensation, partly on the effect of such an assignation. So far as it depends on the doctrine of compensation, it is to be recollected that the rents form a debt on which there can properly speaking be no compensation except for arrears; for each term's rent becomes a debt only when the term is current, and cannot therefore be set off by the tenant till it is due. So far as it depends on the effect of such an assignation, the tenant can retain against third parties only while he is not interpellated.⁴ Interpellation is made by a completed conveyance, which transfers the right to the rents: so an assignation to rents duly intimated is good interpellation. Arrestment of the rents by a creditor seems to be sufficient. So is sequestration followed by the adjudication in favour of the trustee. Even sequestration according to the old law under a process of judicial sale was held interpellation.⁵

SUBSECTION V.—COMPANY AND PARTNERS.

The several questions relative to compensation and the balancing of accounts, on bankruptcy, between company and private debts, are frequently attended with great difficulties. They will best be explained in that part of the work where the doctrines of Partnership are discussed.

See, for the effect of retention and compensation against the Crown, *supra*, vol. ii. p. 55.

CHAPTER V.

OF PREFERENCES BY EXCLUSION.

[140] RIGHTS of exclusion have in themselves no character of a Real Right, but operate merely in the way of Prohibition or Exclusion against claims which otherwise would be entitled

¹ I find this case in Lord Pitfour's *ms. Commonplace Book*. Robert Murray being debtor to Robert Paterson, his (Paterson's) creditors arrest. Murray pleads compensation on a bill of Paterson's endorsed to him. The Ordinary found they were presumed endorsed previous to the arrestment; and therefore sustained compensation, unless Paterson's creditors could prove they were endorsed after arrestment. *Crs. of Paterson v Macaulay*, 1742, M. 2646. See Elchies, *Compensation*, No. 9.

² *Cunningham, Stevenson, & Co. v Wilson & Co.*, 17 Jan. 1809, *Fac. Coll.* The Lord Ordinary explained his judgment (when the case came in by petition and answers) thus: 'It were endless if we opened up decrees of forthcoming on matters happening abroad, and communicated after decree.

The decree operates a complete transfer of the debt due to the common debtor; and after that, compensation or retention in respect of a debt due to the arrestee by the common debtor is out of the question. That would be to compensate one man's debt with a claim against another. There would be also great hardship on the arrestor, who in the meanwhile is put to expense in getting his decree, and who, trusting to the fund arrested, neglects others which he might have attached.' The Court adhered on this ground.

³ See above, vol. ii. pp. 127-9.

⁴ [See *Campbell v Welsh*, 1785, 3 Pat. 32.]

⁵ *Crs. of Auchinbreck v M'Lauchlan*, 1748, M. 1736, *Elch. Tack*, No. 14. See above, vol. i. p. 69.

to a preference. When such prohibition is general, it scarcely can be said to operate as a security. A sequestration, for example, under the late statutes, has by law the effect of an inhibition to bar all preferences after the date of the first deliverance; but the benefit of the prohibition is general to all creditors. It is only where the exclusive diligence or contract belongs to individual creditors, allowing full effect to their securities, and excluding others, that it can be regarded as a ground of preference.

Of this sort of preference several may be distinguished :—

1. That which arises from consent to a preference.
2. That which arises from the effect of an inhibition.
3. That which arises from what is in the language of our law called litigiosity. And,
4. That which arises from the operation of the bankrupt statutes.

SECTION I.

OF PERSONAL EXCEPTIONS TO CLAIMS OF PREFERENCE, AND OF CONSENTS TO A PREFERENCE.

In consequence of a personal exception pleadable against a creditor, or against a class of creditors as competitors with others; or in consequence of a consent granted by one creditor to the preference of another,—the order of preference, as it would stand according to the natural import and effect of the rival securities, may be altered.

Exceptions pleadable to actions differ from objections in this, that the latter are in the nature of negations to the action; the former, positive allegiances which, admitting the action to be otherwise good, exclude, or as our authors express it, elide the action. In actions of competition, as ranking and sale, sequestration, or multiplepounding, which are each a congeries of all the reciprocal actions necessary for determining on the rights and preferences of the competitors, effect is given to the several exceptions by which, on the one hand, the general body of creditors exclude a particular creditor, or by which individual creditors exclude each other.

1. When one creditor has given his consent to diligence by another, a personal exception will be pleadable against him to bar any claim of right inconsistent with such diligence.¹

2. Sometimes a creditor related to the debtor, or particularly interested in him, gives an express consent to his having a preference over the consenter. This has the effect of a personal exception to exclude the consenter from entering into competition against the [141] person in whose favour he has yielded his right; but that right as against other creditors remains unimpaired, unless in so far as necessarily implied in the preference to which consent has been given.

3. It is not to be inferred from the mere circumstance of becoming surety in a personal debt, that the person so engaging means to exclude himself from using his securities or diligence on other debts against the estate of the debtor whose credit he guarantees, however prejudicial that may prove to the person to whom he has engaged as surety.²

4. The effect of personal exceptions can be available only to those entitled to take benefit by them, but not so as to injure in other respects the right of the creditor against whom they operate. In treating of the division of the fund, the practical operation of this will be discussed.

¹ *Livingston v Lady Glenagies*, 1666, M. 10433. Lady Glenagies consented with her husband to a right in favour of certain sureties, to levy the rents of certain lands over which her jointure was secured. One of the creditors to whom those sureties were bound adjudged, and his action of mails and duties was opposed by the lady as infert on the contract of marriage. She was met by the personal exception, which the Court sustained.

² *Sir William Baird v Deuchar*, 1711, M. 10445. Deuchar became bound, along with Sir R. Forbes, to Sir William Baird in a personal bond. On Sir R. Forbes' failure, Deuchar proceeded to make effectual an infertment of annualrent which he held for another debt, and was opposed by Sir William Baird, who pleaded a personal exception against Deuchar. The Court held Deuchar's infertment preferable, and not excluded by his obligation as cautioner.

SECTION II.

OF INHIBITION.

SUBSECTION I.—NATURE AND EFFECT OF THE DILIGENCE.

Conventional hypothecs, express or implied, are not sanctioned in the law of Scotland. But inhibition is a device which has been borrowed from the canon law, to supply that want with safety to the public, as being accompanied with public notice of the prohibition.¹ It is an injunction by command of the king in letters which, on a warrant from the Court of Session, pass under the signet, forbidding a debtor to grant any conveyance, or to execute any deed, or to incur any other debt, by which the creditor may be disappointed in obtaining payment, or performance of the obligation whereupon the letters proceed; and prohibiting the public from giving the debtor credit, or receiving from him conveyances out of which such effect may arise.²

[142] As the inhibition contains a double prohibition, one against the debtor, and another against the public, it requires a double execution. As it affects lands, the commerce of which it has been much the object of our Legislature to establish on the sure footing of the records, the diligence has no effect unless recorded.

1. The inhibition is executed against the debtor, by delivering a copy personally, or leaving it at his dwelling-house; if not within Scotland, at the Record Office for Citations:³ against the public, by publication at the market-cross of the head burgh of the jurisdiction within which the debtor resides; or if he be not within Scotland, at the Record Office for Citations.⁴

2. The inhibition must be recorded within forty days after publication in the Register of Inhibitions of the shire where the debtor's lands lie, or in the General Register of Inhibitions at Edinburgh.⁵ The General Register is always to be preferred. The effect of inhibition *ought* to be only from the date of registering, and this may perhaps be corrected in the renewal of the Sequestration Statute.⁶

¹ It is not by force of the *prohibition* against the public that the inhibition operates, but by the prohibition against the debtor himself, and the public notice, which, as Craig says, '*nostri pro scientia putant sufficere, cum omnes scire eam teneantur.*' Craig, de Feudis, c. 1, d. 12, sec. 31, p. 112.

² [The form of letters of inhibition given in former editions is not abolished (see Jur. Styles, vol. iii. p. 525); but a short form, which 'shall have all the like force and effect,' is provided by 31 and 32 Vict. c. 101, sec. 156. The letters in this form direct messengers-at-arms, etc., to inhibit the debtor 'personally, or at his dwelling-house, if within Scotland, and if furth thereof, at the office of the Keeper of the Record of Edictal Citations at Edinburgh, from selling, disposing, conveying, burdening, or otherwise affecting his lands or heritages to the prejudice' of the creditor; and direct registration in the General Register of Inhibitions for publication to the lieges. A similar form for a warrant of inhibition on the dependence to be inserted in the will of the summons is provided by 31 and 32 Vict. c. 101, sec. 18, which also enacts that 'it shall not be necessary to publish such warrants, or to intimate letters of inhibition passing the signet, to the lieges in any other way than by registration in the General Register of Inhibitions;' specifies what portions of the writ shall be recorded; and declares that 'from and after registration as aforesaid, the inhibition, whether contained in a summons or by separate letters of inhibition, shall be held to be duly

intimated and published to all concerned.' See, to the same effect, 31 and 32 Vict. c. 64.]

³ 6 Geo. iv. c. 120, secs. 50, 51. [13 and 14 Vict. c. 36, sec. 22; Act of Sederunt, Dec. 1868.]

⁴ Formerly the execution in this case was at the market-cross, pier and shore. *Pierce v Ross*, 1793, M. 3721. It is not clearly laid down in the Judicature Act, that where the debtor is furth of Scotland, the execution against the lieges shall be at the Record Office, though perhaps the analogy would hold; and the will of the letters has been since that Act so framed, and the practice has been universal so to cite the lieges in this particular case. [See note 2.]

⁵ 1581, c. 24, Act. Parl. vol. iii. p. 223; 1597, c. 35, and 36 Act. Parl. vol. iv. p. 139. See also 1600, c. 22, Act. Parl. vol. iv. p. 230. *Dunbar*, 1745, M. 3699. [Now only in the General Register. 31 and 32 Vict. c. 64, sec. 16.]

⁶ [Formerly inhibition annulled all alienations between the date of publication at the market-cross and the date of registration, against which, therefore, the record was not a sufficient protection to parties transacting with the person inhibited. This is remedied by 31 and 32 Vict. c. 101, sec. 155, which provides that a short notice of inhibition may be registered in the register of inhibitions; and if the inhibition and execution shall be recorded within twenty-one days thereafter, the inhibition is to draw back to the date of the notice, otherwise it takes effect only from the date of the registration

At first, inhibition operated against the moveable as well as against the heritable estate,¹ and of this the vestiges are still distinguishable in the style of the writ. But with the growth of commerce it has gradually been restricted to the heritable estate, leaving the moveable to be affected by arrestment.² In discriminating between heritable and moveable estates in this respect, the rule of succession is not to be followed, but that which regulates the application of adjudication or of arrestment. 1. It is established that an inhibition is effectual to secure those subjects only which are affectable by adjudication; adjudication and inhibition being co-operative diligences, the latter acting as a prohibition for [143] guarding those subjects over which a real right may be constituted by adjudication.³ 2. It

of the inhibition itself and its execution. It may be observed, that although, as mentioned in Mr. Shaw's edition, the Court sustained a registration of an inhibition by an abbreviate in *Henry v Pearson*, 9 March 1838, 16 S. 827, the erroneous practice on which that decision was founded was forbidden, and full recording required by Act of Sederunt, 11 Dec. 1838.]

¹ So late as 1687, the Court found a formal inhibition a due diligence to 'hinder gratification out of moveables.' *Dalrymple v Lyell*, M. 1052.

² [It seems to be on this ground that lien of a law agent over title-deeds deposited in security subsequent to an inhibition entitles the lawyer to be ranked on the price of the estates for his business account preferably to the inhibiting creditor, the title-deeds, though accessories to the lands, not being heritable. *Menzies v Murdoch*, 1841, 4 D. 257. See *Christie v Ruxton*, 1862, 24 D. 1182. Contrary to the former law, inhibition has now no effect against lands acquired after the date of its registration, unless they were then destined to the debtor by an entail or similar indefeasible title. 31 and 32 Vict. c. 101, sec. 157.]

³ This was established in the *Ranking of the Crs. of Langtoun*. Lord Kilkerran's report of this case is too instructive to be omitted on this occasion. 'It would appear,' says he, 'from the style of an inhibition, that originally it has affected moveables, as it prohibits the alienation of moveables no less than of heritable subjects in prejudice of the complainer; but however that may have been, there is no record of its having ever in practice affected moveables, which has justly, and one may say necessarily, obtained *favore commercii*. But in no time did inhibition ever affect *nomina debitorum*; and therefore, that an heritable bond on which infeftment has not followed, or a bond heritable, as bearing annualrent as the law once stood, or heritable, as secluding executors as the law now stands, have never been reached by an inhibition, has not proceeded from the favour of commerce, which would not be much affected though they fell under inhibition, but from this, that an inhibition, even by its style, does not reach *nomina debitorum*.

'It follows, however, from this, that the criterion of what subjects are and what are not affected by inhibition, is not whether they be heritable or moveable, as between heir and executor, though it should be further observed that there are also instances of subjects which fall to the executors, viz. heritable bonds whereon infeftment has followed, but whereon the creditor has used requisition and charged, which yet fall under inhibition, although not used till after the requisition and charge. It remains, therefore, to say what the criterion of it is, and the present case gave occasion to a reasoning on this point. 'Archibald Cockburn, younger of Langtoun, who had acquired certain debts secured by heritable bonds and infeft-

ments upon the estate of Langtoun, to the extent of about £2000 sterling, conveyed the principal sums, with the interest thereof from Martinmas 1723, to certain persons who advanced the money upon that security, but retained the bygone annualrents due preceding that term, and in 1732 he conveyed these annualrents to John Coutts and others. In the ranking of the creditors of Langtoun, William Scott of Thirlestain, who was creditor by progress to the said Archibald Cockburn in a debt whereon Jean Joissy, one of his authors, had raised inhibition in 1730, repeated a reduction *ex capite inhibitionis* of the said conveyance to John Coutts of the bygone annualrents, which being still *in medio*, he pleaded were affected by the inhibition. The point was reported by the Ordinary, and being new, the Lords appointed a hearing in presence.

'And upon the hearing, they found unanimously, "That the disposition to the bygone annualrents was not affected by the inhibition."

'Nor could they have found otherwise without introducing a manifest novelty; for as the bygone annualrents on an heritable bond descend to the executor, the consequence of finding them affected by an inhibition must have been, that when they were devolved to the executor they should fall under inhibition used against him for his own debt,—a thing unheard of, and which nobody will say.

'And all the question was, Upon what principle they were to put this judgment? It has been already said, that moveable or descendible to executors, and not affectable by inhibition, are not correlate. It had also been pleaded as an argument against the inhibitor, that an inhibition does not hinder the annualrenter's extinguishing the annualrents by intromission; and that it was inconsistent that an inhibition should affect a subject which the person inhibited could, notwithstanding the inhibition, extinguish by intromission. But neither was that satisfying, there being nothing inconsistent in it, as an inhibition forbids not deeds of extinction, but only deeds of alienation; therefore, where an annualrenter intromits, so far the annualrent right is extinguished, because the intromission is not *spreta inhibitione*.

'But what the Lords generally put it on was this, that as an inhibition is only a prohibitory diligence, no deed can be reduced *ex capite inhibitionis*, but where the inhibitor can draw the subject conveyed by an adjudication, the only diligence known in the law to connect with an inhibition; but so it is, that an adjudication, as it only carries the rents of lands from the first term following the date of the adjudication, so it carries the profits of an annualrent right only from that term; and the bygones of both are only affectable by the arrestment.

'Another objection was made to this inhibition, that sup-

is a settled rule that inhibition does not affect debts due to the person inhibited, though heritable in succession, as bonds excluding executors, or even heritable bonds, where no infestment has been taken.¹ Where, however, infestment has once been taken, the debt [144] is held no longer to be a mere *nomen debiti*, but a feudal estate, the conveyance of which may be barred by inhibition.²

In the following cases this diligence may be used in security: 1. Where one claims money as due to him. 2. The person to whom an obligation to convey land has been granted, may by this diligence prevent the granter of the obligation from conveying the land to another. 3. A tenant to whom a land proprietor has bound himself to grant a lease, may by inhibition prevent the sale of the land to his prejudice.³ 4. One who has the radical interest in a trust-estate, may by inhibition prevent the trustee from disappointing him, by conveying it to his own creditors, or by selling it.⁴ 5. One who holds an obligation of warrandice, or to whom a person is bound as cautioner, may in the use of this diligence find security against the future debts or conveyances of the debtor. Inhibition is of two kinds: either it is of the nature of an intermediate security, while the debt is future or contingent, or the claim is still in dependence; or it is a part of the creditor's execution for a debt already liquidated, of which he is proceeding to enforce payment by diligence.

1. INHIBITION ON DEPENDENCE, OR FOR FUTURE DEBTS.—Inhibition may be used where the creditor is in the course of constituting his debt by decree;⁵ or where the term of payment is not yet come; or even where the debt depends upon a condition, the operation of the inhibition, as a ground of challenge, being suspended till the debt is constituted or purified; and any decree of reduction taken on it being merely declaratory (Ersk. ii. 11. 3). It is issued upon production of a document of debt, *ex facie* legal and unobjectionable; although that document should not be recorded, or clothed with any decree, or not be capable of registration as an English bond. But, 1. The amount must be specified, that creditors and purchasers may know the extent of the burden; and, 2. The obligation must be of a kind to be discharged by payment, or satisfied by the setting aside of a fund. Inhibition is no legal way of securing an obligation not to contract debt.⁶ It has been held that a wife cannot inhibit her husband on the dependence of an action of divorce.⁷

Inhibition on future debts is strictly proper only in the case of a debtor *vergens ad inopiam*. In Balfour (476) is found a rule, that inhibition should not be granted against 'ane honorabil person without a sufficient cause.' Kilkerran (288) says: 'It were right that no inhibition passed but *causa cognita*.' But by present practice, the inhibition is

posing a formal inhibition could have affected these bygone annualrents, yet this inhibition was null, in respect it had proceeded upon the production of the horning only, without producing the ground of the horning, *because the Lords have seen the letters of horning*.

'And the Lords were inclined to have sustained the objection, as there is no other legal ground for an inhibition, but either a decree, a liquid instruction of a debt, or a summons executed; and a horning is neither. A creditor may have got payment of his debt, and not delivered up the horning; and by the same rule, an inhibition might proceed upon a caption. But no interlocutor was pronounced upon it, as unnecessary, after having found the inhibition ineffectual, even if it had been formal.' *Scott v Couta*, 1750, M. 6988.

¹ *Stair* iv. 1. 2; *Dirleton and Stewart, voce* Inhibition; *Oliphant v Irving*, 1703, M. 5565. See *supra*.

² *Low v Wedgewood*, 1814, F. C.

³ [*Seaforth's Trs. v Macaulay*, 1844, 7 D. 180.]

⁴ [*See Wilson v Stewart*, 31 May 1809, F. C.]

⁵ [A creditor who is enforcing his debt by a foreign suit against a debtor domiciled abroad, but possessed of heritage in Scotland, may create a dependence merely for the purpose of obtaining security over the Scotch heritage; and the pending suit abroad is no bar to the Scotch proceedings, which will be sisted to abide the result. *Hawkins v Wedderburn*, 1842, 4 D. 924; *Fordyce v Bridges*, 1842, 4 D. 1334; *Seton v Hawkins*, 1842, 5 D. 396.]

⁶ *L. Ankerville v Saunders*, 1787, M. 7010.

⁷ *Fairley v Fairley*, 21 May 1814, n. r. [But inhibition has been sustained on the dependence of an action by a wife or children to enforce marriage contract provisions; e.g. *Innes v Antrobus*, 1829, 8 S. 71; *Geddes v Geddes*, 1862, 24 D. 794. See *Hay v Morrison*, 1838, 16 S. 1273; *Douglas v Douglas*, 1724, M. 12910; *Lyon v Crs. of Easter Ogle*, 1724, M. 8150. Also, on an action of declarator of marriage, where there were conclusions for aliment, or alternatively for damages for seduction. *Gordon v Duncan*, 1827, 5 S. 544; *Wylie v Smith*, 1834, 12 S. 903.]

issued at once; the remedy being an application to the Court of Session, showing cause, and praying that the inhibition may be recalled. The Court gives relief, 1. Where there is no just cause for the creditor's alarm;¹ and, 2. Where security is given for the debt.

In contingent debts, the diligence is subject to the control of equity, the application being made by summary petition.² And, 1. Where there is little chance of the condition being fulfilled on which the payment or performance is to depend, the Court gives relief.³ 2. Where the claim is not merely contingent, but the questionable consequence of a contingent right, relief has been given.⁴ 3. Where the diligence is nimious, it will be recalled, unless caution be found against damage.⁵

Inhibition upon a depending action is not subject to the same control, merely [145] because the claim is not admitted or proved, provided it be specific. Inhibition in such a case is legal diligence, on the supposition that the debt is good (which the Court cannot reject on mere conjecture); and therefore it cannot be recalled *causa incognita*, unless caution be offered.⁶ But where the conclusion is only for a random sum, it is different.⁷

Inhibition on a depending action is issued only upon production of the summons duly executed; and notwithstanding a very general course of practice to the contrary, the Court annulled an inhibition where the summons had not been executed.⁸ The inhibition must bear a distinct reference to the action on which it is obtained. Towards the end of the seventeenth century, it had become a common practice to apply for inhibition upon blank summonses, and to fill up the summons afterwards; and highly improper as this practice was, inhibition was daily passed in this form. The Court at last took occasion to reprobate the practice.⁹ This is now impracticable, since there are no blank summonses; but the principle of the decision goes to establish the necessity of pointing out very specifically the nature and description of the action. Where the action is for a precise sum, that sum must be specified in the inhibition; but frequently the action is of such a nature that it is impossible to specify any certain sum, as in count and reckoning; and in such cases it is sufficient to refer particularly to the relative action.¹⁰

Inhibition covers the expenses decerned for, as well as the principal and interest; and it may be doubted what shall be the effect of it where the decree for expense is extracted in the name of the agent. It would rather seem that the agent should have the benefit of the inhibition, as if he were an assignee of the action and relative diligence. See above, p. 35.¹¹

¹ [The Court will, in the case of a future debt, recall and prohibit recording where the inhibition is not yet recorded, unless the debtor be *vergens ad inopiam*. *Campbell v Cullen*, 1848, 10 D. 1496; *Dove v Henderson*, 1865, 3 Macph. 389. See *Bennett v Fraser*, 1834, 12 S. 760.]

² *Baring Brothers & Co. v Wight*, 1824, 2 S. 609.

³ *M'Credie v M'Credie*, 1747, M. 6980.

⁴ *Hamilton v Fullarton*, 1823, 2 S. N. E. 235, and in F. C. See 1 W. and S. 531.

⁵ See preceding note.

⁶ *M'Leay v Rose*, 1826, 4 S. 812, N. E. 819. [*Crichton v Russell*, 1837, 16 S. 206. See *Hamilton v Bruce's Trs.*, 1857, 19 D. 745; *Geddes v Geddes*, 1862, 24 D. 794; *Mylne v Blackwood*, 1832, 10 S. 430; *Cullen v Buchanan*, 1862, 24 D. 794. See 31 and 32 Vict. c. 101, sec. 45.]

⁷ *Agnew v Bell*, 1825, 4 S. 51, revd. 1 W. and S. 709; *Gillilan v Monkhouse*, 1824, 3 S. 23, N. E. 16; *Hunter v Cochran*, 1825, 4 S. 40, N. E. 42. Also *M'Leay's case*, *supra*, note 6.

⁸ *Rosehill v Thomson's Crs.*, 1714, M. 6968. The same rule was held to apply to arrestments. *Crs. of Strichen*, 19 July 1706; *Orme v M'Vicar*, 13 Feb. 1759, M. 3690. But by the

late sequestration statutes this was altered, and arrestment on the dependence may be granted summarily, on production of the libelled summons; while no alteration was made as to inhibition. 54 Geo. III. c. 137, sec. 2.

[See 1 and 2 Vict. c. 114, secs. 16–22, as to arrestments. A warrant of inhibition may now be inserted in the will of summonses passing the signet, and 'may be executed either at the same time as the summons is served, or at any time thereafter.' Registration, which is sufficient publication, is effected by recording the summons, including the warrant of inhibition and execution, without the condescendence and pleas in law. 31 and 32 Vict. c. 100, sec. 18. A summons against a company is a sufficient warrant for inhibition against a partner. *Ewing v M'Clelland*, 1860, 22 D. 1348.]

⁹ *Milne v Cockburn*, 27 Dec. 1698, M. 8158.

¹⁰ *Ranking of Tofts*, 1722, M. 6970. In a late edition of Erskine the result of this decision is stated too broadly, as if applicable to every case without exception. Edit. 1812, p. 431, note *. Ivory's edit. 526, notes †, and 322.

¹¹ [Where a party inhibits on a dependence in security of expenses, he may sue a reduction on the head of inhibition, although the decree for expenses is extracted in name of the

It has been questioned whether inhibition be competent on a claim in a multiplepointing. The point is, I understand, in dependence in Court, and it would be presumptuous in me to express any opinion.

Inhibition may be applied for at any time during the dependence of an action; and the action is held to be in dependence from the moment of citation to the final decision of the House of Lords.¹ Between the final decree of the Court of Session, however, and the entry of the appeal, the creditor will be entitled to inhibit as upon the final decree; the appeal brings it back to the state of a depending process.

The effect of inhibition on a depending action rests entirely on the decree.² If the action shall not terminate in a decree, the inhibition has no effect; and so, where a cause is referred to arbitration, the decree-arbitral will not be covered by an inhibition on the [146] depending action before the reference.³ But, 1. There can be no doubt that a special agreement to reserve the effect of the inhibition may be effectual, if the creditor stipulate to be allowed to proceed with the action, so as to have a judicial decree for the sum awarded.⁴ 2. Where the object of the reference is merely to ascertain the amount, the action being left in dependence, and decree conform being afterwards pronounced in it, the inhibition subsists.⁵ And, 3. It would seem that where the defender becomes a bankrupt, and instead of persisting in the action, the pursuer enters his claim and founds on his submission, the submission will be held undischarged.

If it be necessary to have an action of constitution against an heir, which cannot proceed before the *annus deliberandi* be expired, it is competent to inhibit on the general charge, provided the amount of the debt be specified in the general charge.⁶

2. INHIBITION ON DEBTS ACTUALLY DUE.—This sort of inhibition, if legitimately used, cannot be recalled at the debtor's instance. It may proceed, *first*, Upon a decree; or, *secondly*, Upon a liquid document of debt; or, *thirdly*, Even upon the production of letters of horning, without the decree or registered document on which they were issued.⁷ These must be produced, and must also be referred to in the inhibition, and mentioned in the 'because;' and, as already observed, the amount of the debt must be precisely stated.

It is laid down in the Juridical Styles, vol. ii. p. 418, that inhibition cannot proceed on an English penal bond. But this seems to be an error. An adjudication may proceed on such a bond (see above, vol. i. 776); and there is no reason why inhibition should not also proceed on such a document.

Inhibition is a PROHIBITORY DILIGENCE. It operates as a bar in favour of the inhibitor

agent; at all events, when the agent is a consenter in the reduction. *Smith v Little*, 1836, 14 S. 653. A defender to whom expenses are found due may inhibit in security. *Wilkie v Tweeddale*, 25 Feb. 1815, F. C.]

¹ *Heron v Heron*, 1774, M. 7007. [The warrant of inhibition authorized by 31 and 32 Vict. c. 100, sec. 18, to be inserted in the will of a summons, may be executed either at the same time as the summons is served or at any time thereafter.]

² [As to the incidence of the expenses of clearing the record of an inhibition used on the dependence of an action in which the defender is assoilzied, see *Laing v Muirhead*, 1868, 6 Macph. 282.]

³ *Reids & Campbell v Napier*, 1751, M. 6993. Here the debt had been constituted by a decree-arbitral, the matter of the depending action having been submitted. Confirmed by Elchies, Inhibition, 17.

⁴ This was done and approved in *Stewart v L. Galloway*, 1770, M. 7004.

⁵ *Anderson v Wood*, 1821, F. C., and 1 S. 31. Here the reference was merely for ascertaining the amount of the

inhibitor's debt, and decree conform was afterwards pronounced in the action on which the inhibition was issued.

⁶ *Livingston v Forrest*, 1713, M. 6967. [All charges against unentered heirs are abolished, and citation and execution on a summons of constitution or adjudication against the heir is made equivalent to it; and such actions may proceed after six months from the ancestor's death. 31 and 32 Vict. c. 101, secs. 60, 61.]

⁷ *Scott v Crs. of Langtoun*, 1751, 2 Falc. 260, M. 6988. Lord Kilkerran gives this case as one that had been left undetermined. Inhib. No. 14, p. 294. But Lord Elchies fully confirms Falconer. 'We thought an inhibition, proceeding not on the bond or ground of debt, but on the horning (i.e. because the Lords have seen the horning), was void and null, but superseded, because it was said that the universal practice some years ago was otherwise. Afterwards they gave us a list of 176 inhibitions since 1692, and we unanimously repelled the objection.' *Voce* Inhib. No. 16. [Inhibition is not competent on a Small Debt or Debts Recovery Decree. *Lamont*, 1867, 6 Macph. 84.]

against the subsequent debts, and against the voluntary conveyances of the person inhibited. But, 1. It vests no real right, or *jus in re*.¹ 2. It gives no title to rank in competition with the real rights of those who by prior voluntary securities, or by adjudication on prior debts, have obtained real preferences. It is important, therefore, to be observed,—

1. That if other creditors have adjudged on debts prior to the inhibition, and against which the inhibition has no effect, and the estate has been afterwards brought to judicial sale, the inhibitor will be ranked only as a personal creditor. The adjudgers will be preferred before him, unless he shall either have himself adjudged, so as to have the benefit of the *pari passu* preference; or unless the decree of sale shall be available to him under the late Acts, as an adjudication, to preserve his *pari passu* preference.²

2. That if none of the creditors have adjudged, and the lands have been sold in consequence of a clause of sale in an heritable bond, or by the apparent heir under the [147] Act 1695, the inhibitor will rank only *pari passu* with the other creditors whose debts arose before the inhibition.

3. That if the creditors have not adjudged, and a voluntary sale has taken place subsequently to the inhibition, the inhibitor will have a preference indirectly, because the purchaser is entitled to have the inhibition discharged before paying the price.³ The inhibitor has not, indeed, without adjudication or other diligence, any active title on which he can demand payment; but no other creditor can effectually adjudge after the sale, unless he can complete his adjudication before the purchaser is infeft, while the inhibitor may at any time reduce the sale and adjudge; and the power of doing so exclusively is held to entitle him to the preference, without going through these proceedings. This doctrine was settled in the case of *Monro of Pointzfield*, and confirmed in the case of *M'Lure*.⁴

¹ Hope calls it *jus ad rem in immobilibus*. Min. Pract. c. 20, sec. 19.

² See 57 Geo. III. c. 137, sec. 12. See also below, Of Judicial Sale and of Sequestration. [19 and 20 Vict. c. 91, sec. 4.]

³ *Horn v Kay*, 1824, 3 S. 81, N. E. 54.

⁴ 1. The first case touching this question is that of *Carlyle v Matheson's Crs.*, briefly stated by Kilkerran, p. 285, M. 6971. It is proper there to observe the effect of the adjudications, which distinguish this case from the subsequent cases of *Monro* and of *M'Lure*. The debtor in Carlyle's case granted a trust-deed after an inhibition; all his creditors, including the inhibitor, *adjudged within year and day of each other*; and the trustees afterwards sold the property for behoof of all concerned. The Court held the sale not reducible, because the inhibitor could have no advantage by it, the other creditors being entitled to rank *pari passu* with him on their adjudications.

2. *Monro v Gordon's Crs.*, 1777, M. Inhib. App. 1. The debtor, Mr. Gordon, had sold his estate, by minute of sale, subsequent to inhibition by Sutherland. After the sale, his other creditors arrested the price, but *none of them had adjudged before the sale*. In a competition, the Court held the inhibiting creditor preferable on his inhibition; and that Mr. Monro, the purchaser of the estate, who had also acquired right to the inhibitor's debt, was entitled to retain the price in payment of that debt.

Sir Ilay Campbell permitted me to extract from his valuable Collection the following opinions delivered in this important case. It was heard in presence, and the judgment pronounced with great deliberation:—Braxfield: 'The case is the same as if the debt still stood in C. Sutherland's person. When Pointzfield purchased the debt, he stood in the shoes of

the creditor. Natural for the purchaser to inquire into the debts, and especially those secured by inhibition, in order to clear his purchase. Admit that inhibition is only prohibitory. The inhibitor cannot assume the possession upon it, but he is entitled to draw upon inhibition alone without adjudication. Knows this to have been a common practice. Inhibitor inter-pels the common debtor: other creditors do not interpel him: purchaser entitled to hold his purchase; but inhibitor entitled to reduce *ad hunc effectum*—not totally, but to the effect of drawing his payment: Therefore an encumbrance; and purchaser will not pay till inhibition is purged, and inhibitor may adjudge the estate when he pleases—nay, he may prosecute mails and duties. If this a good answer to seller, it must be good to his creditors, who are in no better situation than himself. Strange, to say you have done wrong to purchase, *spreto mandato*, when without the sale their arrestments good for nothing. Consent of an adjudger not necessary, when no person that can compete with him. Arrestors cannot draw a shilling till inhibition be purged. Here we have also an adjudication, and the inhibitors might turn the purchaser out of possession by reducing his sale. Not necessary to begin with reducing. No matter whether purchaser is infeft or not. It was long disputed whether one who had only a personal right could challenge an infestment, but never disputed that might make his right real. May begin at either end. In reduction upon Act 1696, the practice frequent to adjudge first, and then reduce afterwards. By adjudging first, you avoid the question about reducing upon a personal right. As to the argument that others would have adjudged within year and day, cannot listen to this, because do not know whether you would have done so or not. If one creditor vigilant, the others not;—no help for it;—you might have inhibited. As to concerning the letters, if nothing at all done, inhibition

[148] 4. That if there be more than one inhibition, and also adjudications, the inhibitions are preferable, not according to their dates, but according to the real diligence of adjudication by which they have been followed; and so *pari passu* if the inhibitors adjudge within year and day of each other.¹

WHAT IS SECURED BY INHIBITION.—Inhibition covers and secures the debt contained in the decree or document on which it proceeds, and in the diligence that legitimately

no better than a sheet of blank paper; but, by contemning, *I get my payment.* Monboddo: 'Clear that inhibitor preferable. Not enough to say that might have arrested. Never heard of inhibition being followed by arrestment. If these arrestors had adjudged prior to infetment of purchaser, might have obtained a preference.' Covington: 'If C. Sutherland's adjudication good, do not see well why the other adjudications within year and day of him should not be good. Inhibition clearly an encumbrance, and seller obliged to purge whether adjudication has followed or not. Not a real encumbrance, applies to *acquirenda*, and dies with person inhibited. The inhibition of itself gives no preference; though often inhibitions ranked, and draw according to the diligence: that many do same as to personal creditors, but made a condition, that should adjudge at least in sale at the instance of apparent heirs. The inhibition does not strike against those debts that were contracted prior; therefore have doubt whether should be preferred.' Kames: 'No sale as to inhibitor. Cannot both purge the encumbrance and pay the price. Purging the encumbrance is beneficial to all.' J.-Clerk: 'Pointzfield a sort of trustee for all. C. Sutherland throws in her inhibition; and to the end of time nobody can touch the price till this be purged. Perhaps has occasion for money, and Pointzfield pays himself. An erroneous practice seems to have taken place.' Ellick: 'Pointzfield allowed ranking to go on while his right was personal. As soon as matters settled, makes it real. Thought there was a *personalis exceptio*.' President Dundas: 'Inhibition must be purged in one way or another, or the purchaser may retain the price. Creditors can only take that which is payable to the common debtor. Law does not put inhibitor to the trouble of reduction. Wished for *pari passu* preference, but cannot make it out.'

3. *M'Lure v Baird*, 1807, M. Compet. App. 3. Here the determination in Monro's case was fully confirmed; and the opinion of Sir Ilay Campbell (containing his remarks on the case of Monro) deserves well to be studied: 'That the points on which this cause depends had been decided so long ago as the year 1777, in the case of Monro of Pointzfield, on a solemn hearing in presence, a decision of great importance, though unfortunately it is not known, because the decisions for that year are not yet reported. (His Lordship produced the papers in the cause, and notes of the opinions of the judges, particularly Lord Braxfield and President Dundas.) From these, his Lordship said it appeared that in that case there had been an inhibition against the estate of a proprietor of land, who owed other debts besides that to the inhibitor. That, after the inhibition, but before any other diligence was done against the estate, it was sold, and then, after the sale, adjudications were led by the creditors who had not inhibited, and a competition ensued. In that case the Court were clear that the inhibitor was preferable for his debt without any further diligence at all. It was held that the sale rendered

all diligence by other creditors against the estate void, because as to them it was a good sale, and conveyed away the property from the debtor. Their only claim, it was found, must be on the price in the hands of the purchaser. But the inhibiting creditor was entitled to disregard the sale altogether, because as to him it was struck at by his inhibition; therefore he might adjudge the estate. But further, his debt being the only one on which diligence could be done against the estate, without regard to the rights of the purchaser, was equivalent to a real encumbrance on it, which the purchaser was entitled to see cleared off before he paid the price, or to pay off himself with the first end of the price. Adjudication by the inhibitor was therefore, though competent, not necessary, because he was sure of payment out of the price of the estate in preference to all the other creditors. This was solemnly laid down as law by the Court, and particularly explained by the able judges above named in the above-mentioned case, and the same rule of law applies to the present case.

'Here there is an inhibition, then a sale, then adjudications by the creditors who had not inhibited, and no doubt also by the inhibitor. This last adjudication may be put out of the case. It is argued to be inept; perhaps it is so, but at all events it is unnecessary. The preference of the inhibitor in no degree depends upon its validity (especially as it may be renewed in more proper form), but rests upon the effect of the inhibition combined with that of the sale.

'By the inhibition, the sale to Baird is reducible as to the inhibitors, M'Lure, etc. Then, by the sale, all diligence against this tenement by the other creditors of Reyburn is void, since the property was carried out of him by a conveyance valid as to them before that diligence was executed. The adjudication, therefore, on their debts is of no effect at all, and can never compete with the inhibitors if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser Baird, who cannot hold the estate without getting this debt purged on which the inhibition has been raised. Unless, therefore, Baird is willing to give up the estate to them, he must pay this debt, since the seller, Reyburn, cannot pay it. He may, no doubt, retain it out of the price, but it must be paid to the inhibitors. Now, as it may be presumed Baird will not give up this estate, it is not necessary to enter into the other points argued in the papers.' [*Lennox v Robertson*, 1790, Hume 243; *Campbell v Gordon*, 1841, 3 D. 629, revd. 1 Bell's App. 563.]

¹ [Another result of the principle that inhibition is in itself merely a prohibitory diligence not vesting a real right, is that it does not entitle the creditors of a defunct to be preferred to the creditors of his heir under the Act 1661, c. 24. *Menzies v Murdoch*, 1841, 4 D. 257.]

follows upon such document or decree; on which ground it has been held to secure the accumulated sum and interests in an adjudication led by the inhibitor after his inhibition.¹ But it does not connect with any other document of debt, such as a bond of corroboration.²

As inhibition is strictly PERSONAL, it must be renewed against the heir, in order [149] to have effect against his acts and deeds. We have already seen that it is lawful to inhibit the heir upon the general charge, particular attention being paid to the manner of expressing the general charge.

The EFFECT of inhibition may be stated in these propositions:—

1. Inhibitions do not give preference according to the rule '*Prior tempore potior jure.*' The inhibiting creditor is entitled, as against creditors whose debts have arisen subsequently to the publication of his diligence (provided registration has duly followed),³ to draw the same dividend which he would have drawn had their debts never existed.

2. As against creditors who have received real securities voluntarily from the debtor after inhibition, the inhibitor is entitled to draw the same dividend as if the deed of security had not been granted.⁴

3. The inhibition protects the user of it against all voluntary acts of the debtor, to which he was not previously bound; although such act should only enable a creditor to proceed with greater rapidity in constituting a preference by judicial steps, than in the ordinary course of law he could have accomplished.⁵ It will not, however, prevent the mere renewal of a bill or other document of debt;⁶ provided no accumulations be included in such new document, to the effect of enabling the creditor to claim a greater sum than he otherwise could have done at the time of inhibition. To that extent the inhibition will be effectual.

¹ *Stewart v Dunbar*, 1742, Elchies, Inhibition, 8.

² *Horsburgh v Davidson*, 1750, M. 6985; Elchies, Inhibition, No. 14. Horsburgh was creditor by personal bond, upon which he used inhibition. Davidson, another creditor, obtained after the inhibition an heritable bond, upon which he was infett. Afterwards Horsburgh, instead of adjudging upon his personal bond, which would then have been secured by his inhibition, took an heritable bond of corroboration for the sum in the personal bond, and for another, and was infett. Afterwards several personal creditors proceeded to adjudge, and Horsburgh followed their example, and adjudged on the bond of corroboration. When the estate came to be divided, it was found insufficient for payment of both Horsburgh and Davidson. Davidson was ranked first, Horsburgh secondly, and the accountant ranked him by drawback upon Davidson in consequence of the inhibition. This was objected to on these grounds:—1. That the inhibition could not be connected either with the infettment on the bond of corroboration, or with the adjudication on it. 2. That Horsburgh cannot, as a personal creditor, draw anything in consequence of his inhibition, since an inhibition only entitles him to redress against any loss he may suffer by the debt struck at, and which otherwise would not fall upon him; while here the other adjudgers would cut him out even were Davidson not in the field. 3. That he cannot now adjudge effectually, since he would be cut out by the prior adjudgers. The Court were of opinion, 1. That an inhibition covers nothing but the document on which it proceeds, and the legal diligence following on it; that it covers neither a bond of corroboration, nor a voluntary security granted for the debt. 2. That an inhibition entitles the inhibitor to challenge only where he is prejudiced by the deed he challenges. 3. That, therefore, these objections would be good if in this case the adjudgers

were in a condition to exclude the inhibitor should he yet lead an adjudication on the bond whereon the inhibition proceeded. But, 4. That as these adjudgers are cut out by the infettment on the heritable bond of corroboration, they are thus barred from objecting to the new adjudication; and it is *jus tertii* to Davidson, whose infettment is struck at by the inhibition. Effect was accordingly given to the inhibition.

M'Vicar v Gordon, 1763, M. 7000. Another case illustrative of the rule occurred in the sale of Little Torroll. There were only two competitors. One of them inhibited on a dependence, and after decree obtained an heritable bond of corroboration, on which he took infettment. His competitor was infett before him, and both had adjudged for the security of their accumulations. The inhibition struck at the whole interest of the inhibitor's competitor, and so the inhibitor was clearly entitled to a preference; but the Court would not support that preference for more than the sums in the decree, refusing to connect the inhibition with the posterior voluntary security or adjudication upon the bond of corroboration.

³ [Now 'subsequently to the registration of the inhibition or of the notice thereof.' See above, p. 134, notes 2, 6.]

⁴ [*Campbell v Gordon*, *supra*.]

⁵ *Watson v Marshall*, 1782, M. 7009. A debtor under inhibition granted a bond of corroboration to the heir of his creditor, which, by supplying the place of a confirmation, enabled him to adjudge more rapidly. It was held objectionable. In *Rutherford v Stewart*, 1745, M. 6973, an opposite doctrine had been adopted. The case of *M'Math v M'Kellar*, 1791, Bell's Oct. Ca. 22, affords a strong confirmation of the principle of the decision in *Watson's* case. [See below, Com. on Act 1696.]

⁶ *Douglas, Heron, & Co. v Brown*, 1785, M. 7070.

[150] 4. But inhibition is no bar to infertment on a previous conveyance ; or to deeds to which the debtor stands previously bound ;¹ and so a wadsetter, or one having a right of reversion, cannot be prevented by inhibition from taking payment of his debt, and renouncing his security. A remedy against the total inefficacy of inhibition in such a case, where other diligence cannot be used, was provided by Act of Sederunt, 19th February 1680,² establishing a form of action in which the inhibiting creditor is to be made a party, as the only legitimate method of redeeming after due notice of the inhibition.

5. After wadset has been declared dissolved, and while the redemption money lies in the hands of the consignee, the Act of Sederunt does not apply. Inhibition has no effect to bar the uplifting of the sum ; and it is subject to arrestment.³

6. Inhibition is no bar to acts of ordinary administration. So it does not annul a lease of ordinary duration ;⁴ but it does annul a long lease,⁵ or a lease at a small rent with a *grassum*, or a lease with a right to retain the rents in payment of debt.⁶

7. Inhibition will not strike at a fair excambion, for there is no loss ; unless in so far as the compensation for inequality is in money.

8. It has been doubted how far inhibition has effect against heritable security for money borrowed and bestowed on meliorations, in respect that the inhibitor has the benefit. But [151] it would appear that the best general rule is that by which all difficulties in ascertaining whether the inhibitor is benefited or injured are avoided.

9. As to the effect of inhibitions on the trustee's power to sell under a sequestration, and the right of the purchaser, see below, Of the Sale of Sequestered Estates.

These propositions seem to comprehend the doctrine of the legal effect of inhibition. The particular, and often strange and unexpected, consequences which arise from the

¹ Stair iv. 1. 90 ; Ersk. ii. 9. 91. [*Livingston v M'Farlane*, 1842, 5 D. 1.]

² 'The Lords of Councill and Session considering, That it hath been the ordinary custome of debtors to make payment of sumes due upon wodset, or annualrent by infertment, and to accept renunciations or grants of redemption from the wodsetter or annualrenter, albeit the creditor had been inhibit before payment, which being made *bona fide*, the debtors conceived themselves secure, and that they needed not search registers to find inhibitiones against the wodsetter or annualrenter, which hath tended much to the detriment of creditors, seeing such sumes secured by infertment were not arrestable : For remead whereof, the said Lords declare, That if the user of an inhibitione, upon search of the registers or otherways, shall find infertments of annualrent, or upon wodset, in favours of their debtor being inhibit, and shall make intimatione, by instrument of ane nottar, to the persones who have right to the reversione of the saids wodsetts or annualrents, that the wodsetter or annualrenter stands inhibit at their instance, and shall produce in presence of the party and nottar the inhibitione duely registrat ; then, and in that case, the Lords will not sustain renunciations or grants of redemption, although upon true payment, not being made *bona fide*, in respect of the intimatione, unless the redemption proceed by way of action, the inhibitor being always cited thereto, or by suspension of double poynding, upon consignation of the sumes, whereupon the annualrent or wodset is redeemable. And ordains this act to be printed, and affixed upon the wall of the Outter-house, that the same may be known to all the leidges.'

³ *Stormonth v Robertson*, 24 May 1814, Fac. Coll.

⁴ *Gordon v Milne*, 1780, M. 7008.

⁵ *E. of Breadalbane v M'Lachlan*, 1802, Hume 42. The

lease here was of unusually long duration, and at a low rent, with power to cut woods, etc., and there was both inhibition and adjudication previous to its date. The interlocutor of the Lord Ordinary, to which the Court adhered, was in these words : ' Finds, That the tack under reduction was granted after the lands had been adjudged by the pursuers, and after an inhibition at their instance duly published and registered : Finds, That this tack is for a longer than ordinary endurance, and contains extraordinary powers of cutting wood, which only belong to a proprietor : Finds it admitted by the defender in his declaration, that this tack was considered by the proprietor as set at an under value : Finds it also admitted in said declaration, that about twenty years ago the defender was drawing out of the subject a rent of £40 sterling a year, whereas the rent payable by said lease is only 400 merks, or £22, 4s. 5½d. of a penny sterling, which is not adequate : Therefore finds that said tack is such a species of alienation as to be struck at by the pursuer's inhibition ; and reduces, decerns, and declares in terms of the libel, superseding extract till the third sederunt day in November next.'

⁶ *Wedgwood v Catto*, 13 Nov. 1817, F. C. Here, after inhibition, the debtor granted a lease for thirty-one years, for a *grassum* of £500 and a rent of £31, 10s., with power to retain the rent till the £500 was repaid, and a stipulation of £50 of rent subsequently. The person acquiring right to the inhibition brought a reduction of the lease. The Court were unanimously of opinion that this was not a lease granted in the course of ordinary administration, beneficial to all concerned, and not struck at by inhibition, but an attempt to obtain in the form of a loan a security for debt which the creditor could not have obtained directly by the voluntary act of the debtor, nor by legal diligence. The lease accordingly was reduced.

application of these principles in the various cases that occur in practice, will demand attention hereafter, in treating of the Principles of Ranking.

SUBSECTION II.—OBJECTIONS THAT MAY BE TAKEN AGAINST INHIBITIONS, AND THEIR EFFECT.

The objections which may be taken against inhibition may have the effect of destroying the preference in whole or in part.

1. Objections arising from nullities of the document of debt, or from fatal defects in the action or decree whereon the inhibition proceeds, or even from errors in the form of the diligence, annul the inhibition entirely. They will suggest themselves without any enumeration from what has already been said, or may easily be learned from institutional writers. It may be proper, however, to remark,—

First, That where an objection fatal to the action, or document, or decree occurs, the inhibition will not be saved, although the creditor is able to establish his debt upon other evidence. Suppose, for example, that an inhibition is passed upon a prescribed bill as a liquid document of debt; although the debt may still be due, and may be constituted by reference to the debtor's oath, this will not support the inhibition, for by statute 12 Geo. III. c. 72 (made perpetual by 23 Geo. III. c. 18, sec. 55) the bill itself is declared ineffectual to produce any diligence or action. Inhibition on an action raised for recovery of the debt is the proper course; and it may here be doubted whether an inhibition proceeding on an action of which the libel should rest on *the bill alone*, might not be exceptionable under the statute.¹

Secondly, Where an inhibition has been raised upon a depending action, and it is found necessary to amend the summons, and on this amended summons a decree is pronounced, the inhibition would seem to be ineffectual so far as the original summons was abandoned. But the case is more difficult where, without abandoning the original ground of action, a new ground occurs sufficient to authorize a judgment. In a case of this description the Court held the inhibition effectual.²

Thirdly, That all defects in the form of the diligence or in the mode of execution and publication are conclusively fatal, on the ground that this diligence is an *actus legitimus* and a matter of record.³ It has been attempted, in questions respecting the execution and publication of this diligence, to take a distinction between defects in the actual ceremony enjoined by law, and defects merely in the evidence of that ceremony having been complied with; but the Court has uniformly rejected such distinction.

2. Where the objection goes not to a radical part of the diligence, but only to its local operation in a particular county, the force of the objection is only partial. The execution against the debtor, and publication to the world at large, are absolutely essential to [152] the very existence and efficacy of the diligence to any purpose whatever. But registration is connected only with its local effects.⁴

¹ See above, vol. i. p. 419. The effect of the cases there cited would seem to be favourable to an inhibition in the above-mentioned circumstances.

² *Brereton v Stewart*, 1824, 2 S. 713, N. E. 594. Here the action was laid against Campbell as a partner of a company; but it was found unnecessary to investigate this in point of fact, he having recognised his liability as guarantee of the debt, on which footing an amendment of the libel was admitted. And the judgment proceeded on this amendment,

and the ground of guarantee therein stated. The Court sustained the inhibition.

³ [*Burleigh v Fearn*, 1848, 10 D. 1517; *Cooke v Falconer's Reps.*, 1850, 13 D. 157; *Walker v Hunter*, 1853, 16 D. 226; *Davidson v Mackenzie*, 1856, 19 D. 226.]

⁴ *Dunbar*, 1745, M. 3696. [Questions of this kind are obviated by the late changes in the law. See above, p. 134, notes 2, 6. But the cases of *Park v Wood's Trs.*, 1838, 16 S. 1363, *Burleigh v Fearn*, *supra*, and others, show that an inhibition may be partially inept and partially effectual.]

SECTION III.

LIS PENDENS IN REAL ACTIONS, OR LITIGIOSITY AS A GROUND OF EXCLUSIVE PREFERENCE.

It is a general rule, which seems to have been recognised in all regular systems of jurisprudence, that during the dependence of an action, of which the object is to vest the property, or attain the possession of a real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the decree which shall ultimately be pronounced. It is grounded on the maxim, '*Pendente lite nihil innovandum.*' In England this doctrine is fully recognised both at law and in equity.¹ The same doctrine prevails on the Continent under the name of *Vitium Litigiosum*; and in Scotland the expressions 'litigious' and 'litigiosity' have long been used as synonymous with the '*vitium litigiosum*' of the continental writers.

Litigiosity (which is the title under which the doctrine is known in our books) may be defined, an implied prohibition of alienation to the disappointment of an action, or of diligence, the direct object of which is to attain the possession or to acquire the property of a particular subject.² The effect of it is analogous to that of inhibition. It tacitly supplies the place of that diligence in all real actions. And inhibition itself, when begun but not yet completed, requires the aid of litigiosity to give it effect during such reasonable time as the law deems sufficient for bringing the proceedings to completion.

Perhaps this doctrine of litigiosity is not altogether consistent with expediency in a nation among whom the diligence of inhibition is in familiar use; or at least ought to be admitted only to aid an inhibitor between the execution of the inhibition against the debtor and the publication of it in the record. But, as established, the doctrine goes a great deal further; and we have here to do with the subsisting law, not with speculations on the fitness or unfitness of its rules.

SUBSECTION I.—LITIGIOSITY IN REAL ACTIONS.

In order to secure the public against the inconvenience of suffering by impending actions without due notice, there ought to have been provided a record for the commencement of such actions as are guarded by litigiosity. But there is no such record.³ The only precaution is, that no action shall have this effect which has not proceeded so far as to be open to public observation. In the Roman law litigiosity did not begin till litiscontestation, that is to say, till the parties joined issue in the trial. And with us it has been solemnly decided that the mere citation of the debtor is not alone sufficient to prohibit the public from contracting with him.⁴ But beyond this nothing has been settled, and the matter

¹ Sugden on Vendors and Purchasers, p. 715. See the argument of Sir W. Grant, Master of the Rolls, in the *Bishop of Winchester's* case, 11 Ves. 197; also Sir T. Plummer's judgment as Vice-Chancellor in *Metcalf v Pulvertoft*, 2 Ves. and Beames 204. [2 Vict. c. 115.]

² *Wanchope v Goldie & Ferrier*, 1 July 1817, F. C., is not properly a case of litigiosity, though placed under that title by the reporter. It is a case of notice of a preferable right sufficient to preclude adjudication, before the adjudication was led.

³ [The Act 31 and 32 Vict. c. 101, sec. 159, enacts that 'no summons of reduction, constitution, adjudication, or constitution and adjudication combined, shall have any effect in rendering litigious the lands to which such summons relates, except from and after the date of the registration of' a notice

of the said summons, in the form specified by the said section and relative schedule, in the General Register of Inhibitions in the case of a reduction, or in the General Register of Adjudications in the other cases specified.]

⁴ *Morrison v Allardes*, 1787, M. 8335, Hailes 1006. A partner of a company having intended to borrow money on a house which was purchased for the use of the company, a summons was executed against him, at the instance of the other partners, for having it found and declared that the property was in the company; and the next day the money was borrowed on heritable bond. An action of reduction was raised on the ground of litigiosity, so far as concerned the purchaser. Lord Monboddo held the mere citation to be sufficient to make the subject litigious; and his opinion was sanctioned by that of Lord Braxfield, who pointed out the difference

is left in more uncertainty than ought to exist on a point so important. In the case [153] referred to, it seems on both sides of the bar to have been taken for granted that the calling of an action in court would be sufficient to stop alienation. But this does not appear to have been decided in any case.

There is litigiosity in all real actions for recovering the property or possession of lands. In the case already referred to, the action was of the nature of a declarator of property. In another case, decided some years before,¹ litigiosity was found to take place in a reduction of a sale; and the successful pursuer of that reduction was found entitled to recover the lands against creditors who had lent money to the defender on heritable bonds, nay, even against a person who had purchased the lands from his creditors.

The possibility of this *nexus* upon property being overlooked by creditors and purchasers, and the severity of its effects, forbids undue delay in such cases. No limits have been fixed to the *mora*, though it would at least appear, that if the action were allowed to sleep, it should be held as relinquished, so as to give effect to an alienation by the defender.²

The effect, however, of the *lis pendens* expires upon the conclusion of the action by final decree, unless an appeal is entered in the House of Lords, in which case the litigiosity remains in force during the dependence of the proceedings there. After decree, the pursuer must proceed to immediate diligence, so as to begin a new course of litigiosity; or he must by inhibition protect himself from the intermediate operations of the defender.

SUBSECTION II.—LITIGIOSITY IN DILIGENCE.

The principle of common law, *Pendente lite nihil innovandum*, is extended to diligence, and assisted by the second branch of the statute 1621.³

1. INHIBITION.—The statute gives the effect of litigiosity to an inhibition from the time of *serving* it; but it is only on condition of the registration, etc. being duly completed, that this takes place.⁴ The expression 'serving inhibition' includes execution against the public as well as against the individual.⁵ But a conveyance between the execution and the registration was held to be challengeable.⁶ The only remedy is, that a person purchasing, or lending money, shall retain the price or loan unpaid till the expiration of the term at which the inhibition in order to be effectual must be recorded.

2. ADJUDICATION.—This process combines the two characters of an action and of a diligence: an action to be completed by decree; a diligence to be completed after decree [154] by charter and sasine, or a charge against the superior. 1. Adjudication is more favoured than a common action, in respect to the commencement of the litigiosity. While land was attached by apprising, the process began by denouncing the lands; which being a public act of proclamation, both upon the lands and at the market-cross, was held a sufficient prohibition to the public. When adjudication was introduced, the citation to the debtor, with too little regard perhaps to the public interest, received the same effect.⁷ 2. An adjudica-

between the old blank summons and the modern, containing a full state of the case. He seems to have relied much on the analogy of adjudication, which is a mere summons. But Lord President Dundas, Lord Justice-Clerk Miller, and Lord Eskgrove, were clearly of opinion that there was no litigiosity. Lord Justice-Clerk pointed out the distinction between the case of a summons in such a case, and an adjudication, which appears in the Bill Chamber, and of which the bill remains in the Signet Office. The citation was held to be insufficient.

¹ *Menzies v M'Harg*, 1760, M. 14165.

² See *Duchess of Douglas v Scott*, 1764, M. 8390. But, on the other hand, see *Menzies v M'Harg*, *supra*.

³ See below, Book vi. cap. 2, sec. 1.

⁴ *Gartshore v Cockburn*, 1686, M. 1051. [The law of this paragraph is altered by 31 and 32 Vict. c. 101, sec. 155. See above, p. 134, notes 2, 6.]

⁵ Stair speaks of the debt to be challenged as 'posterior to the executing of the inhibition at the market-cross of the head burgh of the jurisdiction where the inhibit person dwelt.' Stair iv. 35. 21.

⁶ See *Cruikshanks v Watt*, 1675, M. 8393.

⁷ 1672, c. 10; *M'Kenzie's Obs.* 2 Parl. Chas. II. sess. 3, c. 19; *Menzies*, 1682, M. 8376; *Ersk. ii.* 12. 41. [See p. 144, note 3.]

tion does not, like a common action, lose the quality of litigious by decree; it still continues to run its course as a diligence till recorded and completed into a real right. If not recorded within sixty days, it loses all effect. If so recorded, the public have a fair intimation of the *nexus* formed upon the property. But still there are two questions here of some nicety. *First*, In a competition between an adjudger, whose right is completed merely by a charge against the superior, and an infestment on a voluntary conveyance, granted before the adjudger's proceedings have been commenced, the infestment prevails. But where adjudication has been commenced before a voluntary conveyance is granted, Is a charge to the superior sufficient to preserve the litigious prohibition in force during the legal? or must the adjudger proceed to obtain infestment? It would appear that the charge is sufficient to preserve to the adjudger the benefit of litigiosity till the expiration of the legal, the adjudger not being bound to obtain infestment during the legal, nor blameable for neglect if he rest contented with the charge against the superior.¹ *Second*, But suppose that the adjudger has not himself charged the superior, and has no other completion of his diligence than, in virtue of the statute, a communication of the benefit of another adjudger's charge as being within year and day, Will this produce the same effect? It would rather appear that it should not; as the statute was meant to have effect among the adjudgers merely, but not to extend to other creditors.²

From the expiration of the legal, it is necessary for the adjudger to proceed directly to make his right real by infestment. But as an infestment is necessary only in case the right of the creditor-adjudger is to continue real, and his debt not to be paid off, the creditor cannot [155] be held bound to take infestment until he shall know with certainty whether it be necessary for him to do so. The quality of litigious, it would therefore appear, should continue during a reasonable time after the expiration of the legal, that the creditor may obtain a declarator of expiry and infestment. No case upon this point seems hitherto to have occurred; but it would seem natural to judge of the question by the analogy of the doctrine of litigiosity in other circumstances.

3. **RANKING AND SALE.**—The only other case of litigiosity which seems proper to this place, is that which arises from an action of Sale and Ranking. This is an adjudication for

¹ See this doctrine laid down in *Hamilton v M'Culloch*, 1627, M. 1689. Again, in *Wallace v Barclay*, 1736, M. 8388, where an adjudication, with a charge against the superior, was found to exclude a voluntary infestment in security. [It has been suggested that the facility with which the adjudger may now obtain infestment, entitles him to less indulgence 'either on the plea of litigiosity, or on the plea that during the legal an infestment is not necessary.' Ross' Leading Cases, i. 248.]

² In *Duchess of Douglas v Scott*, 1764, M. 2833, the first adjudger had charged the superior, and raised mails and duties. The adjudication on which the Duchess claimed was within year and day, and the competition was between it and an heritable bond, with infestment dated three years after. There were two questions: 1. Whether this was an improper delay? 2. Whether the charge upon the first effectual was not enough for the second adjudger during the legal? The case was fully argued in presence, and the argument is well stated in the report of the case (3 F. C. 332); but unfortunately we have no very clear indication of the grounds upon which the Court proceeded in preferring the heritable bond. The case is also reported by Lord Kames (Sel. Dec. p. 287); but it does not clearly appear, even from his report, upon what ground the Court proceeded. The decision seems, however, by the slight indications that remain, to have proceeded on those grounds: 1. That it is necessary for the adjudger

at least to charge the superior. 2. That the charge upon a former adjudication, though within year and day, is not enough to supply the deficiency. 3. That a delay for three years to complete the adjudication destroyed the litigious quality of the adjudication. Lord Kames disapproves much of this decision; and in some remarks which he subjoins to it, insists that a charge should be sufficient during the legal, and that a second adjudger within year and day should be held as having charged. But to this may be opposed what Lord Kilkerran says: 'It is an established point, that the Act 1661 concerns only the preference of apprizers and adjudgers among themselves, but statutes nothing with respect to the competition between adjudgers and voluntary rights; that though it is true that even an executed summons of adjudication prior to a voluntary sale, and on which decree of adjudication follows, though after the voluntary sale, and much more a decree of adjudication prior to the voluntary sale, may be preferable, that is not upon the Act 1661, but on the head of litigiosity, which flies off where the adjudger has been *in mora* of following forth his adjudication.' [Some lawyers still doubt the soundness of this decision; and it is difficult to see why the benefit of the first adjudger's charge, as equivalent to infestment, should not have been communicated by the statute to the second adjudger, so as to exclude the creditor in the voluntary security.]

the general benefit, and must therefore be armed with the common quality of litigiosity. It is an action even of a more public kind than the common adjudication. It seems to be held that the edictal citation in the sale is sufficient to infer litigiosity, not only to the effect of preventing voluntary alienations, but even of stopping extraordinary acts of administration, such as the letting of long leases.¹

Mr. Erskine incorrectly seems to apply the doctrine of litigiosity as a bar to legal diligence.² It is an impediment only to voluntary acts of conveyance or obligation hostile to the pursuer. The doctrine which he states as referable to the maxim *Pendente lite nihil innovandum*, is truly to be referred to the principle, that wherever the process can be regarded as a general measure for the behoof of all the creditors, it ought to supersede the diligence of individuals. This doctrine is now established by express enactment in the recent sequestration statutes. When it was first contended for, it seemed applicable properly to the case only of a sale by an apparent heir, looking on him as a trustee for the creditors.³ This distinction was plainly pointed at in the case to which Mr. Erskine refers in illustration of his doctrine. There the ground of the decision was, that 'the decree of sale is to be considered as an adjudication for the benefit of the whole creditors, when obtained by the apparent heir, who is empowered by law to act as trustee for them and himself; and being within year and day of the first adjudication, it ought to be beneficial to all, whether the creditors have adjudged subsequent to it or not.'⁴ A process of sale raised by an individual creditor was held to be nothing else than the form of law, by which alone he can bring his debtor's estate to the market, that he may draw his payment in money; and, regarding it as an individual diligence, it was held not entitled to the effect of preventing other creditors from taking the means that they thought best for forwarding their own preference, by the operation of legal diligence. But all this has now been placed on the just footing of bankrupt law.⁵

CHAPTER VI.

OF PRIVILEGED DEBTS.

FROM considerations of humanity, a privilege has been conferred on certain debts, [156] entitling them to payment in preference to those of ordinary creditors. The expenses of the last sickness and funeral, and the wages of servants, are, by almost all laws, held entitled to this privilege; and the doctrine is fully established in the law of Scotland. By the statute 9 Anne, c. 10, establishing the General Post Office, a privilege is given for postages; and other statutes, also having in view the public benefit, have secured certain

¹ *York Buildings Co. v Fordyce*, 1778, M. 8380; H. of L. 16 April 1779, 2 Pat. 496, 500. [In Mr. Shaw's edition it is said that citation is not enough: the summons must be called in court (*Morrison v Allardes*, *supra*). The report in Paton shows that the House of Lords distinguished between two leases which were in question: sustaining one, and, in conformity with the judgment of the Court of Session, setting aside the other, which had been granted for a *grassum* and five years before the expiry of the former lease, and was therefore not an act of ordinary administration. See *Carlyle v Lowther*, 1766, M. 8380.]

² B. ii. tit. 12, sec. 65, where he says, 'that no diligence carried on or perfected while this sale is pendent, in order to

create a new preference to the user of it, in competition with other creditors, ought to have any legal effect.'

³ *Massie v Smith*, 1785, M. 8377. It was here found, 'that the maxim *Pendente lite nihil innovandum* applies only to things done by the debtor or defender in the action, which tend to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer from making his right better, even in competition with another creditor or pursuer; and that in this case one of the creditors, by raising a process of sale, cannot hinder the other creditors from using the diligence of the law to make their rights effectual.'

⁴ *Irvine v Maxwell*, 1748, M. 5264.

⁵ See below, Of Judicial Sale.

branches of the financial system by means of privileges. And some late statutes, in establishing a fund for the widows of clergymen of the Church of Scotland, and for the encouragement of Friendly Societies, have introduced privileges unknown before.

SECTION I.

OF FUNERAL EXPENSES AND MEDICAL ATTENDANCE.

'*Impensa funeris*,' says Marcianus, '*semper ex hereditate deducitur, quæ etiam omne creditum solet præcedere, cum bona solvendo non sint.*'¹ And the considerations of humanity and decorum which dictated this law, have, in all nations who have acknowledged the influence of the Roman jurisprudence, led to a rule of the same kind. In Scotland this privilege seems at all times to have been recognised. The case in which it most frequently occurs to try this miserable question, is, where one has died apparently solvent, or at least before his affairs have come to a crisis; in which case the expense is frequently greater than it otherwise would have been. On this subject it may be laid down:—

1. That the proper funeral expenses are preferable. This is proved by the authority of all our writers, and taken for granted in all the decisions.

2. It would seem, that although in cases where the insolvency is unknown at the time of the funeral, every part of the funeral expense, moderate and suitable to the condition of the person, is includable within this privilege;² where one dies a bankrupt, undertakers should be upon their guard, and furnish a sumptuous funeral only upon the credit of those who employ them.³

3. It was suggested as a doubt from the bench, in the case just alluded to, whether a distinction is not to be taken between those expenses without which the body cannot be decently [157] interred, and those which, however common or decent, are not indispensable, as 'the mournings of the widow, and such of the children as were not present at the funeral.' This, however, would be a very unnatural and ill-founded distinction; and accordingly, in a subsequent case, the widow's mournings were included within the privilege.⁴

4. It does not seem to be fixed whether this privilege extends to the funeral expenses of any of the bankrupt's family. In one case the Court first determined that it included the general expense of the funeral of a wife dying immediately before her husband. On a second trial of the cause, indeed, they altered this judgment, and found that expense to be only a common debt against the husband's estate, and preferable on the wife's own funds alone; but this was in a case where the wife had separate funds.⁵ The same principle of necessity which leads to the privilege for the bankrupt's own funeral expenses, seems to call for a similar indulgence to the unforisfamiliar children of the family.

On similar considerations of humanity, the expense of medical attendance during the last illness has been classed in the same rank of privileged debts with funeral expenses. Accordingly, in a case where the surgeon apothecary and the undertaker came into competition, they were ranked *pari passu*.⁶ Physicians' fees are presumed paid; but the pre-

¹ Dig. de Relig. et Sumpt. Fun. lib. 11, tit. 6, l. 45.

² See *Glass v Weir*, 1821, 1 S. 163, N. E. 156.

³ *Hall v M'Aulay & Lindsay*, 1753, M. 4854-5. Sir Andrew Home of Kimmerghame, one of the judges of the Court of Session, having died, his affairs turned out worse than was expected; and a question arose, Whether the persons who had furnished black-cloth for hanging the room with mourning, and for the mourning of the family and servants, were entitled to a privilege for their claims. They were admitted to the privilege; but Lord Kames protests against the judg-

ment in his report, 'as it is hard to subject creditors to the expense of funerals without limitation, as much as when the person dies in opulent circumstances.' And he adds: 'I must observe, that this judgment will not be a precedent where the person dies a bankrupt, or habit and repute insolvent, which ought to put furnishers upon their guard.'

⁴ *Sheddan and others v Gibson*, 1802, M. 11855.

⁵ *Auchinleck v Dinmuir's Crs.*, 1697, M. 11834.

⁶ *Peter v. Monro*, 1749. 'Some of the Lords,' says he, 'thought the funerator preferable, as a dead person must be

sumption is reversed and a privilege added in regard to deathbed.¹ To what length of time this privilege shall be allowed to extend, is not perfectly settled. It seems, however, to be held, 1. That deathbed in this question has no absolute connection with the legal term of sixty days of deathbed. 2. That in estimating the time, two circumstances are of importance,—the incapacity of the patient to manage his own affairs, and the shortness of the interval between the commencement of the claim of privilege and death.²

SECTION II.

OF SERVANTS' WAGES.

The current wages of domestic servants have long been considered as entitled to a privilege like that of funeral expenses.³ And it would appear that bankruptcy is held to be on the same footing with death in this question.

There are two points in all such questions: 1. The point of time in relation to which the privilege is to be given; and, 2. The term during which the wages are privileged.

1. As to the former, it may be a question of some difficulty what is to be held as bankruptcy in this matter. If bankruptcy by sequestration, the *terminus a quo* is certain. [158] But where the debtor is rendered bankrupt under the Act 1696, c. 5, and his creditors afterwards proceed by poinding, etc., to distribute his moveable estate, is it the bankruptcy or the concurrence of diligence that is to be regarded? It would seem that it is the concurrence of diligence rather than the bankruptcy that is to be considered in fixing the *terminus a quo*.

2. It is only the current term for which the privilege is given; and that current term extends to the wages of a year, or of half a year, or of a month, according to the contract or the usage of the place in which the contract of service was contracted.

As to the servants who are within the privilege, it has been held,—

1. That on the bankruptcy of a tenant the servants kept for the purposes of the farm have a privilege over other creditors for the wages of the term current at the bankruptcy.⁴ And this privilege has been found to prevail even over the landlord's hypothec.⁵

2. The claim for wages due to reapers, and other occasional labourers employed in raising and securing the crop, is privileged.⁶

3. The artisan servants of an artificer or mechanic are not entitled to a similar privilege.⁷

buried: others thought the furnishing medicines to be no less a debt of humanity, and that *privilegiatus contra privilegiatum non utitur privilegio*; and in this the majority agreed.' *M. 11852*; *Elchies*, *Fun. Charges*, 3.

¹ *Sanders v Hewat*, 1822, 1 S. 333, N. E. 310. [*Drysdale v Kennedy*, 1835, 14 S. 159.]

² *Lawson v. Maxwell*, 1784, M. 4473. Here the surgeon attended for ten months in London a person paralytic, who afterwards returned to Scotland, never having convalesced, but survived for six months. The privilege was refused on two grounds: 1. As no such privilege is allowed in England; and, 2. As the period was too long. [See *Drysdale's case*, *supra*.]

³ In the above case of *Lawson* 'the Lords preferred the funeral expenses, and a year's fee of the servants, which were current at the defunct's death, and the term not come, unless it were instructed that the servants were only fee'd for half-years, in which case they only preferred the current term.'

Crawford v Huitton, 1680, M. 11832.

⁴ The Court ordered the following state of a judgment to this effect to be recorded as a precedent in the Books of *Sederunt*, 23d January 1779. In a competition among the arresting creditors of a bankrupt tenant, upon the price of his

effects, which had been sold by authority of the sheriff, a question having occurred, 'How far the wages due to the farm-servants of a bankrupt tenant, for the term current at a bankruptcy, were to be considered as privileged debts, and preferable to arrestors?' the Lords, before answer, ordered an inquiry to be made into the practice of the sheriffs of the different counties of Scotland as to that point; and reports having been accordingly received of said practice from the sheriffs of Edinburgh, East Lothian, Perth, Ayr, Aberdeen, Lanark, Roxburgh, Renfrew, Dumbarton, Dumfries, Selkirk, Ross, and Kincardine, the Lords yesterday proceeded to take the same into consideration, and thereafter pronounced an interlocutor, finding 'that the wages due to the servants of a bankrupt tenant, that is, to the servants kept for the purposes of the farm, are privileged debts upon the price of the bankrupt's effects, and are preferable to arrestors.' *Melvil v Barclay*, 1779, M. 11863.

⁵ *M'Glashan v D. of Athole*, 29 June 1819, *Fac. Coll.* [The privilege extends to the wages of a gardener. *M'Lean v Sheriff*, 1832, 10 S. 217.]

⁶ *Lockhart v Paterson*, 1804, M. Priv. Debt 2.

⁷ *White v Christie*, 1781, M. 11353; *Fulton v Fair*, 1792.

4. Wages or salary to the overseer of a manufactory are not privileged;¹ and this will apply to clerks of merchants and manufacturers; and so it is accordingly held in practice.²

SECTION III.

OF REVENUE PRIVILEGES.

This is a privilege grounded on the public interest. And,

1. By statute 9 Anne, c. 10, sec. 30, debts for LETTERS not exceeding £5 are recoverable before justices of peace; and 'such debt or sums of money shall be preferable in payment by the person owing the same, or from whose estate the same is or shall be due, before any debt of any sort to any private person whomsoever.'³

2. By statute 57 Geo. III. c. 34 and 123, and 1 Geo. IV. c. 60, the obligations to be granted for LOANS under the said Acts, 'by any person who shall afterwards become bankrupt, and against whose estate sequestration shall be awarded in Scotland, shall, by reason and force of such bankruptcy, and from the time of the date of the first deliverance on the petition to the Court of Session for awarding the sequestration, become, and be due and payable as against such bankrupt; and that all the estate and effects, real and personal, [159] of such bankrupt, which would be liable to satisfy the demands of the creditors seeking relief under such sequestration, shall be liable and subject, and are hereby made chargeable with the payment of the principal and interest due upon such obligations or other security, and all costs attending the recovery of the same; and that the claims of the said commissioners shall be paid and satisfied out of the estate and effects of such bankrupt, and in preference⁴ to the claim or claims of any other creditor or creditors; nevertheless without prejudice to preferences⁴ duly obtained according to the law of Scotland upon the real estates of persons who shall become bankrupts: And it shall be lawful for the said commissioners, etc., to apply by petition in a summary way to the proper Courts in Scotland, etc., for making effectual the payment of the claims of the said commissioners accordingly; and the said Courts are hereby authorized and required to make the same effectual accordingly.'⁵

SECTION IV.

OF WIDOW-FUNDS AND FRIENDLY SOCIETIES.

SUBSECTION I.—MINISTERS' WIDOW-FUND.

By statute 19 Geo. III. c. 20, entitled 'An Act for the better raising and securing of a fund for a provision for the widows and children of the ministers of the Church of Scotland,' etc., 'it is provided that the yearly rates, and other sums payable by the present and future ministers of the Church of Scotland, and by the present and future heads, principals, and masters in the Universities aforesaid, etc., together with the interest thereof, shall be

¹ *Ridley v Crs. of Haig*, 1789. [*Cowan v M'Micken*, 1846, 19 Jur. 91.]

² [*Mabon v Perkins*, 1837, 15 S. 1087. By 19 and 20 Vict. c. 79, sec. 122, it is enacted that, in the case of a sequestration, the wages of workmen, clerks, shopmen, etc., if below £60 a year, are to be privileged like the wages of domestic servants, to the extent of one month's wages before sequestration, or before the concurrence of diligence causing notour bankruptcy.]

³ [1 Vict. c. 32-36; 3 and 4 Vict. c. 96; 10 and 11 Vict.

c. 85; 11 and 12 Vict. c. 88. The subject of revenue privileges is more fully discussed by the author under WRIT OF EXTENT. Let it suffice to add that the Crown has a universal preference over the personal estate for all debts recoverable by process in the Court of Exchequer.]

⁴ Erroneously printed reference, and references, in the Act.

⁵ See *Holden v M'Farlan*, 1821, 1 S. 62. [*Lords of Treasury v Macnair*, 14 Feb. 1809, F. C. See 1 and 2 Vict. c. 88-93; 3 and 4 Vict. c. 73.]

privileged debts, and preferable to all other debts of the said ministers, heads, principals, and masters, not only on their benefices and salaries, but also upon their whole other personal estate.' And it is further provided, that the full expenses incurred in recovering the sums due to the said fund shall 'be recovered out of their respective estates, without any abatement or mitigation.'

This statute is a Public Act; and in virtue of it the general collector of the fund is preferable to all other creditors on the personal estate, for all sums due to the fund, with the expenses. This preference has been frequently contested by creditors, the statute not being much known or attended to. But uniformly, and without one exception, the privilege of the collector has been supported by the Court. It has been held preferable to the funeral expenses; and, in a case solemnly decided, it was found preferable to a lien or right of retention pleaded by an heritor in whose hands the collector had arrested the stipend due to the minister.¹

SUBSECTION II.—FRIENDLY SOCIETIES.

By 33 Geo. III. c. 54 (extended by 49 Geo. III. c. 125), the sums due to the society by the office-bearers dying or becoming bankrupt, are directed to be paid 'before any of the other debts are paid or satisfied.' It has been held that this Act is confined to persons duly and formally appointed officers of the society,² and extends not to one receiving [160] the society's money, as a banker, or receiving it in loan at interest.³ Nay, money lent on his note to a treasurer duly appointed has been found not within the Act, as it was intended only to cover money getting into the hands of officers independent of special contract.⁴ But money coming into the hands of the preses as such, and lodged by him in a bank in his own name, entitles the society to this privilege under the Act.⁵

¹ Sir H. Moncreiff *Wellwood v Guthrie of Craigie*, n. r.

² *Ex parte Ashley*, 6 Ves. 441.

³ *Ex parte Amicable Society of Lancaster*, 6 Ves. 48; *ex parte Ross*, *ib.* 804.

⁴ *Ex parte Stamford Society*, 15 Ves. 280.

⁵ *Millar v Brand*, 1825, 3 S. 518, N. E. 359. [See, on this subject, 9 and 10 Vict. c. 27; 12 and 13 Vict. c. 106, sec. 167; 13 and 14 Vict. c. 115, sec. 36; 18 and 19 Vict. c. 63; 21 and 22 Vict. c. 101; 30 and 31 Vict. c. 117.]

BOOK VI.

SYSTEM OF THE BANKRUPT LAWS.

[161] REFERRING to the general view already given of the principles of Bankrupt Law (vol. i. p. 7 et seq.), it may be proper to consider the subject particularly under these heads:—

1. Of insolvency and bankruptcy, and the restraints which they impose on the voluntary acts of the debtor.
 2. Of the proceedings in bankruptcy against the estate.
 3. Of the division of the funds among the creditors.
 4. Of proceedings against the person of the debtor.
 5. Extrajudicial settlements between insolvent debtors and their creditors.
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PART I.

OF INSOLVENCY AND BANKRUPTCY, AND THE RESTRAINTS WHICH THEY IMPOSE ON THE VOLUNTARY ACTS OF THE DEBTOR.

THE doctrines which have been explained relative to the constitution and effect of securities and preferences, would be left incomplete without an explanation of the regulations by which the abuse of them is prevented. On the eve of bankruptcy, debtors are frequently tempted to make fraudulent and collusive alienations of their funds, for the purpose of concealing and embezzling them; or to bestow on their friends preferences to the prejudice of the other creditors. An inquiry into the laws by which such frauds are prevented or remedied, will be not improperly introduced by a review of the description and character of bankruptcy as contradistinguished from mere insolvency.

CHAPTER I.

OF INSOLVENCY AND BANKRUPTCY.

[162] THE term BANKRUPTCY has been used in a sense extremely vague, not only in common speech, but by writers on law, and even by the Legislature.¹ Insolvency is properly the

¹ See the Observations of Sir G. M'Kenzie 'on the 18 Act 23 Parl. King James vi.;' Ersk. ii. 11. 59; 1621, c. 18; 1681, c. 17; 1690, c. 20.

generic term. It may be distinguished as comprehending SIMPLE INSOLVENCY, which consists in the debtor's inability to pay his debts, and is attended by no legal badge of notoriety or promulgation; and NOTORIOUS INSOLVENCY, properly termed BANKRUPTCY, which is designated by certain public acts of legal diligence, selected by the Legislature as sufficient to indicate an insolvency at once notorious and irretrievable. Another stage of bankruptcy is distinguishable, where the estates of the debtor are taken out of his own administration, and placed under trust or judicial management for the benefit of his creditors. In the construction of deeds and contracts, a considerable latitude may be allowed in the use of these ambiguous words. But at least it may generally be laid down, that where *bankruptcy* is stipulated as a condition in a contract, mere insolvency will not be sufficient;¹ while a stipulation of forfeiture on *insolvency* will require, not the simple fact of failing to pay, or not being able to pay debt; but either acts of notorious bankruptcy, or a previous declarator of a state of insolvency.²

In Scotland, an insolvent debtor may be made a *bankrupt*, whether he be a trader or not. Bankruptcy with us is not, as in England, confined to merchants.

SECTION I.

OF INSOLVENCY.

In one sense, insolvency is the inadequacy of a man's funds to the payment of his debts; but in a practical view, much less than this makes insolvency. Where a man is unable to fulfil the obligations which he has undertaken, and according to his undertaking, he is insolvent. More particularly, he is insolvent when the engagements which he is unable to answer are so numerous, or so great in amount, that he cannot proceed without the aid of some general arrangement with his creditors, some indulgence given in point of time, some consent that his payments shall be taken in small portions. A person in this state is truly insolvent; and it does not follow that he is not insolvent, because in the end his affairs may come round, and he may ultimately have a surplus on winding them up.³

When, in the practice of trade, a merchant is said to be insolvent who allows his bills to be dishonoured, this is a fair indication of the above derangement in his concerns. Other less equivocal proofs are, when a man, finding the impracticability of proceeding with [163] his dealings, calls his creditors together to submit to them some scheme for their payment, or for the division of his estate, or for the compounding of his debts; in all which, although he may present a flattering prospect of ultimate payment, he is forced to admit that without indulgence he cannot proceed. Properly speaking, these are not indications of absolute insolvency, looking to the final payment of the debt; but they are proofs of insolvency in a practical sense, as the debtor cannot fulfil his engagements. It seems hitherto to have been held, that the only conclusive proof of insolvency is to be found in a comparison of the debts with the funds; and in most of the legislative remedies which have been provided against the frauds of insolvent debtors, or the evils of multiplied proceedings on the part of the creditors, it is to this sort of proof that reference has been made as the criterion of insolvency. But still it is left as a question of construction, whether, taking the funds against the debts, they afford the means of answering the creditors according to their bonds. If not, the debtor is insolvent from the moment that he voluntarily pauses,

¹ *Munro v Cowan & Co.*, 8 June 1813, Fac. Coll., where, in a clause of a contract of partnership, provision having been made for the dissolution of the society as to any partner who shall be bankrupt, the Court held it not sufficient that a partner had become insolvent.

² *Hog v Morton*, 1825, 3 S. 617, N. E. 433.

³ See the observations of Lord Ellenborough and the other judges in *Bayley v Schofield*, 1 Maule and Selw. 338; also 1 Camp. 491, note.

or is, by the operations of his creditors, impeded in the course of his dealings. A conveyance *omnium bonorum* by a person indebted to others than the donee makes the grantor insolvent.¹

Insolvency may be inquired into on several occasions, which it may be well to distinguish.

1. The question may be, whether the debtor has made a conveyance to his family or relatives, to the prejudice of his creditors? In such a case, if the deed do not interfere with the immediate rights of the creditors, but establishes merely a right to share in the reversion of the estate after paying debts, it will furnish no ground of challenge, that in a practical sense the grantor is insolvent, provided his funds shall ultimately be adequate. And on the other hand, if the effect of the deed be to interfere with his immediate engagements, present insolvency will be sufficient to sustain the challenge.²

2. The question may regard the fair exercise of his power over his property, and the restraints under which as debtor he ought to be placed in satisfying the demands of his more importunate or favoured creditors; or generally it may be a question of status, whether the debtor be a bankrupt; in which respect, present and practical insolvency, or inability to fulfil his engagements, seems to be the true point of inquiry. See below, p. 156.

3. Again, the question may relate to the proceedings of creditors, whether they are to be restrained to the ordinary processes of the law for the recovery of debt, or to have access to more summary and effectual means of bringing their debtor's estate at once to the market. This depends on the character of the insolvency prescribed in the particular statutes by which the remedy that is sought is provided. Thus it is by 1690, c. 20, requisite to the process of judicial sale of land for debt, that the debtor shall be found bankrupt and utterly insolvent; and by the statute of 54 Geo. III. c. 137, sec. 7, it is declared that, in construing this old statute, it shall be sufficient to authorize a sale, that the interest of the debts and the other annual burdens exceed the yearly income of the subjects under sale, without any other proof of bankruptcy or insolvency.³ This is an insolvency rather of the special estate than of the whole funds of the debtor; the Legislature looking more to the remedy which real creditors are entitled to pursue against the estate which stands secured to them, than to the disposal of the person or distribution of the general funds of the debtor.

[164] 4. Insolvency may be necessary to justify certain proceedings; as stopping goods *in transitu*, retaining goods till security shall be given not originally stipulated, arresting the debtor's funds in security, etc. Creditors are justified in proceeding thus as against an insolvent debtor, when he is unable to perform his engagement to them, or even when in general reasonable suspicion has attached to him; but they must in this last case run the hazard of an action of damages if they have proceeded rashly.

Insolvency must be computed as at the point of time when the act that is challenged as incompetent to an insolvent debtor was done; or when the other circumstances concur which the law holds to constitute a bankruptcy.⁴

SECTION II.

OF BANKRUPTCY.

Bankruptcy is a status or condition fixed by legislative provision; in which insolvency accompanied by certain steps of diligence is held to be no longer doubtful, but public, proclaimed, or notorious, equivalent to the *cessio fori* of a trader.

¹ *Kinloch v Blair*, 1678, M. 889; *Brown v Drummond*, 1685, M. 891.

² *Lourie v E. of Dundee*, 1663, M. 911. It was found sufficient to support a challenge on the Act 1621, c. 18, that 'by the disposition there remained no estate sufficient

ad paratam executionem.' See also *M'Kenzie v Fletcher*, 1712, M. 9246.

³ [Re-enacted by 19 and 20 Vict. c. 91, sec. 3.]

⁴ *Cochran v Crs. of Sir William Forbes of Monimusk*, 1712, M. 1087.

Two objects have been proposed to be accomplished in settling legislatively the character or status of bankruptcy. The one is, to fix a point at which it may be safe to authorize summary proceedings for attaching and bringing the debtor's estate to sale, and for preventing the unequal operation of diligence by individual creditors; the other, to enable creditors to destroy or procure to be recalled voluntary preferences by conveyance, unjustly bestowed by the debtor upon his favourite creditors.

In settling the description of bankruptcy in Scotland, for the purpose of accomplishing the two objects now pointed out, the matter came naturally enough to be considered under two different aspects. 1. In order to authorize fit means for attaching and distributing the estate, and restraining the diligences of individual creditors, it was sufficient to settle a clear description of notorious insolvency. 2. To furnish a remedy against collusive preferences by voluntary conveyances, or by diligence on the eve of bankruptcy, was a more difficult problem: for it became necessary to make provision against those secret arrangements and almost inscrutable frauds which too often are the forerunners of bankruptcy; and this was accomplished by the establishment of a retrospective or constructive bankruptcy, having relation back to a certain period of time prior to the date of the public bankruptcy.

In commenting upon the several statutes by which these points have been regulated, it will be useful to follow the systematic order of the principles, rather than the historical course of the statutes. But, at the same time, the progress of the law should be attended to.

In Scotland, nothing was fixed relative to the description of a bankrupt till the end of the seventeenth century,¹ and the subject engaged the attention of courts of law long before it became matter of legislative interference. About the time alluded to, many great failures happened in Scotland, and the difficulties which chiefly perplexed the Court related to [165] the validity and effect of conveyances granted by debtors on the eve of their bankruptcy. The judges felt the want of a general rule, which might put an end to the inextricable contests that were found to arise relative to such deeds, and serve to regulate the proofs of those fraudulent designs with which a person is chargeable on the eve of bankruptcy. Such a rule was to be attained only by fixing a description of bankruptcy, in the first place; and settling, in the next, to what term of retrospect the presumption of a secret knowledge of the impending failure should be carried back. And thus it happened that the character of a bankrupt was fixed in Scotland, not so much with a view to any general process of distribution, as with a view to the prevention of frauds.

The judges of the Court of Session, while they thought this to be a fit subject for parliamentary interference, were under the necessity of deciding upon such proofs or presumptions as the several cases before them afforded. They named a committee of their number to draw up the project of a law to be submitted to Parliament; and, in the meanwhile, they proceeded in their determinations upon such grounds as the following: That a sudden and unexpected failure, accompanied by the diligence of many creditors; the granting of securities to some creditors in preference to others; and the absconding, taking refuge in the sanctuary, or fleeing the country, accompanied with the being held or reputed a bankrupt,—were sufficient indications of notorious bankruptcy.²

It was in this complicated way of considering it, that the matter of bankruptcy first occurred in the courts of law in Scotland. But in Parliament it came to be reduced to more precise points. In the Parliament which met in September 1696, this became an early object of attention, and a description of bankruptcy was at last settled.³ It consisted, first, Of a precise definition of the public, or, as it is called in the Act, *notour* bankruptcy;

¹ Even in the statute 1681, c. 17, relative to the sale of land estates of insolvent debtors, there is no description of public and notorious failure. 'The Act of this Parliament (says Fountainhall) anent the sale of bankrupts' lands, leaves it in *arbitrio judicis* and undetermined who is meant by a

notorious bankrupt; whether only he who has a *cessio bonorum*, or he *cujus debita excedunt bona omnia, tam mobilia quam immobilia.*' 1 Fount. 155.

² 1 Fountainhall 596, 605, 652.

³ See 1696, c. 5.

and, *secondly*, Of a definite rule for reckoning the term of constructive or retrospective bankruptcy.

By subsequent statutes,¹ the description of the notour bankruptcy has been further cleared and enlarged. Some of those amendments have been intended for bringing under the wholesome restraints against fraud, cases which were improperly omitted, or which did not readily occur in the state of more limited intercourse which prevailed at the date of the original statute; others, and by far the most important, form a part of a new system of general attachment and distribution, suitable to the occasions of a mercantile bankruptcy.

The description of bankruptcy, then, may be distinguished as comprehending, 1. The *indicia*, or characters of notour bankruptcy; and, 2. The constructive or retrospective bankruptcy. These may be considered in their order. And, 3. Some explanations will be necessary as to the termination of bankruptcy.

SUBSECTION I.—OF NOTOUR BANKRUPTCY.

The statutes which contain the definition of bankruptcy in Scotland are, the 5th Act of the Scottish Parliament in 1696, and the statute of the 54 Geo. III. c. 137, continued by subsequent Acts.²

[166] By the Act of the Scottish Parliament of 1696, c. 5, 'a notour bankrupt' is declared to be 'any debtor who, being under diligence by horning and caption at the instance of his creditors, shall be either imprisoned, or retire to the abbey or any other privileged place, or flee or abscond for his personal security, or defend his person by force, and who shall afterwards be found by sentence of the Lords of Session to be insolvent.' And by the modern statutes³ this is extended to comprehend those cases in which some part of the diligence here described cannot be executed by reason of the debtor's absence from Scotland, or of his being a person privileged, or of his being under personal protection or in the sanctuary. In these cases, instead of imprisonment or its equivalents, it is declared sufficient, the debtor being insolvent, that a charge of horning against him shall have been followed, 1. By arrestment of any of his effects not loosed or discharged within fifteen days; or, 2. By poinding executed of any of his moveables; or, 3. By adjudication of any part of his estate for payment or security of debt.

The object which was originally proposed in settling the description of bankruptcy, was to afford to creditors a remedy against unjust preferences conferred on particular creditors to the injury of the rest. It was not, like the description of a bankrupt in England, or of mercantile bankruptcy in Scotland, intended as the groundwork of a general process of distribution. At first it was meant to afford to creditors the means of challenging voluntary conveyances; afterwards there came to be ingrafted on it certain provisions for defeating preferences obtained by the use of diligence; and, by subsequent statutes, it was made one of the requisites in general processes of distribution of the bankrupt's estate among his creditors. But bankruptcy, as thus settled, stands insulated so far, that a debtor may be 'notour bankrupt' without any visible effect being made to follow from it.

To this kind of bankruptcy all persons without exception are liable, whether natives or foreigners, who are at the time in Scotland, or subject to the laws of Scotland.⁴

¹ See 23 Geo. III. c. 18; 33 Geo. III. c. 74; and 54 Geo. III. c. 137. The last is the subsisting Act on this subject, and, like the former, is a temporary and experimental law.

² Under these recent statutes, persons concerned in trade or manufactures may be made bankrupt by sequestration. But as it seems better to present the commentary on that statute in one unbroken view, all that relates to this description of bankruptcy is explained in another part of the work.

³ 33 Geo. III. c. 74, sec. 2; and 54 Geo. III. c. 137, sec. 1. [19 and 20 Vict. c. 79, secs. 7, 11.]

⁴ In England the bankrupt laws apply only to 'persons in any trade.' But with this qualification, they 'afford no exemption in respect of degree, station, or place of birth.' Cullen's Principles of Bankrupt Law 8; Eden's Bankrupt Law 1. [But see 32 and 33 Vict. c. 71.]

1. PEERS, and others having PRIVILEGE of PARLIAMENT,¹ may be bankrupts, though not engaged in trade. They are to be made bankrupt only by particular acts of diligence described in the statute, while their privilege subsists. But, with this exception, all the effects of bankruptcy will attach upon them, as upon other debtors.

2. A PUPIL, an IDIOT, or a LUNATIC, may be made a bankrupt in Scotland. Even in such cases creditors may find it highly useful to have the power of applying the equalizing rules of the bankrupt law. And while all that is harsh towards the person, in the law of debtor and creditor, is taken away when such persons are concerned, and imprisonment cannot take place,² the case will probably be held to fall under the provision respecting those who are not liable to imprisonment by reason of privilege.³

3. WOMEN, of course, are included in the laws of bankruptcy; but MARRIED WOMEN are in a peculiar situation. The general rule of the law of Scotland is, that a married woman is not capable of incurring personal obligation;⁴ and even such obligations as she may [167] have undertaken before marriage, or entered into relatively to her own separate stock, or contracted in a state of separation from her husband, and in the character of a sole trader, unless her husband has abandoned Scotland,⁵ are still so far restrained, that they cannot be the ground of diligence against her person. It would seem, therefore, 1. That a married woman, living with her husband, cannot in the common case be made a bankrupt; 2. That even where she lives apart from her husband, and carries on a separate trade, she cannot be made a bankrupt by imprisonment, unless her husband has abandoned the country, and left her as in a state of widowhood.⁶ But, 3. It has not been determined whether, in consequence of obligations legitimately undertaken relative to her own peculiar estate, or contracted in a state of separation and sole trading, a wife may be made a bankrupt by a charge of horning, with arrestment unloosed, pinding or adjudication of her separate estate, under the provision of the late statute, relating to those who are not liable to be imprisoned by reason of privilege or personal protection.

4. CORPORATE BODIES are in law considered as persons when associated by royal authority or Act of Parliament. When a community is thus established by public authority, it has a legal existence as a person, with power to hold funds, to sue, and to defend.⁷ It is,

¹ See below, p. 164. In England provision is made for this by 4 Geo. III. c. 35, sec. 1; 44 Geo. III. c. 124, secs. 1, 7; 6 Geo. IV. c. 16, secs. 10, 11.

² 1696, c. 41. This statute is merely declaratory of the common law; and though its terms seem to comprehend only pupils, it confirms the rule as applicable to all who are subject to mental incapacity. It does not comprehend minors. Ersk. iv. 3. 25; 1 Bankt. p. 174, sec. 47.

³ See 54 Geo. III. c. 137, sec. 1.

⁴ In cases where there has been no separation, personal diligence has been uniformly held incompetent against married women, even for debts before marriage, unless for enforcing performance of an act within their own power. Neither has a married woman any power of contracting personal obligation, even with her husband's concurrence, so as to bind herself during the marriage (*Menzies*, 1761; *Watson*, 1772; *Harvey & Fawell*, 1791, Bell's Oct. Ca. 255; *Lennox v Auchincloss*, 1821, 1 S. 22); nor can even fines imposed upon a wife, or damages found due by her, authorize diligence against her person during marriage (*Pain v Haliday*, 1738, M. 6079; *Chalmers v Douglas*, 1790, M. 6083).

⁵ *Churnside v Currie*, 1789, M. 6082. 'The husband having left Scotland in bankrupt circumstances, the wife entered into trade in order to maintain herself and her children. Being charged with horning for payment of a bill of exchange, she

suspended, upon the ground that a married woman is not liable to diligence.' The bill of suspension was refused by the Lord Ordinary; and the Court affirmed this judgment, on the principle, that to deny diligence in such cases would prove injurious to married women in this condition, as depriving their creditors of a legal remedy, and undermining the credit which a wife thus left destitute might otherwise acquire.

This doctrine seems questionable as the ground of determination. For however expedient the use of diligence in such cases may be, it is not for courts of law to proceed on such views. I should doubt whether a wife can be considered as deprived of her conjugal character in this respect, by anything short of the husband's exile or transportation as a criminal, which may be regarded as his civil death (*Ersk. i. 6. 25*); or such desertion as, by the law of Scotland, forms a legal ground of divorce (*Ersk. i. 6. 44*).

⁶ In England a wife may, according to the custom of London, be a sole trader, so as to become a bankrupt as to her separate effects in trade; but, in general, a wife is not liable for debts during her coverture, unless her husband has abjured the realm, become an exile, or been transported. *Marshall v Rutton*, 8 Term. Rep. 545, *Whitmarsh's Bankrupt Law* 4, *Eden's Bankrupt Law* 2.

⁷ *Ersk. i. 7. 64*.

of consequence, subject to diligence; and although personal execution cannot proceed against this ideal legal person,¹ and so the requisites of imprisonment, etc., under the Act 1696, c. 5, cannot be complied with, there seems to be no reason to doubt that a corporation may now be made bankrupt by the means recently provided for those cases in which imprisonment is incompetent.

5. It has been doubted whether under the Act 1696, c. 5, even as extended, a partnership can be made bankrupt. Had such a question occurred before the Sequestration Law was passed, there would have been a strong inducement to strain the construction towards the affirmative; since, without construing the law to comprehend the case of a company, all the evils which it was intended to remedy remained unredressed in the very case for [168] which it had become most important to have a remedy. The spirit of the Act directly applies to partnerships as well as to individual debtors.² But there is much room to doubt how far it is possible, according to the words of the law, to make a partnership bankrupt under the Act of 1696.³ It seems, however, to have been taken for granted in some cases that the statute applied to companies.⁴

6. A debtor domiciled abroad, whether a foreigner or a native, where he has property in this country, is liable to the jurisdiction of the Scottish courts, and may be charged on letters of horning for payment of debt. It would seem that he may also be made bankrupt, though under the late statute he will not be subject to sequestration.⁵ In the case of a person abroad, whether foreigner, or native no longer domiciled in Scotland, it is necessary to proceed by previous arrestment *ad fundandam jurisdictionem*, in order to entitle the creditor to have a horning issued against him.⁶

The description of bankruptcy contained in the statute 1696, c. 5, as amended, includes these several circumstances, some of which are alternative: 1. Insolvency; 2. Diligence by horning and caption; 3. Imprisonment, or the eluding of it by absconding, retiring to the

¹ So in *Shoemakers of Canongate*, 1747, Kilk. 52; *Elch. Suspension*, No. 6. In this case it was found 'that no reduction could lie upon the Act 1696, as the corporation, a body politic, was not capable of the personal diligence requisite by the statute, and that no equivalent circumstances are ever admitted to bring a debtor under the description of it.' *Elchies' Notes* 161. [Compare *Hogan v Mag. of Musselburgh*, 1853, 15 D. 417; and *Wotherspoon v Mag. of Linlithgow*, 1863, 2 Macph. 348.]

² The spirit of the law comprehends the case of a partnership, as intended to prevent the frauds of debtors of all descriptions; and partnerships are no less capable of incurring debts, and of granting fraudulent preferences, than individuals. It is probable that it was understood by the Legislature that the law included partnerships; for though not then frequent in trade, the intention was to comprehend every description of debtor. And that the judges have understood it in this sense, seems manifest from the Act of Sederunt 1754, where, acting legislatively, they, at a time when, under that description, partnerships were frequent, rested the regulations intended to apply to all debtors on the enactment 1696, c. 5. This is confirmed by the inference deducible from the case of *Fairholmes*. See note 4.

³ A partnership may sustain the character of creditor and of debtor, but is not the object of diligence otherwise than in its stock and in the persons of its partners. It cannot as a company be imprisoned, nor abscond, nor take sanctuary.

It may be argued, on the one hand, that where a company is charged with horning, and the partners are afterwards imprisoned for the debt, the debtor truly is imprisoned.

But it may be answered, that this imprisonment is not of the company, the proper debtor, but only of the partners, on their obligation for the company debts; and that, at all events, the debtor cannot in any sense be said to be imprisoned in the case of a company, unless every partner be imprisoned. In this view, perhaps, the true doctrine of the law may be that the partnership is represented either actively or passively by its partners; that the acts which a partner does in the line of the company's trade, and under the name of the company, are the acts of the company; while the diligence which a creditor sues out against the company, and executes against all the partners, may justly be considered as done against the company itself. I urged strongly on those who prepared the Act of the 54 of Geo. III., that the law on this point should be placed beyond doubt, but it appeared to them that it was not necessary.

⁴ See, for example, the case of *Messrs. Fairholmes & Co.*, 1770, M. App. Bankrupt, No. 5, who, having granted a disposition *omnium bonorum* to trustees, it was reduced on the Act 1696, c. 5, the company having been made bankrupt by horning and caption for a company debt, with an execution of search against the partners. In this case the objection was not even stated, which seems to imply a general understanding that the law extended to companies; and taking it to be so, the Act of the 12 of Geo. III. may be argued on as a confirmation of this opinion.

⁵ 54 Geo. III. c. 137, secs. 1 and 15.

⁶ See above, vol. ii. p. 65. *Pedie v Grant*, 1822, as revd. in the House of Lords in 1825, 1 W. and S. 716; *Smith v Ninian*, 1826, 5 S. 8, N. E. 7.

sanctuary, or resisting the officer; or, 4. Arrestment unloosed for fifteen days, or poinding, or adjudication.

I. **INSOLVENCY AS AN INGREDIENT IN NOTOUR BANKRUPTCY.**¹—Insolvency is not made a matter of presumption by the statute 1696, c. 5; but few cases occur where a proof of insolvency will be required in addition to the concurrence of the other requisites. It is not necessary, as may be imagined from the words of the Act, to institute a separate action for ascertaining the insolvency. The point is tried in the course of the reduction of a preference, or in judging of the petition for sequestration; and the judgment on the [169] insolvency is combined with the sentence on the whole question before the Court.

Where a deed is under challenge on this statute, as granted by a bankrupt to the prejudice of the general creditors, the computation of insolvency is to be taken as at the date of the acts of diligence by which the bankruptcy is completed, and not as at the date of the deed.²

II. **DILIGENCE BY HORNING AND CAPTION.**—Imprisonment for debt, originally unknown in the law of Scotland, was introduced in two different ways: one form of imprisonment was permitted by the statute merchant, enacted for the encouragement of traders, and to promote the rise of cities and towns; and another form of imprisonment succeeded by gradual steps to the old ecclesiastical proceedings, by which the clergy in their own jurisdictions had acquired a power in execution unknown to the civil courts of the country.³ The imprisonment introduced by the statute merchant proceeds upon a warrant issued by the magistrates of burghs, called an act of warding; and this warrant is contained either in a judgment pronounced by the magistrates, or in a decree of registration given forth from the court of the magistrates upon a clause of consent, or upon a registered protest of a bill.⁴ Generally imprisonment proceeds upon letters of horning and caption, issued from the Court of Session, either upon a judgment of that Court pronounced in an action, or on a decree of registration by consent, or under the statute relative to bills, or on a decree given in supplement of the judgment of an inferior court.

As the object of the statute of 1696 was to mark out as bankrupts those who should be under ultimate personal execution, the other modes of imprisonment should have been as good a criterion of irretrievable insolvency as that which proceeds upon caption; but the expressions of the law are precise, and the Court has always rigidly adhered to them.⁵

Formerly, in cases where whole societies, corporations, or sets of men were liable to any demand, the common diligence was by general letters of horning, which, without any citation or previous sentence, were issued against all persons of that description, without mentioning their names, and authorized a charge for payment; and after expiration of the charge, caption against any individual who, by extraneous evidence, should appear to be included. Thus general letters of horning were issued against landholders for payment of the land-tax, against heritors for payment of stipend to clergymen, etc. In 1592 denunciation upon general letters was declared unlawful, so that the escheat or forfeiture on account of disobedience could not fall upon such a warrant.⁶ This statute took away a part, but not the whole, of the evil, for it was still competent to imprison in virtue of a caption proceeding upon the general letters;⁷ and therefore by 1690, c. 13, general letters were altogether prohibited, except, *first*, For the king's revenue; *secondly*, For ministers'

¹ See above, p. 153.

² See above, p. 154.

³ This subject will be more fully discussed in the last part of this Book.

⁴ See vol. i. p. 4.

Another mode of imprisoning debtors is provided by the Small Debt Acts of 39 and 40 Geo. III. c. 46, as modified by 6 Geo. IV. c. 48, and also as provided by 6 Geo. IV. c. 24.

⁵ *Snodgrass v Beat's Crs.*, 1744, M. 1209, Elch. Fraud 13.

⁶ 'No charges,' says the Act, 'nor letters of horning, shall be generally directed against all and sundrie, except it be against ane burgh, college, or community, whilk represents ane body; at least, it sall not be leasom to denounce ony particular party to the horn upon sic general letters, except gif the said party be first lawfully and specially called to hear and see the said letters direct against him for a special and certain duty or fact,' etc. 1592, c. 140.

⁷ *Stair iii. 3. 13*; see *M'Adam v M'Ilwraith*, 1771, Hailes 453.

stipends upon decrees of locality; and *thirdly*, Upon decrees for poinding of the ground. [170] And these are the only cases in which general letters are used at the present day. In the only case in which it has been questioned whether general letters of horning, followed by caption, were sufficient to fulfil the requisites of the statute 1696, c. 5, the Court found them sufficient.¹

The diligence of horning and caption must, in order to infer bankruptcy, be regular and formal. Thus, a horning executed at the debtor's dwelling-place after he had been for more than forty days out of Scotland, was held insufficient to create a bankruptcy.² In all questions on bankruptcy the diligence should be examined in order to discover whether any objections lie to the proceedings.³

III. IMPRISONMENT AND ITS EQUIVALENTS.—The third requisite in the statute is imprisonment, or its equivalents of absconding, resisting, or taking sanctuary. These alternatives have been selected for completing the character of bankruptcy, as amounting to an acknowledgment that the debtor is unable to pay his debts; this inference being equally strong whether the debtor suffer the disgrace of imprisonment, or abscond, resist, or take sanctuary in order to avoid it. These acts, taken by themselves, may perhaps in many cases imply only negligence on the part of the debtor, or accidental derangement in his affairs, or unforeseen disappointment in remittances, etc.; but, taken along with the other circumstances in the statute, insolvency and expired diligence, they are justly considered as proofs of bankruptcy. In England mere imprisonment is not an act of bankruptcy. It must be either a fraudulent yielding to prison for a true debt which the debtor is able to pay, or for a false debt raised up for the purpose; or if the arrest be fair, the debtor must have lain two months in prison without paying or finding bail for the debt. In Scotland, imprisonment is held as an indication of bankruptcy, as taking place, not suddenly, like the arrest of the English law, but after the debtor has had full warning to call forth all his resources. If, being a merchant or manufacturer, he shall not be able to save himself from prison after such ample notice, or being in any other condition of life, he shall allow diligence to go to this extremity against him, being at the same time insolvent, he is rightly to be considered as bankrupt.

1. IMPRISONMENT.—The following points seem to be settled:—

(1.) That it is not necessary that the debtor shall be actually put in jail,⁴ but sufficient [171] that he has been apprehended or arrested, and taken into custody by the messenger, and the caption not discharged. But,⁵

¹ *Man v Walls and his Crs.*, 1702, M. 1006. Lord Fountainhall says: 'The Lords were more circumspect in deciding this case, because it was among the first pursuits that have been founded on the late Act of Parliament, and it was fit to clear the same for the future.'

² *Coopers v Joyce & Stoddart*, 1807. The objection was to a sequestration, that the debtor was not a bankrupt in terms of 33 Geo. III. c. 74, sec. 13, as he had been more than forty days out of Scotland; and the only horning against him had been executed at his dwelling-house, contrary to the Act of Sederunt, 14 Dec. 1805, sec. 1. The Court sustained the objection, and refused to sequester.

A decision somewhat different was given in the case of *L. Kilkerran v Cooper*, 1737, M. 1091. It will be observed, however, that at that time no rule was established for ascertaining what should be deemed absence from Scotland, as in the Act of Sederunt above referred to; and the decision may have proceeded partly on the possibility of the law being evaded, should the matter be taken too rigidly. No such danger could be apprehended while the rule laid down in the Act of Sederunt was in force, but in the subsisting statute

this regulation has not been adopted; and as the Act of Sederunt had relation merely to the statute which has now expired, the above rule seems to be no longer in force. It deserves to be considered, whether this rule should not be renewed.

³ In *Taylor's* sequestration, Feb. 1819, it was objected that the caption was for sums under indefinite deductions, 'deducting such sums as can be shown to be paid.' This was not held fatal to the application for sequestration.

⁴ A warrant not merely of suspension, but of *liberation*, was required to free a debtor from the hands of a messenger, though he was not in jail. *Beattie v Graham*, 29 July 1726. See also *M'Intosh v Dawson*, 1734; Elch. Prisoner, No. 4; Notes, p. 350.

⁵ This was first determined by a judgment of reversal, in the House of Lords, of the decree of the Court of Session in *Turnbull of Woodston v Colonel Scott of Comiston*. The judgment of the House of Lords bore, 'That Alexander Turnbull having been arrested, and actually in custody of the messenger, upon the caption at the suit of Sir William Ogilvie, was imprisoned within the true intent and meaning of the Act of Parliament 1696.' Determined in Scotland,

(2.) It is not sufficient custody if the messenger shall come into the presence of the debtor, or even declare him his prisoner, unless he shall do so with the solemnities requisite to an effectual taking into custody.¹ There had arisen in practice, since the decision in the House of Lords in Woodston's case, a great degree of looseness in this respect; the most informal act of apprehension having been thought sufficient to infer bankruptcy. The Court held it to be of great consequence to correct this error, and settle the matter upon a clear and certain footing. And it was accordingly adjudged, and is now considered as a fixed point, that to an effectual imprisonment in the sense of the statute, it is necessary that the messenger shall with the appointed solemnities have taken the debtor into custody.²

(3.) Where the imprisonment is once clearly established, the shortness of the time during which the bankrupt is in custody does not seem to destroy the effect of the diligence as a requisite of bankruptcy.³

(4.) Before this matter was so clearly settled as it is now by the late decisions, the [172] Court, in construing ambiguous acts of apprehension and custody, deemed any particular instructions given to the messenger important.⁴ A messenger in the country is very often employed, not merely in his capacity of an officer of the law, but also in some measure as an agent: he is instructed to recover the debt, or to negotiate for a security, or to imprison the debtor, as circumstances may point out to be the most likely way of effecting payment. Where, in the exercise of discretionary powers, the messenger has formally taken the debtor into custody, no exception can be raised against the imprisonment, as having proceeded

1755, 5 Br. Sup. 385; in the House of Lords, Feb. 1756. This judgment was followed as a precedent in *M'Adam v M'Twraith*, 1771, M. App. Bankrupt 8, Hailes 453.

In *Fraser v Monro*, 1774, M. 1109, Hailes 580, 'the Court was clear to adhere to the decision of the House of Peers in the case of Comiston, as establishing a rule that ought to be permanent, and not arbitrary; and that, for the same reason, there was no room for going into a distinction as to the time or number of hours of a bankrupt being in the messenger's custody.'

In *M'Math v M'Kellar*, 1791, Bell's Oct. Ca. 22, the same rule was followed. The debtor was apprehended and taken into custody in the Grassmarket of Edinburgh, walked up the Lawnmarket in the messenger's custody, and after a short time paid the debt from a loan then negotiated by him.

[*National Bank v Johnstone*, 1842, 5 D. 205; *Sutherland v Sutherland*, 1843, 5 D. 544.]

¹ See those solemnities described, Stair iv. 47. 14; Bankt. iii. 5. 13; Duty of a Messenger, p. 6.

² *Maxwell v Gibb*, 1785, M. 1113. The execution of the messenger bore that he had apprehended the debtor; but that, without imprisoning him, or taking him into custody, he had afterwards liberated him on promise of payment. The Court distinguished this from the case of Woodston in the House of Lords, and found no imprisonment.

Elliot v Scot, 1768. Similar.

Ewing v Jamieson, 1808, M. App. Bankrupt, No. 1. The rule laid down in the House of Lords was solemnly sanctioned; but it was held that the debtor had not in this case been taken into custody, as the messenger had no express instructions to imprison, and there was some ambiguity in the apprehension.

Stewart v Lamont, 1808, M. App. Bankrupt, No. 29. The Court went at great length into the argument. It was laid down: 1. That the rule settled by the House of Lords, so far

as it went, was to be adhered to. 2. That although it is of great consequence to follow the universal understanding of the country in a matter of this kind, yet it is of still greater importance to keep strictly to this rule. That, in applying the judgment of the House of Lords, a *formal and regular taking into custody* is necessary to constitute imprisonment, in the sense of the Act. Some of the judges were of opinion that, in the true sense of the Act, *incarceration*, an open and public act, was intended to be the criterion of bankruptcy; that in the case of Woodston, the *custody* which had taken place had been assimilated to the imprisonment of a spunging-house in England, and so had, without due discrimination, been considered as the imprisonment intended by the Act; that this is now to be regarded as law; but that the Court should not go a step further; and in holding custody as sufficient, should require that custody to be distinct, avowed, formal, and legitimate, and such as cannot admit of ambiguity. But this opinion did not prevail.

Blaikie v Clegg, 21 Jan. 1809, F. C. This rule confirmed.

³ And so, where a person was apprehended as a partner of a company by which the debt was due, and detained in custody till his partner went and brought the money, though it was said by Lord Newton that this was like a man putting his hand into his pocket for the money, yet the apprehension and custody being clear, the Court sustained the imprisonment. *Watt v Doig*, 16 June 1807. Petition refused, July 1807, n. r.

⁴ In the above case of *Ewing v Jamieson*, note 2, it was held by some judges, that where there is no express order given to imprison, the apprehension and custody are not enough; by others, that the mere holding of the caption is warrant sufficient. But in the case of *Lamont v Stewart*, note 2, the messenger had orders only to get the best settlement he could; and this weighed much with the Court in holding the custody as not established.

without authority. The holding of the warrant of caption is authority sufficient, unless expressly limited by the most specific prohibition to imprison.

(5.) Where the debtor has been actually in prison, the books of the prison afford good evidence of the fact.¹ An execution returned by the messenger is the proper evidence, where the debtor has not been committed to jail; or where the date is important, and that of the custody has preceded the incarceration. But executions are seldom returned, unless where the intention is to make the debtor bankrupt; nay, it may be the interest of the incarcerating creditor to deny all evidence of the imprisonment. Where his diligence, for example, has been the means of extorting from the debtor a deed of preference, which would be cut down by the bankruptcy, he will not readily be brought to disclose evidence of a fact so fatal to himself. Some other evidence must therefore be resorted to; and circumstantial evidence and oral testimony have been received.²

2. FORCIBLY DEFENDING.—This can admit of no doubt. The natural evidence of it is the attestation of the messenger and witnesses, contained in an execution or return; but a general proof will also be admitted.³

3. ABSCONDING.—Two questions may arise concerning absconding. 1. The messenger's return of execution, stating that after a thorough search the debtor could not be found, is good evidence *prima fronte* that he has absconded; and unless opposed by contrary evidence, is sufficient proof of bankruptcy. But what facts will entitle a messenger to return such an execution? In a man of good credit, mere absence from home is nothing; but in a [173] debtor notoriously insolvent such absence is more suspicious, and indeed has been found sufficient to infer, *presumptione juris*, an absconding under the statute 1696.⁴ It seems reasonable, however, to require some other circumstance than mere absence; as the lateness of the hour,⁵ or the apparent concealment or ignorance of the domestics of what has become of the debtor.⁶ From such circumstances, absconding may be fairly inferred; for although a man even while insolvent may be from home without any intention of eluding the diligence

¹ The messenger, in presenting his prisoner to jail, shows his caption, and sees the debtor's name entered in the books of the jail.

² In *Cleland's Crs.*, 1705, M. 1085, the Court found 'all these alternatives, viz. that the debtor was either imprisoned, or had retired to a privileged sanctuary, or absconded, or forcibly defended his person against the messengers, each of them relevant *separatim*, *prout de jure*;' that is to say, that it should be competent by every species of evidence to establish these several points.

In *Richmond v Trs. of Charles Dalrymple*, 1789, M. 1113, the question was very fully discussed. The Court expressed an unanimous opinion that there was no ground for supposing the execution of a messenger essential to the proof of the facts respecting a bankrupt's imprisonment, which might be equally well established by parole testimony; but as in this case the evidence was deemed inconclusive (the circumstance proved not amounting to imprisonment in the sense of the statute), the Lords adhered to Lord Stonefield's interlocutor, dismissing the reduction.

This case is held to have settled the question; and in *M'Kellar's* case in 1791 (see below, p. 165, note 3) the question was debated, but nothing was said on the subject by the judges, the Court finding the imprisonment established, although the evidence was only circumstantial, or *prout de jure*, as our law terms it.

³ See above, the case of *Cleland's Crs.*, 1705, M. 1085.

⁴ *Spedding v Hodgson*, 1785, M. 1113. It was observed on the bench, at pronouncing the decision, 'that the absence of

a debtor from his dwelling-house at a time when he is notoriously insolvent will create a *presumptio juris* of absconding. Not being, however, a *presumptio juris et de jure*, it may be elided by a contrary proof.'

See also *Davidson v Brown*, Elchies' Notes, p. 45.

⁵ In England the law looks to the intention to *delay payment*, and so holds a denial or absence from his house at an hour when business is transacted as inferring an act of bankruptcy in the debtor; but absence or denial at an hour when no business is done, as insufficient to found such a conclusion. Thus, Lord Hardwicke held eleven o'clock at night to be a very improper hour for creditors to call, and that a man's denying himself at such an hour would not make him bankrupt. 1 Cook's Bank. Law 96.

In Scotland the law looks not so much to the delay of the creditor's payment as to the proof afforded by imprisonment, or by absconding in order to avoid imprisonment, of total inability in the debtor to extricate himself; and as absence from home, at any hour when a search may lawfully be made, is evidence of absconding, the later the hour is, the better always must the evidence of absconding be.

⁶ In *Ross v Chalmers*, 1782, M. 1111, the search was made between eleven and twelve at night, and the proof of absconding held to be complete. In *Young v Grieve*, 1783, M. 1112, the circumstances of 'a debtor not being found at his dwelling-house by a messenger ready to execute a caption against him, and of his family not giving information whither he had betaken himself, were construed to be an absconding under the statute.' [*Davis v Hepburn*, 1867, 5 Macph. 804.]

of his creditors, yet when his affairs are critically circumstanced, and he is aware that the days of charge are expired, he ought to be especially careful to leave notice of the place where he may be found, or the time when he is to return home. It certainly would not be sufficient that the debtor were not at home, if the messenger were informed by the domestics or family where he might be found. 2. Although the messenger's return of execution is *prima facie* evidence of absconding, the Court has always allowed cause to be shown for the debtor's disappearance. Much caution, however, should be used in examining the apology made by the debtor. The statute 1696 was made for the prevention of frauds; and it may be a part of the fraud, that the debtor should abscond on such an occasion as may admit of some explanation, and so the bankruptcy be overturned, after the creditors have been induced to rely on the absconding and execution of search as sufficient, till the time for taking other measures is past. The execution of a caption is no sudden or unforeseen act: the debtor by the charge of horning knows the very day when the caption may be executed, and ought to be particularly careful not to be absent from home, without giving accurate information where he is to be found. And if he is not thus careful, he exposes himself to the imputation of insolvency.¹

Where the debtor is forced to leave the country, without any intention of escaping from diligence (as in the case of an officer marching with his regiment), he is not to be held [174] as absconding. This case comes under the rule established by the late bankrupt statutes respecting debtors who are abroad, and where the bankruptcy is to be established by poinding, arrestment, or adjudication. But where, without any public call of duty, or any pressing necessity, a debtor leaves the country, it will be held an absconding.²

In England it is held, that if a trader have business both in England and abroad, he has a right to go on that business abroad, without being held to commit any act of bankruptcy, if he go not also from fear of arrest, although his creditors are thereby delayed.³

4. RETIRING TO THE ABBEY.—This is made equivalent to imprisonment, because it is a bar to imprisonment, and infers the strongest acknowledgment of insolvency, and of a design to avoid diligence. For twenty-four hours the protection of the sanctuary is complete, without booking. From the moment, therefore, of taking sanctuary, that proof which was intended by the selection of imprisonment and its equivalents as marks of bankruptcy attaches to the debtor.⁴

IV. PROVISIONS INTRODUCED BY THE LATE STATUTES.—The statute 1696 left out of the description of bankruptcy all those who were absent from the country, and so not liable to imprisonment; or who by reason of personal privilege or protection were exempted from horning and caption and imprisonment. This defect was first supplied in 1783, and the provision has been confirmed in the subsequent Acts.⁵

¹ The course of decisions has not been uniform.

Finlays v Aitchison and Moffat, 1767, M. 1106. Here the Court seems almost to have given sanction to a very dangerous doctrine, that the creditors must show evidence of an *intention* to abscond.

In the case of *Carron Co. v Berrie*, 1775, M. 1110, the true doctrine was followed, requiring strong circumstances to be proved in refutation of the legal inference of absconding.

This was confirmed in a subsequent case, where the Court 'seemed,' says the reporter, 'to be of opinion that the execution of a search was of itself conclusive evidence of the debtor's having absconded, and could not be redargued by a proof offered that the debtor had that day left his house to visit his wife, who resided with her father.'

Ross v Chalmers, 1782, M. 1111.

² This found in the case of a sailor and merchant going abroad, apparently in the way of his business, before caption

was taken out against him. *Davidson v Brown*, 1737, Mor. 1092; *Elchies' Bankrupt*, No. 11, and Notes, p. 45.

³ *Warner v Barber*, 1816, Holt's N. P. Cases 175. It appears from the cases referred to by Mr. Holt in his note, that at first the departure and delay were held the essential points, whatever the intention (*Cook's B. L.* 73); that then it was thought necessary to have also an *intent* to delay (*Fowler v Paget*, 7 Term. Rep. 502); and, finally, that intent alone is enough, though no delay take place (*Robertson v Liddel*, 9 East 487; *Chenoweth v Hay*, 1 Maule and Selw. 676).

⁴ In the *Ranking of Castle Somervil, Dickson*, 1751, M. 113, it was found not necessary to bring a man under the qualifications of the Act, that he should be marked in the clerk's book.

⁵ 23 Geo. III. c. 18, sec. 1; 33 Geo. III. c. 74, sec. 2, as explained by Act of Sederunt 14th December 1805; 54 Geo. III. c. 137, sec. 1.

The equivalents to imprisonment introduced by these Acts apply to the case of persons subject to the laws of Scotland, who are absent from Scotland;¹ of persons who have taken sanctuary before diligence was raised against them;² of persons holding the privilege of Parliament, or any other privilege, against arrest;³ and of persons under personal protection.

[175] 1. The debtor may be made bankrupt by a charge of horning, with an arrestment of some part of his effects, not loosed or discharged within fifteen days. It would appear not to be sufficient for this purpose that an arrestment in security has been used for a debt future or contingent;⁴ for no certain or fair indication of inextricable insolvency can be drawn from acquiescence in an arrestment which is not to be the ground of immediate proceedings for payment. The arrestment may be used immediately after the charge of horning, without waiting the expiration of the *induciae*, or it may be used before the charge. But it is left doubtful whether the arrestment must be for the same debt for which the charge is given.⁵

2. The debtor may be made bankrupt by a charge of horning, with poinding executed of his moveables. If the poinding proceed upon the horning, it cannot be executed till the expiration of the days of charge.

3. The debtor may also be made bankrupt by a charge of horning, with a decree of adjudication of any part of his heritable estate, for debt.⁶

¹ By Act of Sederunt, 14th December 1805, sec. 1, a person who has left his ordinary place of residence, so as to make it doubtful whether he be in Scotland, shall, after forty days' absence, be deemed forth of Scotland. But, as already said, it may be doubted whether this, unless renewed by another Act of Sederunt, be law. See p. 160, note 2. [Confirmed by 6 Geo. IV. c. 120, sec. 53.]

² This was decided (after a judgment had been pronounced the other way), *Whyte v Butter*, 1800, M. Bankrupt, App. 12. There was some difference of opinion on the bench. It was stated to have been decidedly the intention of the framers of the law to include this case; and the true interpretation of the clause, and the nature of the situation, were argued as sufficient to bring it under the law. For it is as absurd to apply for a caption against a person in the Abbey as it is to take out one against a peer; and this view ultimately prevailed. It had, on the other hand, been maintained that whatever may have been the intention of the framers of the law, the Court were, as judges, bound to interpret it as it must have appeared to the nation at large, who made it the rule of their proceedings: That, in this view, the Act did not appear to include the case, 1. Because there was no occasion for a new provision where there was no defect; and although there was a defect in the old law, in so far as respected peers, and those under personal protection or out of the country, caption being incompetent against them, there was no defect in the old law as applicable to the case of a man in the sanctuary, since a caption might be taken out against him, his continuance in the sanctuary after caption being sufficient to infer bankruptcy. 2. Because the sanctuary cannot be considered properly as a personal protection: it is only a local exemption, temporary, and depending upon the will of the debtor himself. The question is now set at rest by the words of the recent statute, 'or not liable to imprisonment by being in the sanctuary.'

³ See above, pp. 156-7, as to the question whether pupils or married women are in this sense under privilege of personal protection.

⁴ See above, p. 62.

⁵ See the next note.

⁶ On the law with respect to these equivalents, I took the liberty in a former edition of suggesting three things as deserving the attention of the Legislature.

In the case of *Cooper*, 12 Feb. 1807, as an objection to a sequestration, it was stated that the arrestment had preceded the horning, and the Court was of opinion that the charge of horning may follow as well as precede the arrestment or other diligence. But it would rather appear that, according to the true principle of the law, the charge of horning should precede the other diligence, because that other diligence is introduced only as the equivalent of caption and imprisonment, which of necessity follow the charge of horning.

Another ambiguity is, that the statute does not express as a requisite that the charge of horning should be expired, which the principle of the law requires.

By Act of Sederunt, 14th Dec. 1805, sec. 2, the charge of horning and the diligence may proceed for *separate debts*. It seems doubtful whether this be quite agreeable to the spirit and principle of the law. The Legislature meant only to provide a substitute for caption, but surely not to alter the principle of the legal presumption, which is raised upon the circumstance of ultimate diligence, unrelieved by payment. Now it may happen, on the one hand, that a creditor may have adjudged, or may have poinded or arrested the goods of a debtor, without any idea of rendering him bankrupt; and, at the same time, another creditor may have charged him with horning, but equally without any intention of rendering him bankrupt. It may happen, on the other hand, that the debtor may allow the arrested fund to remain, not from irretrievable insolvency, but from choosing that it should go in payment of the debt for which it had been attached: it may easily happen also, that the estate of a *solvent* debtor may be adjudged. The inference of a bankruptcy, therefore, from these diligences in the hands of different creditors, does not appear to answer the view of the law. The expressions of the statute seem also to countenance the idea of the dili-

V. DATE OF THE ACTUAL BANKRUPTCY.—It is a point of great importance to fix the precise date of the bankruptcy.

1. In bankruptcy by sequestration, the date of the first deliverance on the petition for sequestration is the date of the actual bankruptcy.¹

2. Bankruptcy under the statute 1696 is to be taken as of the date of the day on which the imprisonment, absconding, etc., concur with insolvency and previous diligence by horning and caption.² In the common case no difficulty can arise on the subject, but from an accidental or fraudulent ambiguity in the date of these acts. It may be observed: [176]

1. That where imprisonment is the criterion, it may sometimes be the interest of the creditor to conceal the imprisonment altogether, or to conceal at least the *date* of it, even when it has been discovered that the debtor was taken into custody. The books of the prison will afford evidence at least of the date of incarceration; for every prisoner's name is entered in a register when he first comes into the jail. It will be for the creditor to investigate, if necessary, the date of the debtor's arrest; and here it must be chiefly to the evidence of the messenger and witnesses that recourse must be had, though the creditors will not be forced to rely on these alone. Proof by circumstances may be brought in aid of what may be found defective in their testimony.³ It may be doubted whether, upon an arrest without any of the solemnities required by the cases above referred to,⁴ but followed by incarceration, the imprisonment is to be taken as of the date of the arrest or of the incarceration. It would rather seem that the incarceration would in such a case be held the date of the bankruptcy. 2. That the date of the debtor's *taking sanctuary* is much more easily established than that of his imprisonment or apprehension. As the sanctuary affords no protection *ipso jure* for more than twenty-four hours, a debtor who is really absconding will be careful to have his protection recorded within that time. Proof of his taking sanctuary on the day before the entry of his name will make that the date of the bankruptcy. 3. That resistance and absconding are naturally followed by a regular execution or return of the messenger, which fixes the point of time when they took place. In both cases the messenger is, for his own justification and that of his cautioners, called upon to return an execution; and in the case of absconding, the search being generally made for the very purpose of establishing a bankruptcy, an execution of search is made out to fix the date.

3. With respect to the equivalents introduced by the recent statute, the rule is that the bankruptcy shall be held as of the date when the charge of horning against the person concurs with one or other of the diligences; either of an arrestment used fifteen days before, and not loosed or discharged; or of poinding executed; or of decree of adjudication obtained.⁵

gence there pointed out being a *train of diligence at the instance of the same creditor*. They are, that 'a charge of horning executed against the debtor, together with either an arrestment of any of his effects, not loosed, etc., or a poinding executed of any of his moveables, or a decree of adjudication of any part of his estate for payment or security of debt, shall, when joined with insolvency, be sufficient proof of notour bankruptcy; and from and after the *last step of such diligence*, the said debtor, if insolvent, shall be holden and deemed a notour bankrupt.' 33 Geo. III. c. 74, sec. 2.

In the subsisting Act this provision in the Act of Sederunt has not been adopted; but it is left as a question of construction, whether the diligence is to proceed on the same debt with that on which the charge was given.

¹ 54 Geo. III. c. 137, sec. 1.

² Although the Act of Sederunt of 14th December 1805 declared it sufficient that the charge and the arrestment, etc., be on separate debts, and the statute of 54 Geo. III. says

nothing on the subject, and the Court has found it of no consequence which of these takes precedence, there can be no doubt that the horning and caption must precede the imprisonment.

³ See *M'Math v M'Kellar*, 1791, Bell's Oct. Ca. 22.

⁴ See above, p. 161.

⁵ See p. 164, note 6. In the Act of 54 Geo. III. there has not been sufficient care taken to clear the ambiguities which attend this matter. In a former edition, I remarked that as an arrestment may proceed without a charge, or the moment after the charge is given, while a poinding cannot be executed till after the expiration of the days or charge: in this way the date of the bankruptcy, in the one case, may be long previous to the date of it in the other; and that it ought to have been settled, 1. That the charge of horning must in all these cases expire before the debtor can be deemed a bankrupt; 2. That the fifteen days, during which the arrestment must remain unloosed and undischarged, might run along

Where the debtor has presented a bill of suspension on which a sist has been obtained, but which afterwards is refused, it is not easy to say what shall be held as the date of the bankruptcy.¹ On the one hand, this point, so important to other creditors, cannot without injustice be left to depend on the collusive proceedings of the debtor, regulating his opposition or acquiescence according to his desire to support or abate the preference; but, on the other, it is plainly liable to objection that any other criterion of bankruptcy should be taken than that which the Legislature has appointed, and which can neither be fixed to a precise date, nor rendered justly applicable to all cases. To assume as the date of the bankruptcy [177] the day on which, but for the opposition, the caption might have been executed, would give an uncertain and unsatisfactory rule.

SUBSECTION II.—OF CONSTRUCTIVE OR RETROSPECTIVE BANKRUPTCY.

The description of public or 'notour' bankruptcy sufficiently proves how inadequate a provision the fixing of this point would afford against frauds and collusive preferences on the eve of bankruptcy, and in contemplation of the failure. It is difficult to legislate for a situation so peculiar, since no general rule can be laid down which may not produce individual hardship. On this account it has sometimes been thought that the question should be left for decision on the particular circumstances of each case; it being supposed easy to determine in most cases whether the bankruptcy arose from sudden misfortune, or from a course of unsuccessful or imprudent trading, the tendency of which to irretrievable insolvency could not fail to be known to the bankrupt. But experience, and the danger of arbitrary judgments, have pretty generally shown the fallacy of this kind of reasoning, and led almost every commercial nation to the establishment of a fixed rule of judgment in such cases; a presumption that, for a certain period before the public bankruptcy, the insolvent himself, and all those who have obtained advantages over the other creditors, were aware that bankruptcy was unavoidable.²

In some countries this constructive bankruptcy has been carried back from the date of the public bankruptcy, for a certain definite number of days. In others it has been carried back to some certain act, thought to be indicative of approaching failure. In France,³ and

with the *inducia* of the horning. But this point is still left uncertain.

¹ [Sutherland v Sutherland, 1843, 5 D. 544.]

² In the writings of the continental lawyers we find it universally acknowledged that it is not sufficient to annul such conveyances as are made by the bankrupt after his public failure, but necessary to carry the incapacity back to the eve of bankruptcy, and to include all contracts *gestos a mercatore decoctioni proximo*. But there has been great diversity in the description of proximity; and much learning has been employed for settling the period to which, upon general considerations of expediency and justice, the proximity ought to be limited, or whether it ought not to be left in every case to the decision of the judge, according to circumstances. 'Omnis tamen difficultas,' says one of the best writers on commercial law, 'consistit in bene dignoscendo quis verè dici debeat proximus decoctioni, ita ut habere valeat tanquam si vere jam esset decoctus. Et in hoc multum discrepant doctores. Alii enim volunt, eum intelligi debere decoctum, qui, intra decem dies a celebratione contractus, aut negotii ubi eo gèsti, foro cesserit. Alii hoc idem tempus ampliari usque ad dies quindecim: alii illud abbreviant usque ad quatuor aut sex dies. Hanc tamen questionem, omnes communiter decidendam relinquunt arbitrio iudicis; cum ejusdem

decisio, ut plurimum dependeat a casuum circumstantiis; utrum scilicet mercator ante subsequentem decoctionem fuerit, vel non fuerit, proximus decoctioni, ea interdum provenienti ab aliquo inopinato eventu puta a naufragio alicujus navis, etc. E contra potest dare casus, quod aliquis mercator ante plures dies, et menses prævideat se, intra breve tempus, decocturum, ideoque hanc sui futuram decoctionem callide atque ingeniose simulando procrastinare conetur, ob lucrandam ex ista delatione aliquam utilitatem, etc. Verum tamen est quod in aliquibus locis et civitatibus reperitur per statuta dispositum, quod omnes contractus sive negotia censi debeant nulla et invalida, quæ facta fuissent a mercatore intra certum et determinatum tempus ante decoctionem.' Casaregi Discursus de Commercio, 75, secs. 5, 6, 7.

³ The general law of France, till the beginning of the eighteenth century, left this matter without any settled rule, the 4th article of the Mercantile Code of 1673 only declaring in general terms that all conveyances, etc., in defraud of creditors should be null. In the commercial city of Lyons a local regulation was made, declaring that all conveyances by bankrupts which were not completed at least ten days before the failure was publicly known should be null. The expediency of this local regulation was approved of, and the rule adopted as the general law of France by a declaration of

on the Continent in general, the former has been adopted, and it is the rule of the [178] Scottish law. In England the latter was at first preferred, but now a mixed rule has been established. The retrospect in the English law is carried back to the commission of a certain act, thence called an act of bankruptcy;¹ provided such act shall be within the period of two calendar months.²

The rule established in the Scottish law is extremely simple. The words of the law are, that 'all and whatsoever voluntary dispositions, etc., which shall be found to be made and granted, etc., either at or after his becoming bankrupt, OR IN THE SPACE OF SIXTY DAYS BEFORE, in favour of his creditors, etc., shall be null,' etc. And in the sequestration statutes the retrospective term is described as 'sixty days before the date of the first deliverance on the petition for sequestration.'³ The rule of computation is this: that the number of days is to be reckoned backwards, and exclusively of the day upon which the diligence accomplishing the bankruptcy is completed; that is to say, the first of the sixty days is reckoned back from the midnight preceding the bankruptcy, and any deed granted at any time subsequent to the sixty-first midnight from the completion of the bankruptcy falls under the rule.

Louis XIV. of date the 18th November 1702, registered by the Parliament of Paris on the 29th of the same month. The principle of this adoption is declared to be, 'Que la disposition de cet article previent tous les difficultés et contestations auxquelles l'article du code donne lieu quelquefois, sur la validité des cessions, transports, et autres actes qui se font à la veille des faillites; que ces difficultés cesseroient, et qu'il y auroit moins de lieu à la fraude, s'il y avoit un règle uniforme pour tout le royaume, et un temps prescrit, dans lequel les cessions, transports, et tous autres actes qui se feroient par les marchands debiteurs, seroient déclarés nuls, même les sentences qui seroient rendues contr'eux.' And therefore it is enacted, that all transferences and cessions, all acts and obligations before notaries, bestowing preferences on any of the creditors, or raising new debts, should be null, unless dated at least ten days before the public bankruptcy; and that on judgments pronounced within the same period no hypothec nor preference should take place. *Conférences de Bornier*, vol. ii. p. 672, etc.

It may be observed that, as a general law of France, the retrospective or constructive bankruptcy was not established to the effect of *annulling conveyances* till nearly six years after a similar rule was established in Scotland. But in so far as the rule applied to preferences by *legal diligence*, the French law anticipated the Scottish by half a century.

¹ In England the following are laid down as legal indications of bankruptcy under the name of acts of bankruptcy:— 1. The debtor's 'beginning to keep house,' so that he cannot be seen or spoken to by his creditors. 2. Departing from his dwelling-place, or otherwise absenting himself to avoid payment of debt. 3. Taking sanctuary. 4. Departing the realm with a view to delay or defraud creditors. 5. Remaining in foreign parts for three months after proclamation, with a view to defraud creditors. 6. Escaping from an arrestment for a debt of £100, or suffering himself to be outlawed. 7. Yielding himself to prison, although able to pay off the debt. 8. Willingly and fraudulently procuring himself to be arrested, or his goods to be attached or sequestered. 9. Making any fraudulent grant or conveyance of lands, tenements, goods, or chattels. 10. Procuring a protection, except the lawful protection of privilege of Parliament. 11. Being arrested for

debt, and lying in prison for two months, the first arrestment being the date of the act of bankruptcy. 12. Giving security, payment, or satisfaction to a creditor suing out a commission for more than his just debts. 13. Neglecting to make satisfaction for a just debt of £100 or upwards, after the service of legal process upon any trader having privilege of Parliament. 1 *Cook's B. L.* 94. [See 32 and 33 Vict. c. 71.]

The assignees, as vested with the bankrupt's estate, are entitled under the statutes to make effectual, as a fund for division among the creditors, not only all the property which stands in the debtor's person at the commencement of their right, but all that property also which he has alienated since the first of these acts of bankruptcy took place. And to this rule there seem to be only these three exceptions:—*First*, Where a debtor of the bankrupt has *bona fide* paid up his debt. *Secondly*, Where a purchase has been made *bona fide* from the debtor, and no commission issued within five years. And, *thirdly*, Where creditors have received payment from the debtor in the course of trade without knowing of the bankruptcy or insolvency. 1 *Cook* 593.

² Sir Samuel Romilly avowed, that in regulating the injustice of the old English rule, which imposed no limitation of time, he purposely intended to follow the rule of the Scottish law. By the Act which he introduced on this occasion (46 Geo. III. c. 135), it is provided (sec. 1), 'That in all cases of commissions of bankruptcy hereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt, *bona fide* made or entered into more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed; provided the person or persons so dealing with such bankrupts had not, at the time of such conveyance, etc., any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.'

³ As to the kinds of conveyances included under the law, and the sort of preference forbidden to be conferred, they will form the subject of after consideration.

This question of the computation of periods has given occasion to much ingenious and [179] subtle argument. But without entering into the discussion,¹ it will be sufficient to state those points which have been judicially decided. 1. By a decision of the House of Lords, confirmed in subsequent cases in the Court of Session,² the settled rule for computing the period of deathbed is, that the *terminus a quo*, the day or date of the deed, must be excluded, and the sixty days reckoned independently of it.³ 2. The day does not run from noon to noon (as it does in navigation reckoning), but, consistently with the common understanding of the country, from midnight to midnight.⁴ 3. The sixty days are in a case of bankruptcy, precisely as in a case of deathbed, to be held as exclusive of the day on which the deed is made, and as expiring the moment the sixtieth day from the bankruptcy begins, according to the maxim, '*Dies inceptus pro completo habetur*.'⁵ Should there still, on a question so abstract, remain some vestiges of doubt whether the analogy be perfectly complete between the terms of the Act relative to deathbed and those relative to bankruptcy (both passed at the same time), there is reason to believe that a practical rule so sanctioned as this has been, will not now be thrown loose upon any speculative reasoning.

SUBSECTION III.—OF THE TERMINATION OF BANKRUPTCY.

When the bankruptcy is followed up by sequestration or trust-deed for effecting the distribution of the funds, the natural termination of the bankruptcy is the complete payment of the debts, or of such composition as the creditors may have agreed to accept in the place of full payment; or the final distribution of all the debtor's funds, followed by a discharge. But it will be remembered, that the bankruptcy of the older statutes is not necessarily [180] attended by such proceedings: it may be said to constitute only a *faculty* or *power* in the creditors to follow forth proceedings as against a bankrupt, and to challenge deeds or diligence whereby preferences have been constituted in favour of particular creditors. Where this character of bankruptcy, then, has by the diligence required in the statute been

¹ The whole argument is well stated in the papers on both sides in the case of *Sir Jo. Ogilvy v Mercer*, 1793, M. 3336, relative to a question of deathbed.

² *Ogilvy v Mercer*, and *Mitchell v Watson*. See above, vol. . p. 84.

³ By the law of deathbed, a deed to the prejudice of the heir, made by the ancestor on his deathbed, is ineffectual. But in explanation of the rule, the statute 1696, c. 4, enacts that 'it shall be a sufficient exception to exclude the reason of deathbed, that the person live for the space of threescore days after the making and granting of the deed.' In the House of Lords, it was held 'that the *terminus a quo*, mentioned in the Act respecting deathbed, is descriptive of a period of time (viz. the day or date of the deed) which is indivisible; and sixty days after is descriptive of another and subsequent period, which begins when the first is completed. The day of making the deed must therefore be excluded; and the maker lived only fifty-nine days of the period required. Had he seen the morning of the subsequent day, the rule of law would have applied, *Dies inceptus pro completo habetur*, which makes it unnecessary to reckon by hours.'

In applying this rule to the computation of the period of constructive bankruptcy, it is necessary to reverse its terms, as the period is not *subsequent*, but *prior*, to the *terminus a quo*.

⁴ The Court subjected magistrates for having freed a debtor on the Act of Grace, after twelve o'clock of the tenth day from the intimation. *Blair v the Town of Edinburgh*, 1704, M. 3468.

It is not only the common understanding in citations and charges, that the calling of the action or denunciation cannot proceed till after the midnight of the last day of the citation or charge, but this understanding and practice is grounded upon a decision so old as the time of Colvil. In that case, it was found 'that the last day of an execution of horning "*cedit debitori*," although in computing *de momento* the whole six days are complete some hours before the last day runs out.' *Menzies*, 1581, M. 6854.

⁵ *Blaikie v Clegg*, 21 Jan. 1809, Fac. Coll. An endorsement was challenged on the Act 1696, c. 5. The bankruptcy was said to have taken place on 31st May; the endorsement was made on 31st March, which was the sixtieth day, excluding the 31st May. The Court held, 1. That the bankruptcy was not established; and, 2. That supposing it to be proved, the sixty days must be held as concluded the moment that the sixtieth free day is begun.

Anderson v Starkie, Fletcher, & Co., confirms the above case, 2 March 1813, Fac. Coll. This was a challenge of an arrestment, of date 9th December 1808, on the ground of bankruptcy by sequestration awarded on 7th February 1809, which, excluding the 9th December, was the sixtieth day. And the 'Court had no difficulty on this question, in holding that it was fixed by the judgment in the case of *Blaikie v Clegg*.'

[The rule stated in the text was again confirmed in *Scott v Rutherford*, 1839, 2 D. 206.]

fixed upon an insolvent debtor, without being followed by any proceedings under the bankrupt laws against him, two very important questions may arise respecting the validity of a deed granted afterwards, or the efficacy of diligence used by individual creditors, viz. Whether the bankruptcy may be discharged by the creditor on whose diligence the bankruptcy has been effected? And to what distance of time this character of bankruptcy remains impressed upon the debtor, so as to authorize a challenge, or to give room for the equalizing processes of the bankrupt law?

1. The bankruptcy is not annihilated by the liberation of the debtor from prison, or even by payment of the debt for which he is imprisoned. The three requisites of bankruptcy once concurring, the character of bankrupt is from that moment impressed upon the debtor; nor can any act of the creditor who uses the diligence deprive the rest of the creditors of the rights arising to them from his bankruptcy.¹

2. As to the time during which the bankruptcy continues to operate, it is expressly provided by statute, that the processes for equalizing arrestments or poindings shall be competent at any time within four months from the date of the bankruptcy; and that application may be made for sequestration under the late Acts, at any time within four calendar months of the last step of the diligence, by horning and caption, followed by imprisonment, or any of its equivalents.² By the operations of these provisions, bankruptcy remaining as a character indelible otherwise than by returning solvency, arrestments or poindings used after expiration of four months from a bankruptcy, which may be quite unknown, are placed beyond the reach of the equalizing remedy. As to all subsequent diligence, therefore, creditors are excluded from the benefit of the law of *pari passu* preference, and left to the unjust rule of the old law, by which priority gives preference;³ [181] and this most unlooked-for effect has been held as inevitable as the law at present stands.⁴

As to the right to challenge deeds, there is no absolute limitation of time to which the effect of the bankruptcy is restrained. It is left to be determined by the rules and principles of the common law. And the doctrine is, 1. That the diligence on which a debtor is made bankrupt is held to be the property *quoad hoc* of every creditor, and may be recovered and founded upon, to the effect of maintaining his challenge, even although the debt has been paid off. And, 2. That the bankruptcy continues to operate as an incapacity, in terms of the statute, till the debtor is restored to solvency.⁵ This rule also deserves legislative con-

¹ In the case of *Crs. of Hamilton Campbell v Henry*, 1743, M. 1093, Elchies, Bankrupt, 17, the Court took an erroneous view of this matter. After a full discussion, it was decided 'that the debt upon which the imprisonment proceeded being paid, and so the person not under caption at the time the deed quarrelled was granted, the case did not fall within the Act of Parliament 1696.'

Lord Elchies has this note on the case: 'The Lords, by a great majority, found that the debt and caption being discharged before the transaction quarrelled, it fell not under the Act 1696; wherein the President (Forbes), Arniston, Royston, and Kilkerran, were clear of that opinion, which I own I was not.' Notes, pp. 46, 47.

In *Crs. of Johnston v Nisbet of Dirleton*, 1750, M. 1099 and 1190, the above precedent was well considered, and condemned as a bad decision. See the reasoning of Lord Kilkerran on the subject, and the information presented by him concerning the views of the Court. See also M'Kellar's case, below, note 5.

² 54 Geo. III. c. 137, secs. 2 and 3. But a great evil results from the construction which has been given to the statute, combined with the indelible character of bankruptcy. It is provided that all arrestments and poindings within sixty days

prior to the bankruptcy shall in certain circumstances be ranked *pari passu*; but that, if there be any arrestments (and a similar provision is made as to poindings by sec. 5) 'used for attaching the same effects after the period of four months subsequent to the bankruptcy, such an arrestment shall not compete with those used prior or within the period aforesaid, but may rank with one another on any reversion of the fund attached, according to the former law and practice.'

³ The benefit of the equalizing law would be entirely preserved, if to the provision in the second section, by which 'arrestments subsequent to the four months are to rank with one another according to the former law and practice,' it should be added, 'unless the debtor shall of new be made bankrupt by horning, caption, and imprisonment, after the expiration of the former term of *pari passu* preference, when again the *pari passu* preference shall take place as before, during the period of sixty days before and four months after the new bankruptcy.' And a similar addition ought to be made to the fifth section of the Act relative to poinding.

⁴ *Strang v M'Laren*, 1821, 1 S. 1.

⁵ *M'Math v M'Kellar's Trs.*, 1791, Bell's Oct. Cases 22. M'Kellar was on 5th August 1766 rendered bankrupt. The

sideration; and perhaps it ought to be provided, that no bankruptcy should have the effect of grounding a challenge (unless followed by sequestration or voluntary trust-deed for behoof of creditors) after the expiration of a certain time, as four or six months, with a provision that a new bankruptcy may be raised by repetition of the diligence and execution as before. It is very true that, by the law of England, 'an act of bankruptcy, if once fairly committed, can never be purged, even though the party continue to carry on a great trade; though, if the act be doubtful' (as a great many of the English acts of bankruptcy may be), 'then circumstances may explain the intent of the first act, and show it not to have been done with a view to defraud creditors.' And it appears that, after a manifest act of bankruptcy, it is only when a man pays off, or compounds with all his creditors, that he is held to be no longer a bankrupt.¹ But the difference between the two systems should be kept in view, in looking to the English law as furnishing any analogy on this point. The English bankruptcy is only by commission, like our sequestration, and necessarily runs to a termination by full payment of the debts or distribution of the funds; whereas our bankruptcy of the Act 1696 is nothing more than a status not necessarily accompanied by active proceedings, and which may remain latent and unknown for many a year, till it is accidentally discovered, or industriously searched out, by persons interested to found upon it.

CHAPTER II.

OF EMBEZZLEMENT OF FUNDS BY INSOLVENT DEBTORS, AND OF ALIENATIONS TO RELATIONS AND CONFIDENTIAL FRIENDS.

[182] From the moment of insolvency a debtor is bound to act as the mere trustee, or rather as the *negotiorum gestor*, of his creditors, who thenceforward have the exclusive interest in his funds. He may, as long as he is permitted, continue his trade, with the intention of making gain for his creditors and for himself; but his funds are no longer his own, which he can be entitled secretly to set apart for his own use, or to give away as caprice or affection may dictate. This is the great principle on which the creditors of an insolvent debtor are, by the law of Scotland, entitled to proceed in detecting embezzlement. They are not required to enter on any scrutiny into the secret plans and fraudulent views of their debtor and of his friends, but have to direct their inquiries to these points alone: Whether was this man insolvent when he granted this deed, or constituted this debt? and, Whether did he receive a valuable consideration, or was it granted without a true and just cause?

debt on which the caption had issued was paid, and M'Kellar transacted his affairs as usual, but remained insolvent down to 1779, when the deed under challenge was granted. This was proved by periodical states of his affairs. The Court held M'Kellar to have been bankrupt in 1766, from which state he had not recovered at the date of the deed in question. It was observed from the bench, that when a man becomes bankrupt in terms of the Act, he must remain so till his affairs be extricated, and he regain a state of solvency. A creditor who does diligence, and so renders the debtor bankrupt, acts not for himself; but every other creditor thereby acquires a right, of which he cannot be deprived by the person at whose instance the diligence proceeded. The consequences which follow imprisonment are pleadable by all the creditors. Were it otherwise, very bad effects might ensue;

for supposing a person to have been rendered bankrupt on diligence which proceeded for a trifling debt, and a creditor in a large sum to have purchased up this debt and diligence, such creditor might then dispose of the diligence at pleasure: he might acquire preferences from the debtor, discharge the diligence, and so defraud every other creditor. But this cannot happen as the law stands; for the bankruptcy gives a *jus quæsitum* to each creditor. It was also observed, that when a person has been rendered notour bankrupt, the effect of it can be taken off only by solvency, by *cessio bonorum*, or by discharge from his creditors. This man was bankrupt when the diligence was used, and the progressive states of his affairs show that they were daily more and more involved.

¹ 1 Cook's Bankrupt Law, p. 129.

In the law of Rome this general principle was fully acknowledged. In strict law, a mere donation was revocable at the suit of creditors, if granted by an insolvent debtor and to their prejudice.¹ But conveyances having often been made instruments of fraud, the prætor published an edict, called the Prætorian Edict, 'DE ACTIONE PAULIANA,' by which he declared that he would give an action in equity to the creditors, or their *curator bonis*, for the revocation of all deeds which were, to the knowledge of the receiver, prejudicial to creditors.

In France, following the course of Roman jurisprudence, a general law was made to annul all deeds done in defraud of creditors, directly or indirectly;² but it was not specified what should be considered as a deed in defraud of creditors, and the general rule received its interpretation from the Roman law. When a third party acquired the property in question by onerous title, it was liable to restitution if the receiver was aware of the fraud (*consciis fraudis*); when it was acquired by gratuitous title, restitution was competent, without participation in the fraud.³

In England, a law was made in the reign of Queen Elizabeth, of precisely the same kind with the French ordonnance; providing for the annulling of all false conveyances and obligations, but without declaring specifically what should be held objectionable, or whether mere want of consideration should entitle the true creditors to relief.⁴ But it was soon found necessary to make the law more precise; and accordingly in 1604 a statute was made, declaring all voluntary deeds, granted without a valuable consideration, unavailable against creditors.⁵

In Scotland, not only has the general principle been recognised on which, under the Roman law, all gratuitous deeds made in prejudice of creditors were annulled; but a [183] special statute has been enacted for the purpose of aiding the operation of this principle, and rendering it more efficacious. As it is scarcely less difficult to prove the gratuitous nature of a deed than to prove the fraudulent intention of the parties, the law has, by the aid of certain presumptions, thrown the *onus probandi* on the receivers, where, after insolvency, a person is found to have alienated his property in favour of any of his near relations or confidential friends. To establish these presumptions was the object proposed in the first branch of the statute made in 1621. But the expression of the Act was in some points unhappily conceived for a law intended to accomplish the objects of fair distribution on bankruptcy.

SECTION I.

COMMENTARY UPON THE FIRST BRANCH OF THE STATUTE 1621, C. 18.

This statute was preceded by an Act of Sederunt made in July 1620 by the Court of Session according to the practice of those days, in order to declare the rule by which they meant to administer justice relative to the deeds of insolvents. It was afterwards adopted and confirmed in Parliament by the 18th chapter of the year 1621.

The regulations introduced by this statute, as a check upon secret trusts and gratuitous conveyances, were these: 1. That all conveyances made to any conjunct or confident person, without true, just, and necessary causes, should, if done after the existence of lawful

¹ 'Si cui donatum est, non esse querendum, an sciente eo, cui donatum, gestum sit; sed hoc tantum, an fraudentur creditores? Nec videtur injuria affici is, qui ignoravit, cum lucrum extorqueatur, non damnum affligatur. In hos tamen, qui ignorantes, ab eo, qui solvendo non sit, liberalitatem acceperunt, hactenus actio erit danda, quatenus locupletiores facti sunt; ultra non.' Digest. lib. 42, tit. 8, l. 6, sec. 11.

² See the edict of Henry IV. in 1609, and the 4th art. of the 11th title of the Ordonnance of 1673.

³ Pothier, Traité des Oblig. sec. 153, tom. i. 65.

⁴ 13 Eliz. c. 5.

⁵ 1 James I. c. 15, sec. 5.

debts, be null when challenged by the creditors injured. 2. That it should be sufficient evidence of the fraud, if the creditors were able to prove, by the writ or oath of the receiver of the deed, that it was made without an onerous cause. And, 3. That the right of one purchasing *bona fide* from the confident and interposed person should not be null, but the interposed person should be liable to the creditors of the bankrupt for the price received; and the purchaser should make whatever part of the price remained unpaid furthcoming to the creditors.

The ambiguity of expression which unfortunately prevails in this statute, led to many doubts and questions. It does not contain a simple or clear explanation of the remedy which it was intended to introduce; and in the interpretation of it, judges have been forced even to do some violence to the expression. That something more was intended than was reached by the simple rule of the common law, must have been evident from the first; but it was not easy to say with precision what that was. Two presumptions have, in the subsequent interpretation of the statute, been taken as auxiliaries of the common law, viz.: 1. That in all challenges after insolvency of deeds granted to conjunct and confident persons, subsequently to the challenger's debt, the insolvency shall *presumptione juris* be carried back to the date of the deed; and, 2. That in such cases it shall also be presumed that the deed was granted without value. But it was not at first that this construction was given to the law; on the contrary, there were expressions in it which seemed to oppose at least the latter of these propositions.

In the further prosecution of this subject, it is proper to inquire, 1. What creditors are entitled to the benefit of the statute? 2. What deeds are liable to be challenged? 3. What is the form in which the challenge may be made? And, 4. What is the effect of the challenge when successful?

SUBSECTION I.—TITLE TO CHALLENGE.

By the words of the law, the only title necessary for maintaining a challenge of a conveyance made by the debtor is, that the pursuer be 'a true creditor.' There are no words [184] requiring that his debt shall precede the alienation challenged. It is sufficient if the conveyance be to a conjunct or confident person, without a just, true, and necessary cause, and just price truly paid, and granted after 'the contraction of lawful debt from true creditors.' The words of this provision, taken in combination with the preamble of the Act, entitle every creditor to challenge the deed, who can show it to have been granted after the contraction of debt; unless, on the other hand, it can be shown that the debtor was, at the time of making the deed, able to pay all his debts then existing, without the aid of the subject alienated. But it has happened that in the progress of those decisions in which the Act has been so materially aided by presumptions, it has been held necessary to the challenge, that the creditor who moves it shall himself have become a creditor before the date of the alienation challenged.¹ And to this doctrine the only exceptions which have been admitted are two: 1. Where the debt can, in its original constitution, be carried back to a previous period; or, 2. Where a posterior creditor has paid off, or lent money to pay off, prior creditors, and so comes into their place.

The exact extent of this doctrine should carefully be attended to. Taken in one sense, as an absolute exclusion of a challenge by a posterior creditor, this doctrine would be directly in the face of the Act itself. Taken as part of the judicial construction by which the Act has been made more actively useful as an instrument of justice in the hands of creditors, it goes only the length of denying to a posterior creditor the benefit of the pre-

¹ Stair i. 9. 15. M'Kenzie's Comm. on the Act 1621. Ersk. iv. 1. 44. He says, 'that creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the statutes (of 1621 and 1696), are

not excluded from the remedies competent to them by the common rules of law' (iv. 1. 44). [See *Edmond v Grant*, 1853, 15 D. 703.]

See below, Of Challenges at Common Law.

sumption of insolvency to which a prior creditor has been thought entitled. In this way of considering it, the chief distinction between the situation of a prior and that of a posterior creditor, in respect of this law, would be, that the former is entitled to the presumption of insolvency at the date of the deed challenged; while the posterior creditor seems to be excluded from this as a presumption, by the circumstance of having himself been engaged in transacting with the debtor, as a solvent man, after the date of the deed challenged. Although it is only to a prior creditor that the benefit of the presumption of insolvency has been held to belong, there seems to be no ground for refusing the benefit of the other presumptions of the statute to a posterior creditor, provided he can make good the evidence of insolvency at the date of the deed; or perhaps, according to the strict terms of the Act, provided he can show the existence of debts at the date of the deed. The presumption that the deed was without value does not, indeed, seem to rest so much upon the statute as upon the common law; and where a posterior creditor, who has been deceived by the debtor, can, in challenging a deed to a confident or conjunct person, establish the previous insolvency of the granter, in which the challenger has, by a continuance of the fraud, been involved, the ground of the presumption seems to be as solid as in the case of a prior creditor.

On this principle it is, that the benefit of a challenge under this Act, when successful, *i.e.* when the debtor or the receiver of the conveyance has not been able to support it by a proof of solvency, is extended to the whole body of the creditors. On the same principle, the trustee who acts for the whole is entitled to bring the action, and on succeeding to recover the alienated property for the benefit of the general body.

I. CHALLENGE BY A SINGLE CREDITOR.—Where the challenge is made by an individual creditor, it is held, 1. That the debt of the challenging creditor is of the date of the agreement or engagement out of which it arises, and not of the date of the decree of [185] constitution.¹

2. The deed challenged is to be taken as of the date of its delivery. In this question of delivery, however, the presumption in the common case is, that a deed found in the hands of the grantee, and conceived in words of present alienation, is delivered of the date it bears; though, where a father makes a deed to his children, a different rule is admitted, and the burden of proving the delivery lies upon the children.²

3. Neither acceptances nor endorsements of bills are in the common case dated; and it was determined, 1. That without proof of the time of acceptance a drawer is not entitled to be held a creditor as at the date of the bill; the Court refusing to sustain the presumption that the bill was accepted on the day it was drawn.³ Whether this would now be adhered to, may be doubted; and much would probably depend on the aspect of the case. 2. A decision quite opposite was pronounced respecting an endorsement; the Court holding the presumption to be, that the endorsement was of the date of the bill.⁴

4. Creditors in future debts, and even in conditional debts, have a right to challenge deeds granted to their prejudice after insolvency; for their debts will be as completely due on the existence of the condition as if pure. A challenge by a creditor whose debt is conditional, is, in its effect as against the defender, suspended till the purification of the claim. These cases are considered at large by Sir George M'Kenzie;⁵ and the principle upon which he puts the law is, that 'although personal actions for payment are not competent to such creditors before the day or condition exist, yet they may obtain declarator, that, notwithstanding of such fraudulent rights, their bonds shall be effectual to them, and their debtor's estate liable to them and to execution at their instance, as if those rights were not granted; and upon the matter, reductions are nothing else but declarators to the effect foresaid.'

¹ Pollock v Pollock, 1669, M. 1002; Street v Mason, 1669, M. 1003.

² Inglis v Boswell, 1676, M. 11567.

³ Man v Walls, 1702, M. 1006.

⁴ Thistle Bank v Lenny, 15 May 1794, n. r.

⁵ Observations upon the Statute 1621, c. 18, p. 31.

5. Creditors who have not paid any valuable consideration for their right, are entitled to challenge posterior gratuitous deeds:¹ for donations granted by one having full power over his property (unless declared to be revocable) confer a right upon the donee, which implies warrandice that it shall not be taken away by the mere whim of the donor, nor defeated by a trust constituted for the grantor's use; and so the donee is entitled to the character of a creditor. Sir George M'Kenzie, in speaking of this question, seems to think that, although this be law, 'yet the great reason why the statute was introduced seems wanting here, since the creditor does not lend out his money in this case, in contemplation of his debtor's estate.' But this does not seem to be the principle of the statute. The true principle is by no means wanting in the case of a gratuitous creditor; namely, that the grantor of the challengeable right is bestowing gratuitously, or setting apart fraudulently, a fund which really does not belong to him, but which his creditors have a title to claim to the full extent of his obligations to them.

2. CHALLENGE BY A TRUSTEE.—A trustee for creditors (and through him all the creditors without exception) has the benefit of the presumption of insolvency, if the debts of the creditors whom he represents were contracted previously to the date of the deed challenged. [186] The action may then proceed, to the effect of calling on the defender to prove the solvency; which if he cannot do, the deed will be reduced, to the effect of entitling all the creditors to their share of the fund so augmented.

SUBSECTION II.—GROUNDS OF CHALLENGE.

Deeds of all sorts, conveyances, assignations, contracts, obligations, bills, discharges;² whatever may confer on the grantee property belonging to the debtor, or enable him to claim as a creditor in competition with the true creditors of the grantor, or save him from a demand for payment of what he owes to the debtor, are subject to challenge under this Act. And it signifies nothing whether the deed be conceived as from the debtor to the conjunct and confident, or taken directly from a third party indebted to the insolvent, in favour of the conjunct or confident.

Three things are required to the reduction of a deed under the statute: 1. That the grantee shall be a conjunct or confident person; 2. That the deed shall be granted without a just, true, and necessary cause, to the prejudice of prior creditors; and, 3. That the grantor shall be insolvent at the time of making the deed. The existence of the first of these requisites raises the legal presumption against the deed in regard to the other two. It may be proper, therefore, to consider, in the first place, what is the character of conjunct and confident, pointed out by the law; and afterwards to discuss the other two circumstances which form the subject-matter of the proper defences to be pleaded against the action.

I. DESCRIPTION OF CONJUNCT AND CONFIDENT PERSONS.—At the time when insolvency was construed as disobedience to the command of the king, and forfeiture of moveables or of land was the punishment of this constructive rebellion, Trusts were frequently resorted to as the means of preserving property to its rightful owner. Those trusts were left to be proved by evidence direct and indirect, where the trustee was inclined to be unfaithful;³ and out of this practice arose much litigation of a painful and distressing nature, which forced the Legislature at last, in the end of the seventeenth century, to alter the law in this respect, and limit the means of proof.⁴ But it was natural to make use of such trusts

¹ *Alexander v Lundie*, 1675, M. 940, where a posterior assignation first intimated held preferable while it stood, but reducible upon the first assignation, and the warrandice express or implied, unless the latter was for onerous causes.

² [*Laing v Cheyne*, 1832, 10 S. 200; a discharge of a debt.]

³ *Stair* iv. 6. 2, and iv. 45. 21.

⁴ 1696, c. 25. Perhaps no small mixture of political motive went towards this legislative measure. To increase the danger of trusts was to paralyze the hands of those whom safety against forfeiture might have encouraged to join the

to cover property from the diligence of creditors. And innumerable difficulties were presented in detecting the existence and establishing the proofs of trust. It was from a sense of those difficulties that the Court of Session suggested the remedy which is now under consideration, and which was improved by the aid of certain presumptions of fraud or collusion, laying the *onus probandi* on the trustee. The most natural indication of such collusion is relationship and confidential connection between the supposed trustee and the debtor. Persons nearly connected by ties of blood, or in intimate friendship and confidential communication with the bankrupt, may be supposed to sympathize with his distress, and to be inclined to assist him in his schemes; while transactions of this kind are not to be managed by a debtor, without such concealment as may elude direct detection. The persons who fall under this suspicion are mentioned in the preamble of the Act under the titles of 'wives, children, kinsmen, and allies, and other confident and interposed [187] persons:' in the body of the Act the words used are, 'any conjunct or confident person.'

1. CONJUNCT PERSONS.—The presumption of collusion from relationship is fixed, in this matter of bankruptcy, at that point where in other cases the presumption of a biasing affection takes place. To secure due impartiality in a witness and in a judge, no one can be called upon to act in either of these capacities where his near relation is concerned; and as the same affection which is presumed to deaden the sense of justice, or lead to a deviation from truth, may be supposed capable of seducing a person to participate in devices for saving his friend, the Court has in questions under this Act applied the same test. On this principle, not only brothers,¹ sons-in-law,² and uncles,³ are included [in the category of conjunct persons], but [also] step-sons,⁴ and sisters or brothers-in-law.⁵ It was thought doubtful whether a cousin should be included.⁶ Uncle-in-law and nephew-in-law were held not conjunct, 'because uncle and nephew by affinity are not hindered to judge in one another's cause by Act 13, Parliament 3, Charles II.'⁷

2. CONFIDENT PERSON.—It is not easy to define what in law is held as a confident person, nor is it settled by any established test who are included under this description. The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business; and Sir George M'Kenzie quotes a case (which, however, does not appear in the books of reports) where an ordinary agent in the Court of Session was found to be such a confident person.⁸ To hold a person as comprehended within the description of confident in this Act of Parliament, has only the effect of throwing the *onus probandi* on the granter; and no man ought to accept a conveyance while he stands in a confidential relation to the granter, without being aware of the justice and necessity of proving its onerous cause if challenged by the granter's creditors. But other provisions in bankrupt law have been ingrafted on this description of conjunct and confident, which may raise a question of greater difficulty. Thus, a conjunct or confident cannot be trustee on a sequestrated estate.⁹

The proof of this confidential situation, or of a relation of kindred sufficient to bring a person within the description of conjunct, must of course lie upon the challenging creditor. It is the very groundwork of his challenge, and the foundation of that presumption of fraud which the holder of the deed is bound to overcome.

standard of the exiled family. This law was never held to weaken the Act 1621, c. 18. See 1 Bankt. 262.

¹ Finlaw, 1621, M. 895; Colstoun, 1682, M. 902.

² Skene v Betson, 1632, M. 896; Gibb v Livingston, 1766, M. 909.

³ Tarpersie's Crs., 1673, M. 900.

⁴ Mercer v Dalgarno, 1695, M. 12563.

⁵ Hume v Smith, 1673, M. 899; Scott v Kerr, 1712, M. 2715.

⁶ L. Elibank v Adamson & Callander, 1812, M. 12569.

⁷ Sinclair v Dickson, 1679, 1680, M. 12562. [In the case

of M'Gowan v M'Kellar a disponent was held not to be conjunct with the insolvent by reason of he and the insolvent having married sisters. And see Edmond v Grant, 1853, 15 D. 703, as to affinity.]

⁸ Moubay v Spence, 26 June 1672; Observations on the Statute 1621, p. 68. [A man's father's trustees are not regarded as 'confident persons,' merely because they hold the testamentary estate in trust for his benefit. Young v Darroch's Trs., 1835, 13 S. 305.]

⁹ 54 Geo. III. c. 137, sec. 23. See below, Of Sequestration.

II. OF THE CONSIDERATION FOR WHICH THE DEED IS GRANTED.—A DEED liable to challenge, as described in the statute, is ‘without just, and true, and necessary causes, and without a just price really paid.’ These are to be taken, not conjunctively, but alternatively. According to Lord Kilkerran, ‘on occasion of a question in the bankruptcy of Grant of Tillifour, there was some reasoning among the Lords upon the construction of the Act 1621, wherein they agreed that the words “necessary causes” are in practice thus understood: [188] that though the words “true, just, and necessary causes” would appear as they stand to be conjunctive, they have always been considered as disjunctive; so that if either the deed be granted in consequence of a previous obligation, or though there be no such previous obligation, if the deed be granted for a true and just cause, it is not reducible.’¹

ORIGINAL DEEDS.—In the common case, where a conveyance is made, or a voucher of debt granted professedly for value or for a true debt, the question will turn upon the fact whether value was actually given for the alienation, or whether the value given was adequate, or whether the debt that has been vouched is truly due.

1. It is not necessary that the debtor shall himself have received value for the conveyance. It is sufficient if the deed have proceeded on a consideration onerous, given by the grantee, although a third party may have had the sole benefit.² Thus, a person may be said to act gratuitously who enters into a cautionary engagement for another without receiving any valuable consideration; and if the principal debtor fail, the cautioner becomes debtor in a sum which must be paid, without his having received any corresponding value. Yet a cautionary obligation for a debtor is not gratuitous in the meaning of this statute. It is onerous so far as the creditor who receives the security is interested, and who, in consideration, lends the money, or abstains from diligence; and it cannot therefore be challenged on the Act 1621, c. 18.³

2. So, on occasion of a marriage, provisions which a relation of one of the parties settles by separate deed or in the marriage contract on the other party, or on the children, are onerous, and not challengeable by the creditors of the granter, the marriage being held as entered into in consideration of these provisions;⁴ and this more especially where such provisions are the counterparts of a mutual contract by which other reciprocal provisions are settled.⁵ But where the sum or estate so settled is placed entirely at the disposal of that party by whose relation it is given (as if, in a conveyance to a son in his marriage contract, the sum or subject be given to him and his assignees),⁶ the alienation is held to be gratuitous.

3. A marriage subsequent⁷ is held, in the sense of the Act, to be ‘true and just cause’ for provisions to wife or children. Without regard to the tocher or dower which the wife brings, the provisions stipulated to her in an antenuptial contract entitle her, if they be in the form of an obligation, to the character of an onerous creditor, or to the character of an onerous holder of a right, if they contain conveyances in security of those provisions: they are the conditions on which she has entered into the contract.⁸ But onerous as those rights are, the Court will, on the challenge of prior creditors, reduce even an antenuptial

¹ *Grant v Grant of Tillifour*, 1748, M. 951.

² [*Smyth v Wyllie*, 1832, 10 S. 431; *Mansfield v Stuart*, 1833, 11 S. 389; *Horne v Hay*, 1840, 9 D. 561.]

³ [*Ross v Hutton*, 1830, 8 S. 916.]

⁴ *Ersk. iv. 1. 33*, and argument in *Hepburn v L. Strathmaver*, 1712, M. 930. See case of *L. Elibank's Crs.*, 28 Nov. 1815, Fac. Coll.

⁵ *Blackburn v Oliver*, 29 May 1816, Fac. Coll. In the contract of marriage of the daughter of Chatto of Mainhouse with Mr. Oliver, her father and she on the one hand, and Mr. Oliver and his father on the other, mutually settled certain provisions, Mr. Chatto providing a dower of £1000. Having

failed and executed a trust-deed, his creditors objected to the claim for this £1000 as a gratuitous and postnuptial bond of provision to a daughter, a conjunct and confident person. The Court sustained the claim as undoubtedly just and onerous.

See *Garden v Stirling*, 26 Nov. 1822, 2 S. 39, N. E. 34, Fac. Coll. [*Thomson v Gourlay*, 1824, 2 Sh. App. Ca. 183.]

⁶ *Hepburn v L. Strathmaver*, 1712, M. 930.

⁷ See for Postnuptial Provisions, below, p. 178.

⁸ *Lockhart v Dundas*, 1714, M. 956. *Thoir's Crs. v Lady Middleton*, 1729, M. 984. [*Carphin v Clapperton*, 1867, 5 Macph. 797.]

provision to a wife granted after insolvency, if it be exorbitant,¹ or if the husband [189] was known to be insolvent.² The existence of children may be said to be conditional of the provisions which are stipulated in antenuptial contracts of marriage, as it is only upon the faith of those stipulations that the contract of marriage is entered into. Such provisions are therefore onerous. But it will depend very much upon the terms of the contract, whether the children, upon their existence, will be entitled to the character of creditors of their father, or of mere heirs, to whom the claims of creditors will be preferable. This subject, however, has already been treated of at considerable length.³

4. Where the cause of granting is *value* given, or a *debt* existing, not only must the value or debt be proved, but it must be shown that they are of a character which law can recognise,⁴ and of the full amount to justify the deed. Thus, if the ground of debt be *pactum illicitum*, as a smuggling transaction, or money lost at play, etc., it cannot be held as a just and necessary cause. The cause must also be just and necessary in this respect, that although a full price has been paid, it shall not have been done evasively, the money being afterwards paid back; or collusively, as to raise with the knowledge of the granter a fund for the debtor's escape out of the country, or to pay favourite creditors in prejudice of the rest. The sale to the conjunct and confident person will in that case be held to infer his privity to the design.⁵

5. The value given for property alienated must be adequate, and must be truly paid. The deed may be called *onerous*, if any consideration, however inadequate, has been given for it; but it does not come up to the description in the Act, unless the price be 'a just price really paid.' This is a question for a jury on evidence. And it will not be sufficient that the money is counted out, and even paid over the table, unless there shall be evidence that the price really was paid and retained, not a mere sham payment; for the law presumes a collusion, which the mere show of a payment will not sufficiently refute.⁶

6. If the challenge be directed against a bill, bond, or other voucher of debt, the existence of the debt must be proved otherwise than by such document.⁷

DEEDS IN FULFILMENT OF PRIOR OBLIGATIONS.—A proper legal obligation, undertaken during solvency, to grant the conveyance under challenge, is 'a necessary cause,' which frees the deed from challenge upon the statute. But,

1. It is not necessary to justify a conveyance against a challenge on this statute (as it is to sustain a deed against an inhibitor), that the granter was thus previously bound to grant that precise deed. A security or conveyance granted in satisfaction or security of a prior debt, is for a true, just, and necessary cause, in the sense of this Act. It may be challengeable on the second branch of the Act, if subsequent to the diligence of other creditors; or on the Act 1696, c. 5, if within sixty days of bankruptcy; but it will not be objectionable as gratuitous.

2. Where the deed is of the nature of an acknowledgment or voucher of debt, it [190] is a sufficient justification of it that there was a prior subsisting debt not constituted; though, under the second branch of the Act, and under the Act 1696, c. 5, an objection may lie against the bond, bill, etc., by which the debt is constituted.⁸

¹ *Duncan v Sloss*, 1785, M. 937.

² *Wood v Reid*, 1680, M. 977.

³ See *Of Claims by Wives and Children*, vol. i. p. 678.

⁴ In the preamble of the Act the word *lawful* is used, as well as just, true, and necessary.

⁵ *Crs. of Tarpersie v Kinfauns*, 1673, M. 899, 900. A sale by a father to his son was held reducible on 1621, c. 18, unless onerosity were proved; and a mere receipt for the price is not enough, nor even a bill retired by the son, which may be collusive. 30 Nov. 1808.

⁶ In *M'Arthur v Gibson*, Nov. 1819, n. r., the ground of

VOL. II.

challenge was want of value. The answer that the price was paid; and the reply that the money, though counted and paid over, was not substantially and really paid, and did not, from any proofs of its existence with, or application by the debtor, appear to have come to his use. Lord Pitmilly required evidence of a real payment, other than the mere testimony of witnesses having seen the money counted over, and a petition against this judgment was unanimously refused.

⁷ So held in the bankruptcy of Belch, 24 Dec. 1808, n. r., where a bill *inter conjunctos* was produced as a ground of debt.

⁸ See below.

3. There is some difficulty in the question, where the obligation is of a less perfect kind; a natural obligation, for example, or one merely civil. Cases of this kind occur most frequently under family settlements, where creditors challenge a postnuptial deed of provision granted in favour of a wife or of children, and where the defence is, that the deed is in implement of the natural obligation incumbent upon a husband and a father. The points which have been decided in such cases will illustrate the effects of the less perfect obligations in supporting deeds against this statute.

Provisions made for wives by *postnuptial* contracts stand in a very different situation, in respect of their consideration, from those which are *antenuptial*.¹ The marriage itself is not in such cases contracted upon the faith of the provision stipulated in the contract; but the wife has, without any stipulation, united her interests with those of her husband, and may be presumed to have taken the risk of his good and of his bad fortune. But though there be these strong distinguishing features between these cases, the rule peculiar to each class may admit of qualification. Thus, in the case of an *antenuptial* contract, the wife's provisions are not supported, if immoderate;² and the same principle must, of course, operate where a *postnuptial* deed is made in implement of an *antenuptial* agreement. But, on the other hand, where there is no *antenuptial* contract, though the wife seems to have taken the risk, her claim, in natural justice, to an aliment of some kind has been held sufficient to support a moderate *postnuptial* provision.³ A *postnuptial* deed is well supported by an *antenuptial* contract, unless in so far as the provision is exorbitant;⁴ and where the *postnuptial* deed rests upon the natural obligation merely, the Court holds the marriage itself to be an onerous consideration, to the extent of a moderate provision.⁵

Postnuptial provisions to children have already been discussed. But it may be added, that where a father, believing himself to be solvent, expends sums on his son's promotion in life, in the army, or in a profession, and afterwards fails, and his insolvency is found to have existed at the time of such expenditure, and a question is raised whether the sums so expended do not by the Act 1621, c. 18, constitute a debt against the son, which may be recovered for behoof of the creditors, it would seem that the son is not liable.⁶

WHERE THE SUBJECT IS NOT AVAILABLE TO CREDITORS.—It may be questioned whether creditors are entitled under this Act to challenge the conveyance of a subject which they could not by their diligence attach had it remained untransferred,—an alimentary fund, for example; or a faculty strictly personal? The creditors in such a case seem to have no interest to pursue a challenge, or at least their interest is extremely indirect and remote. They may by personal diligence force the debtor to concede to them the benefit of his [191] right, but they cannot attach it by diligence; and this indirect interest on the part of the creditors does not appear to be such as the Legislature had in view in enacting the statute of 1621.

The life interest of an heir of entail is a subject attachable by his creditors. They may take the rents as they accrue; or they may adjudge his liferent, and have it sold judicially; or under a sequestration the trustee may dispose of it as a part of his estate.⁷ His creditors may therefore challenge the alienation of it under the Act 1621, c. 18. But it seems to be doubtful whether the heir of entail's faculty or power to cut down timber falls

¹ See vol. i. p. 687.

² *Supra*, p. 683.

³ See vol. i. p. 687.

⁴ It was so decided in the Outer House by Lord Justice-Clerk M'Queen, twice confirmed by the Court. *Crs. of M'Kenzie v his Children*, 1792. See in Bell's Oct. Cases, p. 404, all the former cases collected, and notes of the opinions of the judges.

⁵ See the cases already quoted, vol. i. p. 687.

⁶ *M'Dougal's Crs. v. M'Dougal*, 1804, M. App. Bankrupt

121. Here the father was deemed rich, having an estate valued at £70,000, and a lucrative business as a writer to the signet. He purchased a company for his eldest son, a lieutenant in the army, and made other advances to the amount of £1214. Two years after he failed, and his creditors brought an action against the son, who had succeeded to a land estate as heir to a distant relation. The Court sustained the son's defence. [See *Campbell v Macalister*, 1827, 5 S. 204.]

⁷ See above, vol. i. p. 50.

under the same rule.¹ Where an heir of entail, however, has made a contract of sale of the timber on the estate, the price is a subject attachable by his creditors; or if the cutting is carried on by himself, the trees as they are felled become his, and are subject to the diligence of his creditors. The transfer, therefore, of those trees, or an assignment of the price stipulated in the contract, or the contract itself, if made in favour of a conjunct and confident person, may be challenged by creditors on the Act 1621.

Creditors may challenge an assignation or sublease granted by a tenant, their debtor, though his lease bears an exclusion of assignees and subtenants. For the benefit of the exclusion is pleadable only by the landlord; and if *he* does not object, the diligence of creditors will be available to secure the benefit of the lease to them. See vol. i. p. 72.

Policies of insurance, effected by the debtor on his own life, are funds which, if assigned gratuitously, the creditors will be entitled to claim under the statute.²

EVIDENCE OF THE CONSIDERATION.—In the construction which has been given to the statute, the *onus probandi* has been laid upon the receiver of the deed, although the words might lead to a very different conclusion.³ But the presumption against deeds to conjunct and confident persons is rather of a negative than of a positive nature, the deed being only held as not onerous. And some little difficulty occurred at first, where the deed itself bore onerous causes, whether that was not to be held as sufficient to counteract the negative presumption? It was first held insufficient; then a distinction was made where the expression was not merely general, but a specific value was mentioned; but at last the doctrine was settled, 1. That, in deeds to conjunct and confident persons, the narrative is not sufficient evidence to remove the presumption of the deed being gratuitous; and, 2. That the narrative is sufficient for this purpose where the deed is in the person of a stranger.⁴ It need hardly be added, that where the narrative bears gratuitous causes, it is considered as confirming so strongly the presumption of gratuitousness, that the law holds it as ultimate evidence of no valuable consideration having been given.

The statute having, in speaking of the evidence with regard to the consideration of the deed, mentioned the ‘oath and writ of the party receiver,’ advantage seems to have been taken of these expressions to contend that if, in addition to the narrative of the deed, the holder’s oath were given in support of the deed, the evidence would be complete. But it plainly never was by that statute intended to give to the holder of the deed the benefit [192] of his own oath. In some cases, however, this sort of evidence was actually admitted, at least to the effect of overcoming the legal presumption of fraud.⁵

In proving the consideration of the deed, every case must depend on its own circumstances. It may be observed, however, in general, 1. That it is not in all cases necessary to prove that the highest price possible has been got for the subject; but quite sufficient if what is commonly called a fair price has been received, *i.e.* a price which, in the whole circumstances of the case, indicates a fair and *bona fide* transaction.⁶ A sale of the subject

¹ See above, vol. i. p. 51.

² See the English case, *Schondler v Wace*, 1 Camp. 487.

³ ‘And it shall be sufficient probation of the fraud intended against the creditors, if they or any of them shall be able to verify by writ or oath of the party receiver, etc., that the same was made without any true, just, and necessary cause.’

⁴ *Riddoch v Younger*, 1639, M. 12554. See also *Napier v Gordon*, 1670, M. 3755; *Lady Lucy Hamilton v Boyd*, 1670, M. 12555; and *Whitehead v Lidderdale*, 1671, M. 12557; *Stanfield v Brown*, 1676, M. 954. See note in *Fountainhall*, vol. i. p. 98; *M’Lerie v Glen*, 1707, M. 12565. See also the case of the *D. of Buccleuch v his Grandfather’s Crs.*, 1757, M. 12575; *M’Niel v Livingston*, 1758, M. 4316.

⁵ See, on the one hand, the cases of *Skeen v Betson*,

1632, M. 896; *Nisbet v Williamson*, 1642, M. 2774; *Gray v Chiesly*, 1711, M. 12568. And, on the other hand, the cases of *Auld v Smith*, 1629, M. 12552; *Glen v Binnie*, 1626, M. 12551.

In considering these cases, it may be taken as the reconciling principle of the varying decisions, that wherever the presumption arising from the mere connection of the parties was alone to be overcome, the narrative, fortified by the holder’s oath, is sufficient; but wherever any additional circumstance appeared indicative of unfair dealing, other evidence is necessary.

⁶ *Bankt. j.* 262. 78. He cites a very odd case, however, in evidence of a doctrine which required no support but manifest equity. *Wood*, 23 Nov. 1680.

soon after the conveyance, without any material change of market or of circumstances, will afford sufficient evidence of the value. But all circumstances which have affected the price of that sort of property are proper to be considered in estimating *ex eventu* the value as at any particular time which is past. 2. In estimating the value of a contingent interest, as an annuity which has been alienated, it seems inadmissible to take the value *ex eventu*. It must be taken as *in prospectu* at the time of the alienation; and the value which such an annuity would then have given in the market is the true and just consideration for which alone it can be alienated to the prejudice of creditors.¹ 3. Where the deed objected to is a bond, bill, or other voucher of debt, such evidence as would be relevant in an action of constitution of the debt, will be sufficient to establish value in a question upon this statute. 4. Where a previous obligation is founded on as the onerous cause of a deed, that obligation must be proved either to have been itself onerous, or to have existed at a period when the granter was solvent, or at least prior to the date of the challenger's debt. It may be observed, further, that where an anterior transaction or deed is relied on as proving a valuable consideration, these rules seem to be consistent with the true principles of the Act: 1. That if the documents produced in fortification of the deed challenged be anterior to the date of the challenger's debt, they will have the effect of obliging the challenger, as a posterior creditor, to prove insolvency, etc., as at the date of the documents. 2. That if they be not anterior to the challenger's debt, they leave the challenger in as full possession of the legal presumptions under the Act as if they had been the original object of his challenge; and the holder must prove either solvency in the granter at the date of the documents, or onerosity in the debt.²

III. QUESTION OF SOLVENCY.—The other great defence against a reduction on the statute of 1621 is, that the granter was SOLVENT at the time of making the deed. An ambiguity [193] in the expression of the Act left room for contending that it would not support a deed granted without value to a conjunct or confident person after the existence of debts, though it were proved that the granter was solvent at the time. But those doubts have all been cleared away in a long succession of decisions; and it is now settled, 1. That wherever the debtor is insolvent at the time of the challenge, there is a legal presumption of insolvency also at the date of the deed, if granted to a conjunct and confident person, and challenged by a prior creditor;³ and, 2. That the deed will be completely supported by a proof that the granter was solvent at the time of making it.⁴

In addition to what has been said already respecting insolvency, there are some points which particularly demand attention here.⁵ And, 1. It has been held sufficient if the debtor have at the time of the deed a *visible* estate, although *ex eventu* he should prove insolvent.⁶ The subsequent depression of the funds, or the fall of markets for land or goods, will therefore afford a good answer on the question of insolvency, where, on a fair reckoning of the estate as at the date of the deed, the debtor was solvent.⁷ 2. No rights which are merely *in spe* (as expectations of succession) can be taken into account in reckoning

¹ This question may occur to be considered either, *first*, In estimating the value of the subject alienated; or, *secondly*, In settling what is to be reckoned as the value of the property left unalienated, in judging of the solvency. There seems to be room for a distinction in the method of reckoning in the two cases. See below, p. 181, note 2.

² *Rule v Purdie*, 1711, M. 12566. Lord Kilkerran, in his report of the case of *M'Kie v Agnew*, 1739, lays it down as a general rule arising out of that case, that 'where a right is quarrelled upon the Act 1621, as granted without an onerous cause, and anterior bonds are produced for instructing thereof, there is no necessity also to instruct the onerous cause of these bonds; though, had these bonds been the deeds quar-

relled, the onerous cause of them must have been instructed.' M. 12574. See also 5 Br. Sup. 208. The authority of so sound a lawyer as Lord Kilkerran is not to be questioned lightly; but this opinion seems scarcely reconcilable with the principle of the statute.

³ *Cra. of Cult v the Younger Children*, 1783, M. 974.

⁴ *Clerk v Stewart*, 1675, M. 917; *Cra. of Mousewell v the Children*, 1677, M. 919. Both those cases Dirleton has reported very fully, with the opinions of the Court.

⁵ See above, vol. ii. p. 153.

⁶ *M'Kell v Jamieson*, 1680, M. 920.

⁷ This retrospective reckoning to be favourably taken where the challenge is at a distant time.

solvency or insolvency,¹ however immediate the succession may seem to be, and although *ex eventu* the debtor has actually succeeded, unless by such succession the debtor has been restored to solvency. But although, perhaps, strictly following out the principle, the same rule should hold as to rights actually vested, but of which the *continuance* depends on a contingency, this does not appear to be the opinion of the Court; and a life interest, the interest of an heir of entail in possession, etc., are allowed to be reckoned in computing solvency.² 3. In computing the value of life interests, the amount must depend on two circumstances: *First*, The expectancy of the annuitant's life; and, *secondly*, the rate of interest which money happens to bring at the time. Two tables of lives used formerly to be chiefly resorted to in such computations, those of London and those of Northampton. But, of late, a table adopted by the Legislature in the Legacy Acts of 36 Geo. III. c. 52 (grounded on the Northampton tables), has been held the rule in these computations.³ However just the rule of the Northampton tables may be in so far as the expectancy of life may be in question, it seems to deserve consideration whether they are equally entitled to approbation, in so far as relates to the rate of interest on which the computations proceed. That rule is taken at four per cent.; but the object of the Legislature in the Act alluded [194] to was the improvement of the revenue, and the value of annuities has been thus fixed in the tables at a rate higher than such annuities ever bring in the market.

If challenges on this statute shall be long delayed, the creditors will lose the benefit of all the presumptions of the Act. It has been decided, 1. That after a long time the grantee is not bound to prove the solvency of the granter, or even that he was so reputed;⁴ 2. That the proof of consideration of the deed is not, after a long delay, to be laid on the grantee;⁵ and, 3. That in all questions of computation, the creditors are not entitled, after a long delay, to go very narrowly to work in their reckonings, but the question is to be taken on a broad and fair and rather favourable view for the debtor.⁶

SUBSECTION III.—FORM OF THE CHALLENGE.

This is by action of reduction in the Court of Session; so the practice has settled the point.⁷

A case might, however, arise so critical, that it might be of importance to determine whether the challenge in another form were inept. The general rule respecting the challenge of nullities is, that where it is expressly declared by law, and the ground of the nullity either depends on a negative which proves itself, or is established by the deed in question, it may be pleaded in the way of exception or defence against any claim or any plea grounded on the deed; but that where the nullity is not plainly declared by law, or where the fact

¹ So held by Lord Alloway in *L. Elibank's case*, *Selkirk v Murray*, and his judgment affirmed by the First Division of the Court, 28 Nov. 1815. See 18 F. C. 176.

² There is a distinction between those rights when considered relatively to the question whether the debtor is solvent, and when they are to be viewed as claims to be made on a bankrupt estate. As rights to be enforced, life interests, annuities, etc. may be valued, and a claim for that value entered; but in reckoning the funds of a debtor in a question of solvency, nothing ought properly to be taken *in computo* which is not liable to the demands and diligence of the creditors, or which is not actually brought into a shape tangible by them: for a debtor seems not entitled to exhaust by donations his actual property, and leave the contingent to answer his debts. If the possibility of sale at market is to be the test, then the surviv-

ance of an annuity, or even the immediate expectancy of a succession, may be sold, or by insurance made valuable. This sort of argument was not listened to in *L. Elibank's case*.

³ So held in *Selkirk v Murray*, 28 Nov. 1815. See 18 F. C. 176.

⁴ *Spence v Dick's Crs.*, 1692, M. 1015. The delay here was of forty years. The Court 'abstracted from the period of prescription.'

⁵ *Blackwood of Pitreavie v Sir G. Hamilton's Crs.*, 1749, M. 904; *Elliot v Elliot*, 1749, M. 905.

⁶ *Selkirk v Murray*, 1815, Fac. Coll.

⁷ [By the Bankruptcy Act, secs. 10, 11, alienations by bankrupts which are void either by statute or at common law may be set aside either by action or exception, and that at the instance of the trustee acting for the whole body of creditors.]

out of which it is to be inferred is not proved by the deed itself, it is necessary to proceed by way of action of reduction or declarator in order to make the challenge effectual. In practice this distinction came to be very much overlooked, and all nullities whatever were held pleadable only by way of action, unless where the Legislature expressly declared the deed null by way of exception or reply.¹ By the words of the Act 1621, c. 18, the alienation, disposition, etc., is declared to be 'null, and of none avail, force, strength, or effect, by way of action, exception, or reply, without any further declarator.' But the practice in other cases came to be followed under this statute, insomuch that, in a case which arose about sixty years after the Act, it was stated as the universal practice to admit the plea only by way of action. The decision of the case seems to sanction the practice so far only as relates to heritable rights, for the Court admitted the plea by exception in that case, the matter in question 'being no heritable right requiring the production of author's rights';² but the practice since that time has uniformly tended to admit this challenge in all cases by way of action. It has also been usual to bring such action in the form of an ordinary summons for restitution of the property, where mere moveables have been made over, bills endorsed, etc.; or sometimes of a declarator of trust, concluding that the effects which have been made over to the defender truly belong to the debtor, and form part of his divisible estate. And it has been said that there is no necessity for the peculiar form of an action of [195] reduction, unless for the purpose of forcing production of deeds and titles, where there are written conveyances. But undoubtedly in all cases reduction is the best form of action in which the matter can be judicially disposed of, and the conveyance annulled.

SUBSECTION IV.—EFFECT OF THE NULLITY.

The effect of the nullity may be considered either as it regards third parties, who may have acquired the property alienated from the person conjunct or confident, or as it concerns the creditors themselves.

1. EFFECT OF THE REDUCTION AGAINST STRANGERS.—The reduction is by the statute restrained in its operation to the original receiver, and those who are partakers of his fraud. The words are: 'And in case any of His Majesty's good subjects, noways partakers of the said frauds, have lawfully purchased any of the said bankrupt's lands or goods by true bargains, for just and competent prices, or in satisfaction of their lawful debts, from the interposed persons trusted by the said dyvours; in that case, the right lawfully acquired by him who is noways partaker of the fraud shall not be annulled in manner foresaid, but the receiver of the price of the said lands, goods, and others from the buyer, shall be holden and obliged to make the same forthcoming to the behoof of the bankrupt's true creditors, in payment of their lawful debts.' Thus, where a third party has purchased *bona fide* the right granted to a conjunct or confident person, it shall not in his person be annulled.³ But the remedy provided to the creditors in that case is a claim against the purchaser for the price if not paid, or, if paid, an action only against the receiver of the price.

The words of the statute limit the privilege of freedom from reduction to the case of a purchaser, and allow no such favour to an adjudger. But whether the challenge does extend against creditors adjudging, or doing other diligence, though decided in one case against the adjudgers, has been much questioned.⁴ It rather, on the whole, appears that

¹ See Sir T. Hope's Minor Practicks, tit. 13, sec. 18, etc.

² Bower v Lady Couper, 1671, M. 2734.

³ Brodie v Stiven, 1749, M. 907, where a bill by a father insolvent, to his son, was held good in the hands of an endorsee.

⁴ Sir George Mackenzie gives the following account of this disputation: 'I have heard it debated, that though a third person, who acquires a right from the person interposed for an onerous cause, be not liable to this action, yet a compriser,

comprising this right from the interposed person, had no such privilege: as, for instance, a right made by one brother to another, without an onerous cause, is reducible; and therefore if one of the creditors of that brother, to whom the right was made, should comprise the right so made to him, it was alleged that as this right would have been reducible in the person of the first acquirer if it had continued with him, so it would have been reducible from

creditors doing diligence for debt will not be more affected by the secret trust than [196] the creditors of the trustee were held to be in the several cases already discussed on a former occasion.¹

But wherever the purchaser appears to have been aware of the circumstances, he will, as 'a partaker of the fraud,' be liable to challenge. So, 1. If the deed express the relation of the parties, and the gratuitous nature of the right;² or, 2. Even if only one of these circumstances be mentioned in the deed, as that it is gratuitous, or that the receiver is a conjunct or confident, the Act seems to apply.³ Of extraneous evidence, it was not held enough, where the deed did not express gratuity or relationship, that the purchaser was brother of the disposer.⁴ And as a gratuitous deed is effectual where the granter is solvent, it has been held a sufficient answer by a purchaser (even where the deed bears the connection between the granter and receiver), that the granter's circumstances were supposed to be good; that the general understanding was, that he was solvent. It cannot be supposed that a stranger bargaining for a right can either have the opportunity of knowing, or can effectually inquire into, the affairs of the maker of the original deed: he will naturally think himself free to enter into a bargain with the disposer, without any danger of challenge, unless where insolvency appears, or where creditors are proceeding with diligence.⁵

2. EFFECT OF THE REDUCTION AS TO THE CREDITORS.—The statute of 1621 was made prior to the existence of any regular system of bankrupt law in Scotland, and without having in contemplation any general process of division of the common fund; and according to the strict doctrine, the effect of the reduction is nothing more than to clear, for the operation of the reducer's diligence, the estate of the debtor from secret trusts, and to recover it from relations and confidants.⁶ But the effect of the reduction is virtually to open the fund recovered to the whole creditors. The decree in favour of a particular creditor reducing the gratuitous deed confers on the pursuer no privilege in competition, but only brings back the subject as common fund to be affected by the diligence or proceedings of the creditors. They will be preferred in competition according to the priority of their diligence, and the whole creditors are accordingly, in practice, admitted to the benefit of the fund.

The reduction ought to be at the instance of all the creditors, or of a trustee for them; and where there is a sequestration, the trustee is the pursuer.

the compriser, and that for these reasons: 1. A compriser comprises only *omne jus quod in debitore erat, tantum et tale*; and therefore, since it was reducible in his debtor's person, it ought to be so in his, even as it had been reducible from his creditor, *ex capite inhibitionis, aut interdictionis*, etc. 2. The express words of the privilege given by this paragraph do not meet this case, for the words run thus: "If any of His Majesty's good subjects shall, by lawful bargains, purchase." But so it is, that he who comprises cannot be said to purchase by way of bargain; but though a comprising be a legal disposition and assignation, yet it is a sale by the judge, and not a purchase or contract amongst the parties. 3. This case seems not to fall under the reason of the Act; for the Act privileges such as, having a good security, do in contemplation of that right (which, for aught they can know, is sufficient) lay out their money, and so follow the faith of that right in the first constitution of their debt. But the compriser lent his money to his debtor, without showing that he relied upon the right now quarrelled; but finding thereafter that he could not recover his debt, he comprised anything he could find. 4. If this were allowed, it would open a wide

door to fraud; for rights might be made to confident persons, and then might be comprised, which any creditor might be induced to, whereas few would adventure to buy originally these rights, as said is. This case was debated in July 1666 betwixt Jack and Jack, but was not decided; and it did divide the opinions of very able lawyers.' Observations on 28th Act 23d Parl. James VI. pp. 100-102.

In the case of *Kerr*, 1680, 1 Fount. 76, the Court decided against an appriزر. But this judgment, as Fountainhall reports, 'offended many,' and 'the Lords' (he adds in a *notabene*) 'afterwards mitigated this interlocutor,' but in what degree or upon what principle he does not explain.

¹ See above, vol. i. p. 300.

² *Hay v Jamieson*, 1672, M. 1009.

³ *Leslie v Leslie's Crs.*, 1710, M. 1018; *Spence v Dick's Crs.*, 1693, M. 1015. See also the case of *Lyon v Crs. of Easterogle*, 1723, M. 1022.

⁴ *Allan v Thomson*, 1730, M. 1022.

⁵ *Spence v Dick's Crs.*, 1693, M. 1015.

⁶ Sir G. M'Kenzie's Obs. on Act 1621; Kilk. 47; Elchies, Compensation, No. 4.

SECTION II.

OF ALIENATIONS WITHOUT ONEROUS CONSIDERATION AS REDUCIBLE AT COMMON LAW.

[197] An insolvent debtor, capable of engaging in frauds against his creditors, will avoid such transactions as may throw the burden of the evidence upon the holder of the deed. He will grant conveyances to strangers, whom he may prevail on to act as his trustees: he will employ, as apparently fair holders of claims or of securities against him and against his estate, those whose interference will not be dangerous or liable to suspicion: he will avoid all his relations, and take care to employ none of his confidential friends.¹ Against these dangers no provision can be made in the way of presumption: the remedy is only to be attained by making out a case of fraud.

1. It is no bar to the creditors, in their attempt to make out such a case, that the deed itself bears the cause of granting to have been onerous.²

2. It is not necessary to prove actual fraud. In order to support the challenge, it will be sufficient to establish insolvency on the part of the granter, and the want of a valuable consideration on the part of the grantee; for there is nothing in the third circumstance required by the statute of 1621, more than a mere facility given to the creditors in establishing the other two.

3. In a challenge on the common law, insolvency (which in a reduction under the Act is presumed, and must be refuted by him who supports the deed) is required to be established by proper evidence. But where the connection between the parties has been very close and intimate, the Court has raised a presumption to the effect of throwing the *onus probandi* of solvency on the holder of the deed.³

4. Even where the alienation has been made during the granter's solvency, it has been held liable to challenge, if kept latent, so as to deceive posterior creditors, especially where the receiver has had any participation in the design. Of this description of cases many are to be found in the books.⁴

CHAPTER III.

OF CONVEYANCES TO THE PREJUDICE OF DILIGENCE BEGUN AGAINST THE DEBTOR'S ESTATE.

It was not till the year 1696 that a general law was made for securing creditors against deeds of preference granted in contemplation of bankruptcy. But in the same statute of

¹ It was held by some of our older lawyers, that if the grantee was not a conjunct or confident person under the statute, the deed was not liable to challenge as gratuitous. See Sir George M'Kenzie, *Observ. on 28th Act. Parl.* 28 James VI. p. 70.

² Erskine's doctrine on this point seems to be objectionable (*iv.* 1. 35). It is not supported by the case on which he relies (*Trotter*, 1680, M. 12561); and it is contrary to the great rule common to all cases of fraud, that parole evidence is receivable in proof of circumstances of fraud.

³ *Crs. of Marshall v his Children*, 1709, M. 48, note; *Inglis v Boswell*, 1676, M. 11567; *M'Christian v Monteith*, 1709, M. 4931.

⁴ *Crs. of Pollock v Pollock*, 1669, M. 1002; *Street & Jackson*

v Mason, 1673, M. 4914; *Reid v Reid*, 1673, M. 4923; *Blair v Wilson*, 1677, M. 4928; *Robertson's Crs. v his Children*, 1688, M. 4929.

See these cases, M. 4909-4929. [*Wilson v Drummond*, 1853, 16 D. 275; *Richmond v Railton*, 1854, 16 D. 403; *Dobie v Macfarlane*, 1854, 17 D. 97. The subject of the common law right of creditors to reduce gratuitous conveyances and fraudulent preferences is more fully treated, *infra*, ch. iv. sec. 2. The object of the Scottish statutes is to render proof of insolvency unnecessary in certain cases therein defined. In cases not falling within the terms of the statutes, insolvency must be proved as a condition of setting aside the gift or preferential security.]

1621, which has already been commented on in the preceding chapter, the Legislature [198] endeavoured to provide against the debtor's interfering to disappoint individual creditors in their lawful exertions to attach his funds. Unfortunately this statute was constructed without much attention to distant consequences; and in a more advanced age it was found to obstruct the improvement of the bankrupt law. It entitled an individual creditor who had begun execution to persevere, even in opposition to deeds granted for the general benefit, so as to establish for himself a preference over every other creditor who was behind him in the race of diligence.

The principle on which this law proceeded, is that which has already been discussed under the name of LITIGIOSITY. As, by litigiosity, heritable or moveable property, against which a creditor has begun his attachment, is secured against such voluntary acts of his debtor as might disappoint the attachment during the time necessary for completing it, this principle was adopted and extended in the second branch of the Act of 1621. But in thus extending the rule of the common law, there was danger of sacrificing some very important rights of the public; for the doctrine, even at common law, has been thought productive of great injustice to *bona fide* creditors. The first point of inquiry then is, How, under the statute, the interest of the public was, by the interpretation of the Court, reconciled with that of the creditors, whom it was the object of the law to protect?

In the Roman law, so much regard was paid to *bona fides* on the part of creditors receiving payment or transacting with the debtor, that they were safe till the *missio in possessionem*, when, the estate being publicly put under a curator for the creditors, all *bona fides* was necessarily precluded. Sir George M'Kenzie says: 'Our law has equalled diligence done by horning, inhibition, etc., to the *missio in possessionem* of the Roman magistrate.'¹ But the precautions which made this rule safe in Rome, have been comparatively neglected with us. It does not seem, indeed, to have ever been conceived that the statute applied to the case of new transactions entered into in the course of commerce. The uniform interpretation has been, that it included only deeds granted without value, or securities granted to former creditors.² Neither has it ever been held to cut down payments in cash.³ But still the injustice which a prior creditor may suffer, who has *bona fide* received a security from the debtor, and finds it unavailing, may be very great. A creditor, for example, who has insisted for payment, and threatened to proceed with diligence, is appeased by a security, and gives up his intention of proceeding to execution: if he be afterwards forced to relinquish the security thus fairly acquired, not that it may become a part of the common fund of division, but to serve as a fund of payment to an individual creditor, who perhaps by secret diligence may have entitled himself to the benefit of the statute, the receiver of the security has reason to complain of hardship and injustice.

There were only two ways in which the interest of the public, and that of creditors doing diligence, could under this statute be reconciled: either, 1. By requiring as an ingredient in every challenge of a voluntary deed under the statute, that the diligence of the challenging creditor should have been advanced so far as of itself to give intimation to the public of the inchoated right of the creditor; or, 2. By making the challenge incompetent in any case where the debtor was not notoriously insolvent, or known by the holder of the deed to be so. 1. To require the diligence to be advanced so far as to serve for a public intimation, would have been to render nugatory the very intention of the [199] statute; for already the common law had done this, by the litigiosity which accompanied the commencement of the various diligences. The Court of Session therefore uniformly rejected all attempts to restrain the operation of the law in this respect. Thus, mere execution of an inhibition against the debtor, even without publication, was held sufficient

¹ Observations on 18th Act of 23d Parl. of James VI. p. 149.

² *Monteith v Anderson*, 1665, M. 1044; *Bathgate v Bow-*

VOL. II.

doun, 1681, M. 1049; *Nelson v Ross*, 1681, M. 1045, Ersk. iv. 1. 57; *Blaikie v Robertson*, Fac. Coll., M. 887.

³ *Kilk.* 62.

to entitle the creditor to have his diligence protected by the statute;¹ and a charge of horning was held sufficient to support a reduction under the statute.² 2. But to require that the holder of the deed should be apprised of the insolvency of the debtor, in order to entitle the creditors to reduction, was consistent with the spirit, though not perhaps strictly according to the words, of the statute. When this was first tried, the judgment of the Court pointed strongly against the opinion that notorious insolvency was necessary to found a reduction under the statute.³ But the succeeding cases have fully established this to be the rule.⁴ According to these decisions, the general scope and spirit of the statute is, *first*, That it authorizes the reduction of all voluntary deeds granted after such diligence shall have begun, as law has appointed, for attachment of the subject conveyed, provided the debtor was insolvent at the date of the deed; and, *secondly*, That if the insolvency is secret, and, in particular, unknown to the holder of the deed, the challenge will not be successful.

I. TITLE TO CHALLENGE.—To entitle a person to challenge a deed upon this branch of the statute, it is requisite, 1. That he should be a creditor who has begun to use such diligence as would, if not interrupted, legally affect the subject alienated; 2. That the diligence must be regular and formal, so that, if completed, it would not be liable to any objection that should prove fatal to it; 3. That the diligence must have been prosecuted in due course, and without any unfair or improper delay.

1. The words of the statute seem almost to restrict the remedy to the case of CREDITORS who have attached the heritable estate of the debtor. The enumeration does indeed include diligences of both kinds—inhibition, comprising, horning, and arrestment; but it is followed by this apparently restrictive conclusion, ‘or other lawful means, duly to affect the dyvour’s lands [or goods⁵], or price thereof.’ But the statute, in its whole scope and intention, holds out a remedy to creditors of all kinds doing diligence against any part of the debtor’s funds; and so it has been uniformly interpreted by the Court, and challenges have been sustained of conveyances of moveables as well as of conveyances of heritage.

Another doubt arose upon the interpretation of the Act: Whether it was necessary that the creditor who raised the challenge should be able to state himself as in a course of diligence legally to affect the particular subject of that conveyance? or whether (to use the words of Sir George M’Kenzie) ‘any of the diligences alluded to in the statute should be a sufficient ground promiscuously to quarrel any disposition?’ From Sir George M’Kenzie’s remarks, it would appear that those who contended for the promiscuous right of reduction rested strongly upon the provision already made at common law for securing each particular diligence once begun. But the opposite opinion has been held the better of the two. It has Sir George M’Kenzie’s support.⁶ And Erskine⁷ lays it down, in express terms, ‘that [200] the diligence ought to be of that nature or kind which is proper to affect the right questioned.’

The proper diligences against land are, inhibition and adjudication. The inhibition is not a complete diligence till it be executed against the debtor and against the public, and duly entered in the record; but from the moment of its execution against the debtor, the right of reduction under the statute begins. This was decided in the cases already mentioned. Adjudication needs no assistance from the statute, for with citation the *vitium litigiosum* begins at common law. It might thus seem requisite to reduction of any heritable right, to show either an inhibition or an adjudication begun; but the older decisions afford

¹ *Gartshore v Sir James Cockburn*, M. 1051. Lord Kames has erroneously put this down in his Dictionary as a decision upon the mere point of litigiosity, vol. i. p. 559. *Bruce of Kennet’s Crs.*, 1696, M. 1067.

² *Chaplain v Sir George Drummond*, 1686, 1 Fount. 396, M. 1067.

³ *Milne of Carriden v Sir Wm. Nicolson’s Crs.*, 1697, M. 1046.

⁴ *Royal Bank v Kennedy of Gilmour*, 1709, M. 1057, 1079; *Tweedie v Din and others*, 1715, M. 1039.

⁵ [The words in brackets were inadvertently omitted by the author.]

⁶ Observations, etc., 155 et seq.

⁷ Ersk. iv. 1. 39.

many instances of hornings being held sufficient for this purpose. These judgments may be traced to one of two principles: either that the horning was a necessary step previously to some comprisings;¹ or that, as the direct manner of inferring rebellion of the debtor (in which, if he continued for year and day unrelaxed, his heritable property fell by escheat to the Crown), it was in one sense an heritable diligence. There is no case to be found, since the abolition of escheat as a consequence of civil rebellion, in which, upon the footing of this statute, a reduction has been tried of an heritable right by a creditor who had merely denounced his debtor upon a horning: whence a very strong indirect conclusion arises against the relevancy of such a challenge; and to this doctrine Erskine seems to add the weight of his authority.² But it would seem that wherever a charge of horning is a necessary or proper step of diligence previous to an adjudication, the creditor using it may, even at the present day, claim the benefit of the statute.³ Arrestment and poinding are, since the abolition of escheat, the legal diligences for affecting moveables. But, in general, the first step taken by a creditor before proceeding to any diligence against particular funds (unless the debtor's circumstances appear to be very desperate), is to charge him upon the horning to pay. This, indeed, is a step absolutely necessary before he can proceed to poind; but arrestment may be used the moment after the warrant is issued from the signet. Is a creditor, then, who charges his debtor upon the horning, protected by the statute against conveyances of moveables? The expression in the statute is strong in favour of the affirmative; but at that time the horning was by means of the escheat a direct form of execution, and in the numerous cases under the older law the decisions may be traced to this principle.⁴

A horning with a charge can be regarded as the beginning only of poinding: it is not necessary as the forerunner of arrestment. It seems doubtful, therefore, whether it could found the challenge of an assignation of a debt, since no harm would thereby be done to the creditor, and no remedy refused him. As the common law entitles him to use at once his arrestment, he would seem, in neglecting to arrest and using a charge, tacitly to declare his intention of disregarding the arrestable fund.⁵

2. It is not enough that the challenger has begun that sort of DILIGENCE which the law has appointed for affecting the subject conveyed: he must also, so far as he has gone, [201] conduct his proceedings so CORRECTLY and REGULARLY, that, if carried on to completion, they would form an unobjectionable and valid right. But the distinction already taken notice of may thus be important, that in adjudications very different effects are given to objections; some being fatal to the diligence, altogether annulling and destroying it; others having only the effect of limiting the adjudication to a judicial security or mortgage, and depriving it of the capacity of being declared an absolute right of property after the expiration of the term of redemption. The title to set aside a conveyance, as prejudicial to an adjudication, must follow this distinction—be excluded by an objection which would be fatal to the diligence, but not by an objection whose sole effect would be to restrict it from an absolute right to a mere security.

3. As a debtor's hands cannot with any regard to justice or expediency be for ever tied

¹ M'Kenzie, p. 160.

² Ersk. iv. 1. 39.

³ Murray v Drummond, 1677, M. 1048.

⁴ Erskine, in speaking of this subject, says: 'Though the late statute, 20 Geo. II. c. 50, has for ever discharged the casualties of single and liferent escheat consequent upon the denunciation at the horn of rebels in any civil debt or obligation, so that now denunciations can neither affect heritage nor moveables, except upon delinquencies; yet letters of horning continue to be a legal warrant for poinding the moveables of debtors in a civil obligation, and therefore a

voluntary right of moveables granted by the debtor to a creditor, after a charge given to him upon letters of horning by another creditor, may be voided at the suit of the creditor charger' (iv. 1. 39). Erskine has not here expressed himself with perfect clearness. He leaves a material question unresolved: Whether a charge of horning can sanction the reduction of a conveyance, where the subject is not poindable, but attachable only by arrestment?

⁵ [In Grant v M'Edward's Trs., 1835, 13 S. 244, a creditor who had charged the debtor on his bill was held entitled to challenge a trust-deed *omnium bonorum*.]

up by the secret bond of inchoated diligence, a creditor must, in order to have the benefit of this law, bring the diligence to COMPLETION within a moderate and proper time, otherwise he will lose his right of challenge. A delay of five,¹ of four,² and even of three³ months, has been held to exclude the challenging creditor.

The pursuer of a reduction on this statute must therefore be able to show, 1. That his diligence is prior to the deed challenged; 2. That it is of a kind which, if not interrupted, would duly have affected the subject conveyed; 3. That it is liable to no fatal objection; and, 4. That in the prosecution of it there has been no undue delay,—a delay of even a few months being sufficient to cut down the right of challenge.

II. DEEDS LIABLE TO CHALLENGE.—These are described in the statute as ‘any voluntary payment or right to any person, in defraud of the lawful and more timely diligence of another creditor.’ But these seemingly comprehensive words have been held not to apply to acts which at first sight they seem directly to include. Thus, payments in cash, though made to prior creditors, are not challengeable; bargains fairly entered into for value, though to the complete disappointment of the challenger’s diligence, are also free from challenge; and necessary deeds are by the very expression of the Act itself saved from reduction.

1. PAYMENT.—Payments in cash are not challengeable under this Act, the object of the Act being only to preserve funds for the effectual operation of diligence already begun; but there is no form of diligence by which money in a man’s pocket can be attached.⁴ Under [202] this exception of payment is not to be included the case of creditors receiving conveyances, and subsequently receiving payment out of the subject conveyed.⁵

2. NOVA DEBITA.—Although the words of the statute seem to include all deeds granted to the prejudice of prior diligence, yet, as they are declared to be only such deeds as are granted ‘in defraud’ of the previous right, they have been held not to include new transactions; as transferences for a price paid, or bonds for money advanced at

¹ Drummond, for Bank of Scotland, v Kennedy, 1709, M. 1079.

² Young v Kirk, 1688, M. 1078.

³ Duff v Bell’s Reps., 1742, M. 1052. [See Miller v Stewart, 1835, 13 S. 483.]

⁴ See Alexander, 1826, 4 S. 439, N. E. 445. In the following case from Lord Elchies’ Reports the doctrine seems to have been well settled:—

‘A debtor merchant, after he was distressed by diligence, by horning and caption, paid three or four debts before he was in prison, one of them the very morning of the day on which he was incarcerated. The creditor arrested in their hands, and by their oaths the fact came out as above; and the creditor insisted, on the second branch of the Act 1621, that these were voluntary payments, after his diligence, and on the Act 1696. The sheriff assoilzied the defenders, and it was brought before me by advocacy, and I affirmed the sheriff’s judgment. The pursuer having reclaimed, the Lords refused the bill without answers. My reason was, that though the Act 1621 mentions voluntary payments after diligence, yet it is after diligence duly to affect the subject, and no diligence duly affects money in the debtor’s pocket; and the Act 1696 is only against assignations and other deeds giving partial preference, but says nothing of payment of money, and there is no precedent in all our books of repetition of money so paid. Forbes v Brebner, etc., 1751.’ Elch. Bankrupt, No. 26. Lord Kilkerran says: ‘The words are strong, and at the first view would appear to comprehend payment made in *numerata pecunia*; and no case can occur more

favourable for this construction than the present, where the payment was maliciously made. Nevertheless, as there is no instance where a payment in *pecunia numerata* has been found to be affected by any of the statutes concerning bankrupts, nor has any of our lawyers ever said so; so these words in the statute, “having served inhibition,” etc., “or used other lawful means to affect the dyvour’s lands,” etc., were thought to limit the statute so as only to concern conveyances of the subjects which may be affected by such diligences, notwithstanding of the reply that, even taking the statute in the strictest sense, a debtor’s ready money as well as his other effects is affected by horning and denunciation, as at the date of the statute it fell under his escheat, which is burdened with the debt in the horning,—as properly the escheat affected nothing to the creditor, although the Crown was by special statute subjected to the debt, and that the subjects which the statute supposes to be affected are only the debtor’s lands or his goods, or the price thereof, none of which comprehended his ready money. And as none of the statutes do restrain him from spending or squandering his ready money, it would have been strange to have restrained him from giving it to his creditor.’ ‘There was no occasion,’ Lord Kilkerran adds, ‘in this case, to determine what the case would be of payment made by delivery of moveables, though it was mentioned in the reasoning as a thing not to be doubted, that such payment would fall under the statute.’ Forbes v Brebner, 1751, M. 1128.

⁵ Veitch v Pallat, 1675, M. 1029. But see the case of Lady Riccartoun v Gibson, 1709, M. 1035.

the time. Commercial expediency calls for such a decision; and this interpretation has been uniform.¹

3. PREFERENCES BY CONVEYANCES, ETC.—The expression ‘voluntary’ in the statute is plainly exclusive, in the *first* place, of all such deeds as are not properly the act of the debtor, but merely the completion by the creditor of a right formerly granted, though not completed; and, *secondly*, of all deeds which the debtor is bound in law to grant. 1. Where a creditor receives a deed of conveyance of heritage, or an heritable bond, or in moveables an assignation—requiring in the one case sasine, in the other intimation, to complete the transfer—the taking of sasine, or the intimation (though subsequent to the commencement of diligence affecting the property alienated),² not being the act of the debtor himself, is not objectionable under the statute. 2. Sir George M’Kenzie contends that all deeds to which the debtor was not actually compelled should be objectionable, notwithstanding any previous obligation to grant them.³ But this does not appear to be law. Lord Kilkerran says,⁴ in reporting the case of *Grant of Tillifour*, 9th November 1748: ‘On this occasion there was some reasoning among the Lords upon the construction of the Act 1621; wherein they agreed that the words “necessary causes” in the Act 1621 are in practice thus understood: That there be a previous obligation to grant the deed; that though the words “true, just, and necessary causes” would appear as they stand to be conjunctive, they have always been considered as disjunctive; so that if either the deed be granted in consequence of a previous obligation, or, though there be no such previous obligation, if the deed be granted for a true and just cause, it is not reducible.’

These exceptions leave under the influence of the statute all deeds granted by the debtor voluntarily, and to a prior creditor, or without value, whether they are deeds of security or deeds of conveyance.

1. It is against DEEDS OF CONVEYANCE principally that the statute seems to have [203] been aimed—deeds by which any part of the debtor’s funds was withdrawn from those of his creditors who had actually begun diligence; but securities are in the same situation, and are to be regarded as truly conveyances.⁵

If the subject conveyed or given in security be one over which no diligence can extend, it may be doubted whether the statute will sanction a reduction. An alimentary fund, for example, cannot be attached by creditors, but may be so ample as to enable the debtor to spare some part to a particular creditor. Strictly speaking, no creditor can say that in this way *his* right is directly encroached upon, or a subject given away over which he could have extended his execution; and so, directly, he does not seem to have an interest to challenge or object to the deed under this Act. But indirectly, by imprisonment, the creditors may obtain a share of his alimentary fund as the price of his obtaining the benefit of the *cessio*; and therefore it is not absolutely to be concluded that no challenge is competent where no direct means of attachment exist.

2. An OBLIGATION is no direct conveyance; but by an obligation a debtor may so facilitate the operations of a particular creditor as to enable him to attain a preference by priority of diligence. Under the statute of 1696, all deeds of obligation, granted within sixty days of bankruptcy, so as to give to a prior creditor an advantage, which without the debtor’s interference he could not have enjoyed, are reducible; but the Act 1696 is a general and equalizing law, by which every deed is reduced, whose effect is to raise one creditor to a preference over the rest. The branch of the statute now under consideration

¹ See *Veitch’s case*, *supra*; *Stair* i. 9. 15; *Ersk.* iv. 1. 37; *Nelson v Ross*, 1681, M. 1045; *Bathgate v Bowdoun*, 1681, M. 1041; *Monteith v Anderson*, 1665, M. 1044; and *Brugh v Gray*, 1717, M. 1125; *Blaikie v Robertson*, 1787, M. 887.

² *Crs. of Hunter of Muirhouse*, 1696, 1 Fount. 688, 743. See M. 1023.

³ *Observ. etc.* 149, 153.

⁴ *Kilk.* 55.

⁵ [The granting of a trust-deed for behoof of creditors is reducible under this branch of the statute. *Grant v M’Edward’s Trs.*, 1835, 13 S. 424.]

is different: it looks only to the interest of one single creditor, not to that of the whole mass; it favours the growth of preferences; it gives to a liquidated debt a preference over those which are unliquidated, but which may be equally just. Unless the words of the statute, then, forbid any latitude of interpretation, the debtor should be permitted to acknowledge, by bond or other form of voucher, debts which are justly due by him, so as to give the creditors in them a fair chance for equality with others who are accidentally better situate in this respect. The words of the law seem not to include obligations, for payments and rights in defraud of diligence are alone forbidden. But the Court has interpreted the Act otherwise; and seems to have proceeded upon this principle, that an insolvent debtor ought to do no deed by which the situation of his creditors may be affected, but should leave everything to the operation of the law.¹

It is a good defence against a challenge, that the holder of the deed, although later than the challenger in beginning his diligence, was in a condition much sooner to have brought it to a close, and so to have anticipated the alleged right of the challenger. Where a creditor, for example, has raised an adjudication which, from the moment of the decree being pronounced, will be an effectual attachment of rents, and has executed the summons, but another creditor has his diligence ready for arresting, and receives an assignation to the [204] rents, can the adjudger claim the benefit of the statute in reducing the assignation? In the only case in the books, the Court found the voluntary conveyance good.²

III. EFFECT OF THE REDUCTION.—The statute of 1621 was not made in contemplation of any general process for dividing the funds, but for the protection of the rights of individual creditors proceeding with separate diligence. In applying it to the use of the general body of creditors, it is necessary to bring them into a situation to which the rule of the statute can apply; otherwise the effect of the Act will operate directly against the principles of bankrupt law. Indeed, this unhappy effect was frequently found to result from it, in preventing bankrupts from making trusts for the common behoof. The general creditors can be made partakers of the benefit of this Act in one or other of the following ways:—

1. If it is a conveyance of land that is challenged as detrimental to a creditor having begun to adjudge, it would appear that the benefit of the challenge should accrue to all the creditors adjudging, or entitled to adjudge, within year and day; for all those creditors are by statute brought in *pari passu* together, as if an adjudication had been deduced and obtained for the whole respective sums contained in their adjudications.³

2. In other kinds of diligence there may be a similar communication of the benefit, provided the course of the diligence is such that the debtor might have been made a bankrupt within sixty days of the completion of the diligence; for, by the late statutes, a *pari passu* preference is introduced among all arrestments and poindings within the period of sixty days before, and four months after, bankruptcy.⁴

Doubts have been entertained as to the effect of this challenge against third persons purchasing *bona fide* from the first disponee. In treating of this question, Sir George M'Kenzie (p. 161) observes a distinction in the statute between a reduction on the first

¹ *Scott v Bruce*, 19 Jan. 1788, n. r. This is a very strong case; for here the object of the deed was to admit a creditor to take his share in a poinding, and so to secure that equal division which the law is so anxious in the statute 1696 and in the late Sequestration Acts to accomplish.

In *Dunbar's Crs. v. Sir James Grant*, 1793, M. 1027, a first effectual adjudication had been led, and there was full time to constitute the debt of another creditor within year and day. To save expense, the debtor granted a bond of corroboration, and the adjudication following on it was objected to in the ranking. Some of the judges were a good deal moved by the hardship to the creditor (who had time in this

case to have led an adjudication independently of the bond), and by the object of the documents having been, not to give him a preference over other creditors, but to place him upon an equality with them. A great majority of the Court, however, were of opinion that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature. The challenge was sustained.

² *Gellatly v Stuart*, 1688, M. 1053.

³ 1661, c. 62. See above, vol. i. p. 754.

⁴ 54 Geo. III. c. 137, secs. 2 and 5.

and a reduction on the second branch. In the former, the rights are declared not subject to question in the person of a *bona fide* acquirer; respecting the second there is no such declaration. His opinion is, that the distinction is a just one, and that it was the intention of the Legislature to make it. He rests it upon this principle, that there is an essential difference between a personal objection, like that of fraud in the acquirer, under the first branch of the statute; and a real ground of nullity, like that of the second, arising from the attachment of the creditor's diligence upon the subject. But although Sir George M'Kenzie draws this conclusion, he wishes to confine it to dispositions of heritable subjects, thinking it very dangerous and destructive to commerce to extend it to the sale of moveables. The soundness of the doctrine in every point seems, however, to be extremely doubtful; for, 1. If a sale directly by the debtor to a stranger cannot be objected to, far less can one by a creditor who has received the right from him; such a transaction being entirely removed from suspicion. 2. The remedy pointed out in the Act is, 'That the dyvour and his interposed person shall be bound to make reparation.' 3. If the danger of eluding the Act be dreaded, it may as easily be eluded by a direct sale to a stranger, the creditor being paid from the price. It would therefore appear that this reduction should not be extended against a stranger, unless it be proved that he knew of the device used to disappoint the creditors, and that he co-operated in the unfair design.¹

CHAPTER IV.

OF PREFERENCES TO PARTICULAR CREDITORS AFTER BANKRUPTCY, ACTUAL OR CONSTRUCTIVE.

A BANKRUPT cannot effectually do any deed to alter the condition of his creditors, [205] and confer preferences on his friends. But on the eve of bankruptcy attempts of this kind are often made. And if it be not so entirely a loss to the creditors to have the property which ought to be divided equally, distributed among those of their number who are the favourites of the bankrupt, it is at least an evil to which creditors are much more exposed than that of embezzlement. A debtor in critical circumstances must often purchase indulgence from particular creditors, by giving them additional securities, or payment in money; and the prospect of bankruptcy coming on will often move even a good man to save, if possible, from sharing in his ruin, those friends by whose aid and credit he has been able to proceed so far, and whose safety he has hazarded, by persevering so long in his endeavours to retrieve his affairs. But, in the eye of the law, all such preparations for making bankruptcy fall lighter on some than on others are frauds; and when it is possible to discover a conspiracy thus to disturb the equal distribution which it is the object of the bankrupt law to secure, the deeds are declared void.

To prove a design, however, to prefer one creditor to others, in contemplation of bankruptcy, is matter of extreme difficulty; and to save creditors from the expense of so difficult an inquiry, the Legislature has extended the term of bankruptcy retrospectively, and held the debtor to be constructively a bankrupt before any visible indications are to be distinguished. This is not intended to preclude the operation of the common law, where fraud can directly be established, but to comprehend many cases where evidence cannot be procured.

This chapter will be divided into three sections: one containing a commentary on the statutes establishing the retrospective or constructive bankruptcy; the second an exposition

¹ As in the case of *Blaikie v Robertson*, 1787, M. 887.

of the common law; and the third, the statutory regulations respecting payments after sequestration.

SECTION I.

COMMENTARY ON THE STATUTE OF 1696, C. 5, AS AMENDED BY THE 54 GEO. III. C. 137.

The history of this statute, as appearing in the cases which immediately preceded it, and in the difficulties which the Court felt in settling any fixed principles of decision, is very instructive as to the object and spirit of the law.

Amidst all the political confusions of the seventeenth century, Scotland rose considerably in commercial importance. The design of establishing an Indian trade in Scotland, the intended settlement at Darien, and the general spirit of enterprise which spread widely in the country, produced much sanguine though fruitless speculation, attended with frequent bankruptcies. The records of the Court of Session bear testimony to the numerous failures produced by the premature exertions excited in Scotland. Not only traders, but gentlemen of landed property, engaged in those speculations, and sold and mortgaged their lands to [206] raise funds for the enterprise. When bankruptcy came, it was often found that its history was that of a train of struggles to maintain a desperate credit; and the discontents of the creditors were expressed in challenges of preferences. The necessity of some general rule for deciding such cases was apparent; but while the difficulty of settling the principle was felt and acknowledged, an extensive bankruptcy occurred in the year 1694, which brought this matter into very full discussion. The result was the appointment of a committee of the judges to prepare a legislative proposal.¹ So far as any decision was pronounced in this

¹ 'The Lords,' says Lord Fountainhall, 23 Jan. 1694, 'this day advised Sir Thomas Moncreiff's Reduction v the other preferable Crs. of Cockburn of Langton, whereby he quarrelled all the corroborative securities granted by Langton in March 1690, on the noise of his breaking, to his personal creditors, viz. giving them heritable bonds, whereon they immediately took infeftment, and confirmed, and so were preferable to Sir Thomas' debt. His reason of reduction was, that though the Act 1621 did not reach this case, yet fraud was regulate and determined from the common law; and many citations were adduced, proving that a notour bankrupt could give no rights in prejudice of his creditors, and that our decisions had gone on the same principles as in Street and Mason's case in 1673, and the Lady Tarsappie and Kinfauns, and many others; so that Sir Thomas needs say no more, save that Langton was a notour bankrupt at the time when he granted these bonds. Answered, that our law knew no such definition of a bankrupt, unless incapacitate by diligence against him at his creditor's instance.' The Court first supported, but afterwards reduced the deeds; and their deliberations are very interesting, as they show the gradual ripening of our bankrupt law. 'The vote being stated, Whether Langton's being notour bankrupt and fled, at the time of his subscribing these corroborations, was a relevant ground in law to reduce them as fraudulent, the receivers knowing the report of his being broken at the time, albeit there was no diligence actually execute against him at the time, but very shortly after a deluge of hornings, etc.? the Lords by a plurality found that there was no law yet in Scotland whereupon the securities could be annulled, though granted by a notour bankrupt, in *fuga et qui cessit foro*, and had taken sanctuary in the Abbey; seeing we have no standard whereby to render and declare a man bankrupt

save only diligence, etc. To this some of the Lords,' he adds, 'were moved, because the creditors who got these corroborations did rely so little thereon, that they betook themselves to the legal security by adjudication; others thought Langton was as effectually bankrupt then as now, and that no deed then done by him was to be regarded, unless the Lords would allow him to rank his creditors in the Abbey by partial preference; and after one was redacted to that case, they thought all the creditors would come in *pari passu*. The Lords were so sensible of the defect of law in this point, that they named a committee to propose an Act of Sederunt to fix when one is reputed to be such a dyvour and bankrupt, as that afterwards he can do nothing that shall subsist in prejudice of any creditor, and that the marches may be so distinct and clear that every man may know it, without leaving it to the arbitrement of judges.' 1 Fount. 596.

The case came afterwards to be reconsidered on a petition for Sir Thomas Moncreiff, 'when the Lords by a plurality, the Chancellor being present, altered their former interlocutors, and generally agreed in this, that a notour bankrupt could not gratify nor prefer one creditor before another; but they differed as to what they called a notour bankrupt, and whether the circumstances alleged against Langton made him such: for some made a difference between one notourly bankrupt, and one notourly insolvent. They acknowledged that Langton fell under the last of these two when he granted the corroborative rights now quarrelled, but that nothing could make him a notour bankrupt but what the law had so declared by diligences done against him, which was not at that time. At last the Lords fell on this condescendence, that he had before the granting of this right fled to the Abbey or absconded, and that many bonds and hornings were then given in against

case, it seemed to fix that, after notorious and public failure, the creditors were to be held as the true owners of the debtor's funds. But another case occurred, in which, though the debtor was insolvent, he was not notoriously so; and the question was, Whether private knowledge on the part of him in whose favour the alienation was made was sufficient to ground a challenge?¹

The idea of a retrospective and constructive bankruptcy has been supposed to [207] have been borrowed from France, whence we had been in the practice of deriving many institutions. But in France the law of retrospective bankruptcy was not yet established; though, in Lyons, a regulation which appears to have been the groundwork afterwards of a regulation similar to that adopted in Scotland, had for some time before been established. And it is probable that our judges were led to adopt the principle of a retrospective bankruptcy, rather by the natural course of their deliberations on the cases which had actually occurred before them, than from any suggestion of foreign jurisprudence.

The law was at last passed in 1696. That part of it which settles the definition of public bankruptcy, and fixes the rule for computing the constructive bankruptcy, has already been commented on.² What remains to be explained is the effect of the bankruptcy so established on deeds of alienation and preference.

There is a remarkable difference between the Scottish rule of retrospect, as settled in the Act of 1696, and that of England on the one hand, and of France on the other. 1. It differs from the French rule only in *degree*, not in principle.³ It is as a fraud on the creditors that the deed is annulled in France, as it is in Scotland; only, instead of sixty days, the French law has fixed *ten* days as the retrospective term during which a bankrupt's acts of alienation and of preference shall be ineffectual; a period which, in a busy commercial country, may be thought long enough. 2. The English and Scottish laws differ in *principle*. The principle of the English law is not, that an act in itself legitimate is to be annulled on account of actual or constructive fraud, but that the whole estate is bound up by the com-

him, to be passed and registered; that he disposed of his whole moveables, and it (the disposition) was intimated at the cross of Dunse; that he gave the corroborations over his whole estate, so they were like a *cessio bonorum*, and he broke suddenly and unexpectedly. These circumstances the Lords, by a vote of five against four, found to be sufficient to make him a notour bankrupt, and incapable after that to grant any heritable bonds.' 1694, 1 Fount. 605. See M. 1054.

¹ It was a challenge raised by the Cra. of Carlowrie v L. Mersington and others, of an infetment of relief granted by Skene of Halyards and Drummond of Carlowrie after they were 'obserate and bankrupts, and had retired to the Abbey, and were under diligence by hornings and inhibition.' The case of Langton was cited; 'but it was contended that there was a further qualification required in Langton's case which cannot be subsumed here, viz. that he was then holden and reputed bankrupt. The Lords thought it deserved a hearing in presence, that they might settle the limits of bankruptcy, where one should be utterly incapacitate to dispose or grant any rights or gratification in favour of one creditor before another.' When the cause came to be decided, 'the Lords found the above qualifications not sufficient to reduce, unless it were also offered to be proved that he was then held and reputed bankrupt.' The challenging creditors next founded strongly on the private knowledge of the creditor that his debtor was bankrupt; but 'the Lords did not find private knowledge sufficient in this case.' 1695, M. 4929.

² See above, p. 154 et seq.

³ In France, the sort of contest which arose on bankruptcy

seems to have much resembled those which occurred in Scotland. They terminated in the declaration of 18th November 1702, that all transfers or cessions of the goods of merchants who become bankrupt should be null, if not completed ten days at least before the failure was publicly known. The French law, as it now stands in the late Code du Commerce, is this:—

'442. Le failli, à compter du jour de la faillite, est dessaisi, de plein droit, de l'administration de tous ses biens.

'443. Nul ne peut acquérir privilège ni hypothèque sur les biens du failli, dans les dix jours qui précèdent l'ouverture de la faillite.

'444. Tous actes translatifs de propriétés immobilières, faits par le failli, à titre gratuit, dans les dix jours qui précèdent l'ouverture de la faillite, sont nuls et sans effet relativement à la masse des créanciers; tous actes du même genre, à titre onéreux, sont susceptibles d'être annulés, sur la demande des créanciers, s'ils paraissent aux juges porter des caractères de fraude.

'445. Tous actes ou engagements pour fait de commerce, contractés par le débiteur dans les dix jours qui précèdent l'ouverture de la faillite, sont présumés frauduleux, quant au failli; ils sont nuls, lorsqu'il est prouvé qu'il y a fraude de la part des autres contractans.

'446. Toutes sommes payées, dans les dix jours qui précèdent l'ouverture de la faillite, pour dettes commerciales non échues, sont rapportées.

'447. Tous actes ou paiemens faits en fraude des créanciers, sont nuls.' Code du Commerce, l. 3, tit. 1, De la Faillite.

mission from the first act of bankruptcy, and that the right of the assignees operates as a conveyance of all the estate which stood in the bankrupt at the time when the first act of bankruptcy was committed. It was held that the hardship of individual cases was compensated by the public advantage arising from the general rule; while the exceptions introduced by particular statutes were supposed to confine its operation, as to the bankrupt, almost solely to fraudulent transactions; and as to other persons, only to the placing of [208] them on a level with all the rest of the bankrupt's creditors.¹ But the length of time to which the rule sometimes drew back, was an evil which was remedied by a law, proposed by Sir Samuel Romilly, for limiting to the period of two months the retrospective effect of the commission.² The difference of principle has produced a very distinguishable difference of effect in the operation of the two laws. By the original rule of the English law, independent of the exceptions in the later statutes, the debtor could neither receive payment of money due to him, nor pay away any part of his funds in liquidation of debt, nor sell effectually, though for a fair price. But in Scotland, payment to a bankrupt is effectual; payments by him are not included within the things prohibited; and sales for a fair price, or a new transaction of any kind, for full value, not being deeds of preference, are effectual. It was necessary to have the direct interference of the Legislature in England to control the general rule (which bound the debtor's property as from the first act of bankruptcy) so far as to authorize the bankrupt to receive payment of his debts, to make it safe to pay to him bills or the price of goods, or even to make a purchaser safe in the possession of what he had bought for a fair price at the distance of more than five years from the public bankruptcy.³ In Scotland all these things were fully provided for by the general principle of the statute, without requiring any direct interference of the Legislature.

The statute of 1696, c. 5, as amended by the late statutes, consists of two branches: 1. The provisions of the Act are directed against alienations in satisfaction or security of debts existing at the time; 2. They are next pointed against certain forms of security which at that time much prevailed in Scotland, for debts to be afterwards contracted.

SUBSECTION I.—OF ALIENATIONS IN SATISFACTION OR SECURITY OF DEBTS ALREADY DUE.

The Act 1696, c. 5, 'declares all and whatsoever voluntary dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of his creditor, either for his satisfaction or further security, in preference to other creditors, to be void and null.'

I. TITLE TO CHALLENGE.—It is the defect of the earliest Scottish statutes, in the matter of bankruptcy, that they were constructed, not with a view to any general system of distribution, like the bankrupt statutes in England, but more for the purpose of guarding the interests of individuals who were already creditors, and who had begun to take measures for procuring payment to themselves, or who might by the debtor's manœuvres be precluded from the benefit of legal diligence. It thus happened that the benefit of those laws was confined to persons who were creditors at the date of the deed challenged. In the statute of 1696, though more nearly approaching to the true spirit of bankrupt law than that of 1621, the expressions made use of were such as were supposed to give no right of challenge to creditors whose debts originated after the date of the deed. The object of the Act is to annul all alienations granted to creditors, 'for satisfaction or further security, *in preference to other creditors.*' It seems not to be inconsistent with these words to extend the benefit of the Act to every creditor prior to the bankruptcy; and in the true spirit of bankrupt law,

¹ Cullen's Principles of Bankrupt Law, p. 231.

³ 1 James I. c. 15, sec. 14; 19 Geo. II. c. 32; 21 James I.

² 46 Geo. III. c. 135. Repealed by 6 Geo. IV. c. 16, sec. 1, c. 19, sec. 14. and re-enacted sec. 87.

all those who are creditors at that period ought to be considered as the true owners of every estate vested in the bankrupt at the earliest point of time to which the bankruptcy [209] reaches back. But cases arose upon the matter soon after the Act was made, and while those very judges sat on the bench, by a committee of whom the law was prepared, and the Court unhappily settled the interpretation unfavourably for posterior creditors.¹ So much was this held an authoritative determination, that it was nearly a century before the question was stirred again, and then it was decided in the same way.² The effect of this, if followed out to all its consequences, would in a bankruptcy be extremely unjust, and quite against the spirit of the bankrupt law. And in the renewal of the Bankrupt Act it ought to be declared, that the challenge of deeds of preference on this constructive fraud should hereafter be available to all who are creditors at the date of the bankruptcy.

Perhaps, even without legislative interference, it might still be possible for the Court, should the question occur again, to give to the statute its true construction. Uniformity of decision is inestimable; but when a meaning has been given to a law which counteracts its very spirit, it seems not improper to alter even the most solemn determinations, provided they are not of a character to guide the practice of the country, or make rules for conveyancers, but only such as may have the effect of encouraging frauds. In the present instance the misapprehension of the law only tends to obstruct that equality which it is the great object of the bankrupt law to establish.

PROOF OF TITLE.—1. The title of a challenging creditor naturally consists of the document or decree by which the subsistence of the debt against the bankrupt is established.

2. If the challenge is by a trustee, his title is the deed of trust, or the assignation or other conveyance by which he is vested with the right to prosecute for the debt.

3. An interim factor on a sequestrated estate may, in case of necessity, raise this reduction; his duty being to take all proper measures for preserving or recovering the estate. And this sort of necessity may arise from the prudence of arresting or inhibiting in security, to prevent the object of the action from being disappointed. The factor's title will be an extract of the minute of his appointment, accompanied by the extract of the act of sequestration.

4. The title of a trustee in a sequestration is the act of confirmation.

5. The assignees under an English commission of bankruptcy must produce such evidence of title as the law has appointed. It has been too much the custom with us to receive loosely copies of these proceedings unauthenticated.³

6. The bankrupt may himself acquire a right to reduce by means of a composition contract with his creditors.⁴

7. Besides a title to challenge, there is necessarily implied, as requisite, an interest to maintain it; else the pursuer will be barred from prosecuting the action. So, if the success of the action will have no beneficial effect to enlarge the estate, or prevent a claim on [210] it, the want of interest in the challenge will be a good answer to the action. Thus, if a bankrupt have endorsed a bill accepted by a debtor of his, a creditor having a title will also have an interest to challenge the endorsation, and claim the benefit of the acceptance. But if the bill so endorsed be a wind-bill, the interest to challenge is wanting; since the sole

¹ *Man v Walls*, 1702, M. 1006. 'The Lords were the more circumspect in deciding this case,' says Fountainhall, 'because it was amongst the first pursuits that have been founded on the late Act of Parliament, and it was fit to clear the same for the future.'

² *Robertson Barclay v Lennox*, 19 Nov. 1783. In the Faculty Report of the case (M. 1151) this part of the judgment is omitted. The Court sustained the objection to the claim of preference, so far as the debts of the objecting creditors were contracted *prior* to the date of the sasine; but

found that the creditors whose debts were contracted *subsequent* to the date of the sasine were not entitled to object to that preference.

³ See the case of *Stein v The Royal Bank*, 1813, Fac. Coll.

The proofs necessary in actions by assignees were first settled by an Act introduced by Sir Samuel Romilly, and which has been extended by the late Act of 6 Geo. IV. c. 16. See Eden's Bankrupt Law 331 et seq.

⁴ See below, Of Settling Bankruptcy by Composition. [See *Drummond v Watson*, 1850, 12 D. 604.]

effect of success in the challenge would be to make the *defender* claim on the estate; whereas, if allowed to recover payment under the endorsation, instead of *his* claiming on the estate, the *acceptor* of the wind-bill would claim as a creditor; and so the creditor would be changed, but the debt would continue.

II. FORM OF THE ACTION.—From the statute it would appear that there had been in contemplation of the framers of the Act a process of declarator of bankruptcy; and that, as a legal consequence of a decree of declarator of bankruptcy, the deeds falling under the description of the Act were to be void and null. But a preferable form of action, and that which is uniformly followed, is the combined action of Declarator, Reduction, and Repetition, by which the written contract of alienation, if such there be, is called for under certification; and on a narrative of the statutes, and of the bankruptcy, the conclusion is for declarator of the bankruptcy, reduction of the alienation, and redelivery or repayment of the alienated fund. The challenge is not admitted in the shape of an ordinary action; and the action is competent only in the Court of Session.

III. DEEDS LIABLE TO CHALLENGE.—The statute declares void not only all voluntary dispositions and assignments, but other deeds which, directly or indirectly, give to a creditor satisfaction or security in preference to others. The exceptions are: 1. Acts which have, by accretion to the title of the creditors, the effect of completing a transference in his favour; 2. Payments in cash, or what is equivalent to such payments; and, 3. Securities and alienations for money, or other consideration, instantly advanced.

1. OF DEEDS OF DIRECT ALIENATION OR PREFERENCE.—The general rule is, that all deeds directly conveying heritage, whether redeemably or absolutely, and whether in satisfaction or in security of prior debt, and all conveyances and assignments of personal rights, or traditions of moveables, in security or satisfaction to prior creditors, are challengeable under this Act.¹

(1.) It was at one time contended that the words of the law confined the remedy to written conveyances; that not only where the debtor, therefore, had paid money, but where he had delivered goods to his creditor in extinction or for security of his debt, no challenge could be maintained. But the Court had no doubt 'that the Act 1696, anent notour bankrupts, comprehends the case of a merchant delivering goods to another merchant, or others his creditors, within sixty days of his being bankrupt, in payment or satisfaction of debt before the sixty days.'²

[211] (2.) Where a person has purchased goods, and they are sent to him, he may, if insolvent, reject them;³ but if they have been actually delivered, the seller has only a personal claim along with the other creditors. The buyer cannot in these circumstances send back

¹ [See *Wright v Walker*, 1839, 1 D. 641, 'as to an assignation; *Morrison v Carron Co.*, 1854, 16 D. 1125, as to renunciation of a lease; *Douglas v Craig*, 1832, 10 S. 647, as to a conveyance by a company in trust for creditors.]

² *Forbes v the Debtors of Forbes*, 1715, M. 1124.

In the subsequent case of *Smith v Taylor*, 1728, M. 1128, the decree in *Forbes*' case was produced, and the words of it were stronger than the report bears. The Court decided: 'That the Act 1696, anent (concerning) notour bankrupts, comprehends the case of a merchant delivering goods to another merchant, or others his creditors, within sixty days of his being bankrupt, in payment or security of debts due before the sixty days.' In this case the facts were, that Butter having within sixty days of bankruptcy delivered to Taylor lint, deals, etc., to the value of £70, and paid in cash £30, as the balance of £100, for which Taylor was creditor to him by bill, Smith, a creditor of Butter, arrested in Taylor's hands, and then raised a reduction on the Act 1696. There was,

besides the general question of law, a question of fact arising from the nature of the debt, but that was reserved. Taylor pleaded: 1. That the Act applies only to written deeds; 2. That, at all events, he must be entitled to come in *pari passu*, as equality is the spirit of bankrupt law. As to the first, the reason of the thing, and *Forbes*' case, were opposed; and to the second, it was answered that the deed being set aside, the effect of *Smith*'s diligence stands uninterrupted. 'The Lords found that the delivery of the goods fell under the Act 1696, and that the defender was liable to restore them or their value, and preferred the arrestors; and found that the defender comes not in *pari passu*.' 19 Jan. 1728.

The case is not reported anywhere but in a short note in the Dictionary. See Sess. Pap. Adv. Lib.

These cases were strongly confirmed in *Young v Johnston*, 1783, M. 1141.

[*Gibson v Sir C. Forbes*, 1833, 11 S. 916.]

³ See vol. i. p. 253.

the goods; for this would have the effect of bestowing on the seller, his creditor, a preference over the other creditors.

(3.) The Act clearly applies to endorsements of bills, and also to drafts made in favour of prior creditors on persons indebted to the bankrupt. These are both of them assignations in the strict terms of the Act. Bills have been assimilated to cash, as being the money of a trader; the instruments of his commerce, with which he makes his payments, and manages all his transactions; as in law, 'bags of money.' But a debtor may gratify a favourite creditor, either by drawing in his favour a bill upon some of his own debtors, or by endorsing to him a bill payable to himself, or, what is the same thing, by giving it over, the endorsement by which he holds it remaining still blank; and if such deeds as these were unchallengeable, a trader upon the eve of bankruptcy, and within the sixty days, might distribute among his favourite creditors the greater part of his circulating capital, and of his outstanding debts; nay, the goods in his warehouse might be alienated effectually by disposing of them, and taking the bills for the price payable to the persons meant to be favoured. But the words of the statute, as well as its spirit, include such deeds. The Act comprehends 'all dispositions, assignations, or other deeds made and granted, etc., in favour of creditors, either for satisfaction or further security, in preference to other creditors;' and a bill, whether an original draft in the creditor's favour, or an endorsement to a draft in which the bankrupt is creditor, is strictly and properly an assignation, for satisfaction or security, in preference to the other creditors.¹

In the first case concerning bills, the 'Lords found bills included within the Act of Parliament, as well as other assignations, unless they bore value received, or were so proven.'² The Court next held an endorsement made by a debtor to his creditor, within sixty days of bankruptcy, to be null. The Court decided, 'That the Act of Parliament 1696, concerning bankrupts, takes place, if the suspender prove that the endorsement was for satisfaction or security of a prior debt, and not for present value received.'³ It was afterwards decided, and affirmed on appeal to the House of Lords, that the deposition of a bill of exchange, in security of a prior debt, is bad under the statute.⁴ In the next case that occurred, although the decision was the same, the first suggestion appears of the exception, which has more lately been gaining ground, from a sense of the necessity of substituting bills in certain cases for actual cash.⁵ In several cases, endorsements to bills within the sixty days have been set aside so far as they related to prior debts.⁶

As a general rule, then, it may be held that the Act includes drafts, endorsements, and transfers of bills of exchange, in satisfaction or security of prior debts.⁷

(4.) There are some deeds of alienation and security which require no conveyance to be executed by the bankrupt. Thus, a lender of money holds in security an absolute [212] disposition to land, qualified by a backbond. The security is enlarged or converted into an absolute conveyance, without any deed being executed by the borrower, but merely by an alteration or cancelling of the backbond which restricts it. If this be done within sixty days of the bankruptcy, and for security or satisfaction of a debt already due, it will be objectionable under the statute.

(5.) It seems doubtful whether creditors should not have the remedy of the statute, where their debtor has been in possession of goods so as to raise credit on the footing of reputed ownership, and has given them up to the true owner within the sixty days. The

¹ [See *Ritchie v Wyllie*, 1821, 1 S. 161; *Miller v Low*, 2 W. and S. 597; *Barbour*, 1824, 2 S. 309, and see 7 S. 752; *Stewart v Scott*, 1832, 11 S. 171; *White v Briggs*, *Thurburn, & Co.*, 1843, 5 D. 1148.]

² *Durward v Wilson*, 1700, M. 1119.

³ *Campbell of Glenderuel v Graham*, 1713, M. 1120.

⁴ *Manson v Angus*, 1771, M. App. Bkt. No. 7; H. L. 22 March 1774.

⁵ *Campbell v M'Gibbon & Campbell*, 1780, M. 1139, where a distinction was hinted at on the bench between the case of a creditor dwelling at a distance and one at hand.

⁶ *Robertson v Ogilvie*, 1798, M. App. Bill, No. 6; *Blaikie v Wilson*, 1803, n. r.

⁷ See an exception lately introduced in favour of bills and endorsements in the course of trade. Below, p. 202.

ground of action in such case would be, that the true owner was, till restoration of his goods, a creditor for redelivery; and that goods which the law holds to be the property of the bankrupt, have been delivered in satisfaction of such prior debt within the sixty days.

(6.) Where the security is granted not to a creditor of the bankrupt, but to the creditor of another person, the Act does not apply; unless it involve some circuitous and indirect mode of giving benefit to the bankrupt's creditor.¹

2. OF DEEDS OPERATING INDIRECTLY IN CONSTITUTING PREFERENCE.—It does not save a conveyance or security from the rule of the statute, that it is indirect in its operation, though it may be a little more difficult to expose the nature of the transaction. A few examples of indirect preferences may serve to illustrate this doctrine.

(1.) Without granting any conveyance, the debtor may, by means of an acknowledgment or voucher constituting debt, enable the creditor to attain the same object by legal diligence. In general, it is an act of justice to a creditor, and even of prudence and economy in a debtor, to grant an acknowledgment for debt when demanded of him. But as the effect of it may be to enable the creditor to proceed with diligence more rapidly than if retarded by the necessary delays of an action; or to enjoy the benefit of the laws establishing a *pari passu* preference, from which, without such aid from the debtor, he might have been excluded;² and as it is possible for a debtor to create great inequalities among his creditors, by favouring one and delaying another,—such interference on the part of the bankrupt is held illegal. Formerly the power in a debtor was very great, when there was no general process to which the creditors could have recourse for levelling the preferences obtained by the priority of diligence, nor any *pari passu* preference, except in the case of adjudications. The question has now lost much of its importance; for, 1. If the debtor be comprehended under the description in the sequestration law, a creditor, even on an open account, may apply for sequestration, and at once get the better of any preference by diligence obtained within sixty days before. 2. Even if the debtor be not under the sequestration law, a creditor whose debt is still unconstituted has sufficient time to lead an adjudication, and come in *pari passu*; or to raise an action, and arrest on the dependence, and so come in *pari passu* with an arrestment; or to summon the poinder within four months subsequent to the bankruptcy, and so get a share along with him.

In the first cases wherein this question occurred, the Court supported bills accepted by the debtor within sixty days of the public bankruptcy;³ but in the later cases the rule has been settled, that from the moment of constructive bankruptcy, the debtor can do no act [213] by which the situation of his creditors may be altered, even to the effect of establishing equality among them.⁴

¹ *Hamilton's Crs. v Henry*, 1748; *Elchies*, Bankruptcy, No. 17; Notes, p. 46.

² On principles of equity, the Court of Session frequently pronounces decree, reserving all objections *contra executionem*, that the creditor may have the benefit of the *pari passu* preference in the event of his ultimately succeeding in establishing his debt. [In *Wilson v Drummond*, 1853, 16 D. 275, a consent to decree was held objectionable.]

³ *Cowan v Mansfield's Trs.*, 1762, M. 1167; *Swinton's Trs. v Sir William Forbes & Co.*, 1790, M. 1181.

⁴ *M'Math v M'Kellar's Trs.*, 1 March 1791, Bell's Oct. Ca. 22. In this case the right objected to was an adjudication in the person of M'Math, proceeding upon a bond of corroboration granted by M'Kellar within sixty days of bankruptcy. This bond included, 1. Debts due originally to M'Math's father, as well as debts due to himself, and so saved confirmation. 2. Debts, the term of payment of which were not yet arrived. 3. Accumulations of principal, interest, and

expenses on the debts. The objections rested on these points:—That a bond of corroboration, or other deed of acknowledgment, is an indirect conveyance, as enabling the creditor to proceed with diligence more rapidly than in the common course of law he could have done; and that here the claim of the creditor was, by the accumulation of interest, expenses, etc., increased beyond the reach of any legal operation. The case was argued with great ability, and the decision intended to be a solemn settlement of a very important point. The objection was sustained, and the provisions of the statute found to strike at the bond of corroboration.

1. The judges agreed that a bankrupt is no otherwise deprived of the capacity of granting deeds than as he interferes with the interests of the creditors. 2. Upon the validity of the bond of corroboration, so far as the debt was thereby enlarged, and a penalty superadded, it was on all hands agreed, that where this was done to an extent which could not have been attained by the operation of legal diligence, it

Were the bankrupt, instead of paying his bill, to substitute a new acceptance, it does not appear that this could be held to come under the rule; for, in relation to the [214] debtor's estate, the creditor is in no better situation—no advantage is conferred on him. If the bill were due beyond six months, the rule would seem to apply, as the renewal would authorize diligence without an action, which otherwise could not be issued.

(2.) A transaction may be entered into, which of itself is in no shape objectionable, but which indirectly, by raising to a creditor a right of Lien or Compensation, may confer a preference on him. Thus, a cattle-dealer is due money, and instead of delivering cattle to his creditor, he sells them to him at the usual credit; and when his bankruptcy takes place, the creditor pleads compensation: it would seem that this transaction is challengeable under the statute.¹

was objectionable. 3. With respect to those accumulations which might have been affected by legal diligence, although it was at first the opinion of several of the judges that a bond of corroboration could not be objected to, yet it seems at last to have been agreed that every accumulation not made by law should be challengeable, and that interest upon interest should be struck off when it arose by a voluntary accumulation. 4. The only other question then was, Whether such a document of debt could validly stand in place of a legal constitution of the claim by action, or save to the creditor the delay and expense of completing a title by confirmation, etc.? Upon this point the opinions of the Court were much divided. Those of the judges who denied the application of the statute to such a case, proceeded upon these grounds: They considered the frauds of bankrupt as resolving into two classes—the fraudulent increase of debts, and the fraudulent distribution of the funds. The first of these they considered as provided for by the Act 1621 and the common law. When, therefore, the Act 1696 came to be enacted, there was no occasion to guard against the admission of false debts, and the fraudulent increase of true debts, but the object of the Act was to prevent the bankrupt from giving securities to particular creditors over the fund from which all should be paid; and the words of the Act they held sufficient to prove that the intention of the Legislature was to prevent a dilapidation of funds, not to stop the fraudulent increase of debts. The mere acknowledgment of a debt, therefore, which is truly due, or the renewal of a personal obligation, unattended with any transference or right over the funds, in preference to other creditors, cannot fall under the statute. It saves to the creditor the expense of proceedings at law; it supplies the place, perhaps, of a title, which it would cost much money and time to make out; it brings a creditor, whose debt, though most onerous, is still unvouched, to an equal footing with others. But in all this, a deed of this kind is fair, just, commendable,—not fraudulent, but such as justice calls for, and law would enforce. No doubt a debtor may be partial, and refuse to one creditor what he grants to another; but this would make a case of fraud, which, wherever it can be established, the Court will correct. The judges, whose opinions favoured the application of the statute, took another view of the question. The great object of the bankrupt statute 1696 they held to be, the establishing of a general presumption of fraud, with a view to crush it, and leave no possibility of committing it. At common law, deeds are reducible if fraud can be proved; but this law defined fraud, and dispensed with the necessity of investigating the ever-changing circumstances of fraudu-

lent transactions. As fraud may arise, says the Legislature, if such and such deeds be permitted, therefore we declare such deeds to be ineffectual if executed within sixty days of bankruptcy. All deeds, therefore, which may be a cover to fraud, are struck at by this statute. Bonds of corroboration, and deeds of a similar kind, may be instruments of fraud, by enabling a creditor to accelerate his diligence, and get the start of others. The debtor may act fraudulently in refusing them to one while he grants them to others: nay, from its mere secrecy, the acknowledgment of a debt may be fraudulent; whereas a legal constitution by action, being public, would have given intimation to the other creditors to take similar steps. In short, the purpose of the Act is to avoid all questions of actual fraud in such cases, and to make a rule which may stifle fraud. The principle that a bankrupt cannot alter the situation of his creditors one iota, was strongly inculcated in the case of *Fairholmes*, and assented to in the great retention cause, *Harper v Faulds*. The case was decided by a narrow majority.

See also *Crs. of Thomas Dunbar v Sir James Grant*, 1793, M. 1027, where 'a great majority of the Court was of opinion that a bankrupt ought to execute no deed by which the situation of his creditors is affected; and that it would be dangerous to support any deed of that nature.'

Strang v M'Intosh, 1821, 1 S. 1. Here the act objected to was a bill given as the constitution of the debt of the granter to his general creditors, in order to get the better of a preference.

[*Mansfield v Walker's Trs.*, 1833, 11 S. 813, affirmed 1 S. and M'L. 203; *Wilson v Drummond*, 1853, 16 D. 275; *Ramsay v Donaldson*, 1854, 16 D. 720.]

¹ It was held otherwise, however, in *Hepburn v Bell*, 11 July 1816, Fac. Coll. Here Bell had given to Stewart a bill for his accommodation. Before it was due, Stewart sold cattle to Bell, and took a bill for the price. He next day became bankrupt, and returned the bill which Bell had granted. The trustee required Bell to pay the price, and he pleaded a set-off on the accommodation-bill which he had retired. Lord Gillies held this to fall under the Act as an indirect preference. The Court entertained doubts on the subject, and, before deciding, remitted the cause for a fuller inquiry into the circumstances, with a view to the detection of the fraudulent purpose. It was argued (and there seems to be some ground for so contending) that the statute stands in place of evidence in all such cases; and as nothing more distinct in point of fact could be stated in support of the alleged fraud, the parties rested the case on the question of law. The Court,

3. OF SUPPLEMENTARY DEEDS OR ACTS.—There are certain acts and steps of conveying necessary for supplying the links of a defective conveyance, which are neither proper deeds of conveyance, nor to be classed with obligations and acknowledgments of debt; and it may well be doubted whether they fall under the prohibition of the Act.¹

Thus, if a proprietor of land not yet infeft, sell it, the disposition to the purchaser may contain an assignation to the unexecuted precept of sasine, on which the disponee may take sasine in his own name, dropping the disponent out of the feudal progress. If, instead of this, his disposition contain a precept of sasine, and infeftment is forthwith taken on it, his right is still incomplete till the disponent himself is infeft, so that creditors might come in to disappoint him; but the completion of the disponent's title accrues to that of the disponee, and renders it valid, as if at first complete. In the same way, if an apparent heir sell his right, it will be ineffectual to the disponee, till the disponent's title be completed by service; when that title will accrue to the prior conveyance, and make it valid. Is the completion by the disponent of his title in either of these cases, the inevitable effect of which is to render perfect a security which till that moment is good for nothing, objectionable on the statute? The question has been determined in the negative;² and when, in deliberating [215] on the provisions in the subsisting sequestration law of 54 Geo. III. c. 137, secs. 12 and 13, for making more effectual the prohibition of the Act 1696, this question was moved, it was thought more expedient to leave it on the footing on which the decisions had placed it.³ See below, Of *Nova Debita*.

4. OF SECURITIES AND PAYMENTS, FORMING EXCEPTIONS TO THE RULE OF THE STATUTE.

viewing the law differently from Lord Gillies, dismissed the action. The ground of the decision appears to have been, that as there was here a new transaction, and the preference only incidental and consequential, it seemed necessary to prove fraud or collusion. [See *Scougall v White*, 1828, 6 L. 494; *Dawson v Lauder*, 1840, 2 D. 525.]

¹ [This principle has since been accepted as one of general application; and it may be affirmed that any act or deed in implement of an obligation *ad factum præstandum* undertaken more than sixty days before bankruptcy is valid, although the deed in implement was itself made and granted within the statutory period. Per whole Court in *Taylor v Farrie*, 1855, 17 D. 639. As to the application of this rule to delivery of goods under a contract of sale (the price being truly paid), see *Miller's Tr. v Shield*, 1862, 24 D. 821. Even after bankruptcy, the trustee is bound to deliver if the price is paid, under the Mercantile Law Amendment Act.]

² *Watson's Crs. v Cramond*, 1724, M. 1180. Watson had granted to Cramond a bond of relief on which infeftment was taken more than sixty days before the bankruptcy; but Watson had not been served heir, and gave, within the sixty days, a procuratory for serving himself heir. The service proceeded after he was actually in the Abbey, and, by accruing to Cramond's right, made it good. The creditors objected to the procuratory that it was a deed granted within the sixty days, in order to validate a security in favour of a prior creditor, and establish for him a preference over the rest. Answered, This is not a deed in favour of a particular creditor: it is a step taken for the benefit of the whole, as tending merely to the making up of that title which may be beneficial to all; and the advantage derivable from it by Cramond is a mere consequence of the legal accretion. 'The Lords found that Mr. Watson's posterior infeftment did accrease to Mr. Cramond, and therefore repelled the nullity objected.'

Crs. of Gratney competing, 1728, M. 1127. This was a case nearly resembling the former, and the same decision was given. Johnson of Gratney had succeeded as substitute in a deed of settlement, but had never taken infeftment. He granted rights of annualrent to the Duke of Queensberry and other creditors, and they were infeft though his titles were not yet completed. Other creditors afterwards adjudged; and the debtor, to prevent further diligence, made a trust-disposition for behoof of his creditors, in which he gave a preference to the Duke of Queensberry, etc. Sasine was taken in Johnson's person as substitute in the deed under which he had succeeded; and then the trustees took infeftment upon the trust-disposition. The heritable creditors argued, 1. Upon the trust-deed. 2. Upon the accretion of the infeftment in Johnson's person to their prior heritable securities. 'The Lords found that the infeftment could not accrease, in regard the adjudication upon special charges between the infeftment of annualrent and infeftment in favour of the Colonel, which alone gave him the real right, were a mid-impediment, and therefore preferred the adjudgers.' Then certain personal creditors adjudged. They took up the two questions also. On the question relating to the validity of the sasine in Johnson's favour as accruing to the prior heritable securities, the Court repelled the objection; thus deciding that the statute of 1696 does not comprehend such an act.

See also *Tr. for M'Lagan's Crs. v Dr. M'Lagan*, 1800, M. App. Bankrupt, No. 11; and *Mitchell v Finlay*, 1799, M. App. Bankrupt, No. 10.

[A disposition granted and infeftment taken within sixty days of bankruptcy, in implement of missives of sale executed several months previously, held not reducible under the statute. *Cranstoun v Bontine*, 1830, 4 S. 425; 1832, 6 W. and S. 26.]

³ See above, vol. i. p. 737.

—These seem reducible to three classes: 1. Payments in cash; 2. Transactions in the usual course of trade; and, 3. *Nova debita*, or transferences for a consideration given at the time.

PAYMENTS IN CASH.—A creditor receives a preference over the rest more effectually by payment of his debt than in any other way; but this is not a sort of preference which falls under the remedy provided by the statute. If the payment in cash be fraudulent, it will be challengeable at common law; but the creditors, in objecting to such payment, will not have the aid of the presumptions established by the bankrupt statute, unless the payment has been made after sequestration.

There is between the English statutes and those of Scotland a difference relative to payments which is worthy of attention. By the English law, the general rule being that the assignment carries all the bankrupt's property as at the date of the first act of bankruptcy, an exception to this rule was made by statute, of payments in the usual course of trade for goods sold to the bankrupt, and payment of bills due by him.¹ By Sir Samuel Romilly's Act, 46 Geo. III. c. 135, sec. 1, 'all payments by a bankrupt *bona fide* made more than two calendar months before the date of the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes, etc., provided the payee had not notice of a prior act of bankruptcy or of insolvency.' And this is renewed by the late Bankrupt Act for England.² The principle of the Scottish remedy is different. There is no general process of attachment under the statute of 1696, carrying the estate with certain exceptions to the creditors; but every act done by the bankrupt is effectual, which is not either at common law proved to be a fraud against other creditors, or actually prohibited by the statute. Payments in cash have not been expressly mentioned in the Act; and not having been prohibited, they are considered as lawful. It has been seen, that under the second branch of the Act 1621 payments in cash were not included, because the statute was made for preserving to creditors the fund attachable by their inchoated diligence; and money in a debtor's pocket was held not [216] attachable by any diligence known in practice. Perhaps some little effect may have been produced, even in the framing or in the construction of the Act 1696, by the same considerations; for at that time there was no general process of division of the bankrupt's funds. But the chief ground for the omission of payments in the enumeration of acts challengeable on constructive bankruptcy, most probably was, that payment being the ordinary way of discharging obligations, and which does not naturally suggest the idea of embarrassment or insolvency, it was right to hold it as effectual, unless proved to be fraudulent, or subsequent to notice of the bankrupt's situation. Lord Elchies says, 'There are no words in the Act of 1696 that can apply to payment of money, which is not in the sense of law a *deed*; and if it could apply, the law were monstrously unjust in making a retrospect of sixty days before bankruptcy.'³

1. It is not sufficient to characterize a transaction as a payment, that MONEY or CASH has been paid to one who is a creditor, unless he be a creditor entitled at that time to demand payment, or who may be supposed *bona fide* to receive it in extinction of his debt, as in the ordinary course of dealings. So payment of money to one who is only a contingent creditor (as a cautioner) before the debt is due, is not extinction of the debt, but truly

¹ By 19 Geo. II. c. 32, sec. 1, it was enacted, that 'no person really *bona fide* a creditor of the bankrupt, for or in respect of goods really and *bona fide* sold to such bankrupt, or for any bills of exchange really and *bona fide* drawn, negotiated, or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignees of such bankrupt's estate any money which, before the suing forth of such commission, was really and *bona fide*, and in the usual and ordinary course of trade

and dealing, received by such person, of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances.' [See 12 and 13 Vict. c. 135, sec. 1.]

² 6 Geo. IV. c. 16, secs. 82, 83.

³ *Forbes v Brebner*, 1751; Elchies, Bankruptcy, No. 26; Notes, p. 50.

a security, and has been held to fall under the Act.¹ On the same principle, payment to one who is creditor in a future debt seems objectionable; and if such a transaction is ever to be sustained, it must be in circumstances falling fairly within the description of discount; which, although not very usual, may innocently and *in bona fide* take place, where one holding the bill of a trader, and intending to discount it at a bank, the party rather chooses to retain it himself.

2. To make a payment in cash effectual, it seems to be necessary that the money should be actually delivered to the payee, or some person for him: it does not seem to be sufficient that the money should be set apart, or separated for the creditor's use. A person who acts as factor for another, or as steward over his estate, may keep a box or chest as the depository of the papers, money, etc., belonging to his principal, and of the cash or endorsed bills received in payment of his goods. But if to place money in such chest be sufficient to make it a payment in cash, a bankrupt may on the very eve of his failure distribute his estate among his creditors. Such a case has already been referred to, in which the Court, on a complex view of the matter, held the manager of a branch of a bank to have effectually transferred money to his constituents, by depositing it in the iron chest belonging to them. But it is to be carefully observed, that this case was not finally determined.²

3. Under the denomination of a payment in money, strictly speaking, nothing ought to be included but the lawful circulating coin. But in the question at present under consideration, a payment in BANK-NOTES, navy-bills, etc., which are commonly paid and received as cash, would be held as a payment in money. Whether payments by bills of exchange are effectual, will be discussed hereafter. See below, p. 203.

There are few cases in the books upon this exception of payments out of the rule of the statute; for the existence of the exception has never been held to admit of doubt, and it has only been in cases where suspicion of fraud or collusion existed that the question has ever been tried.³

[217] TRANSACTIONS IN THE COURSE OF TRADE.—The next class of cases to which it has been contended that the rule of the statute does not apply, comprehends transactions and dealings in the usual course of trade. It is extremely desirable that the jurisprudence of England and Scotland should be the same respecting dealings of ordinary occurrence in trade; and although there is a difference between the laws, which has not been sufficiently marked, yet the determination in cases of this kind has now come very much into the same course in both countries.⁴

The plain intendment of the Act of 1696 was to comprehend all conveyances made to a *creditor*, if directly or indirectly intended to confer on him a preference over other creditors; and in construing the words according to this spirit and intendment, courts of law have brought themselves to consider ordinary transactions in the course of trade as exceptions to the rule.

1. The exception most commonly contended for, is that of PAYMENT BY A DRAFT or endorsement. Such payments, made in the ordinary course of dealings, have been considered not as preferences in the sense of the statute, but as necessary acts in the daily process of the debtor's dealings, where he does not intend or is not obliged to stop at once; as, where on the day that a bill falls due, and may effectually be paid in money, it is paid by the

¹ *Speirs v Dunlop*, 1825, 4 S. 92, N. E. 94, and rem. 1826, 2 W. and S. 253; finally decided 1827, 5 S. 729, N. E. 680.

[See *Guild v Orr, Ewing, & Co.*, 1857, 20 D. 3. Also cases reported 7 S. 749, 12 S. 802, 1 D. 1, and 1 Rob. App. Ca. 617.]

² *Christie's Crs. v British Linen Co.*; see vol. i. p. 283. See *Borthwick v Wright*, 1827, 5 S. 293, N. E. 273.

³ *Forbes v Brebner*, above, p. 201, note 3; *Bean v Strachan*, 1760, M. 907. See also *Ersk. iv. 1. 1 in fin.*

⁴ Since the former edition of this work, the English law in this respect has been much improved. The statute of Geo. II. had been so rigidly interpreted, that in one case a bill given *for freight*, and in another payment of money due *for carriage of goods*, were held bad, as the statute excepted only bills, etc. in the course of trade by *buying and selling*. *Bradley v Clark*, 5 Term. Rep. 197; *Pinkerton v Marshall*, 2 H. Blackstone 334. But the 6 Geo. IV. c. 16, sec. 82, places this on the right footing.

discount of another bill, this has been held as unexceptionable. So also a bill given and received as cash in payment of goods delivered, was held as money.¹

2. Another case is where a debt is to be paid at a distance, which, if payable in the place of the debtor's residence, might without objection be paid in cash; but a draft or bill of exchange is necessary in making the REMITTANCE. This was the description of the first case that occurred, in which a bill or endorsation was supposed to form a lawful exception to the rule of the statute: for after several determinations, already referred to (p. 201), by which drafts and endorsations were held to be deeds in the sense of the Act, it was suggested on the bench, in a case where a debt was paid by the endorsation of a bill, that if the parties had lived at a distance, it might have made this a necessary method of paying, which on that consideration would not fall under the Act.²

In the next case which occurred, the point of law was not presented very pure; but the opinion of the judges seemed to be, that drafts and endorsed bills were challengeable, though sent from a distance for the purpose of remitting money; and that bank-bills or bank-notes alone were to be held equivalent to cash.³ But in the course of an extending com- [218] merce, the occasions became so frequent on which such remittances were made in the ordinary course of trade, and the challenges of such transactions on the faith of the former decisions were so numerous, that it came to be received as the true construction of the statute, that payments in the ordinary course of trade, though made by means of bills or

¹ *Watson v Young*, 1826, 4 S. 507, N. E. 515.

² *Campbell v M'Gibbon*, 1780, M. 1139. 'The Court,' says the reporter, 'considered cases of this kind as different from those in which the debtor and creditor live at a great distance from each other, and where payments could not easily be made except by the endorsation of bills. In that case the bills would not have fallen under the Act 1696. But to sustain such endorsations as the present, made by one neighbour to another, it was observed, might tend in a great measure to defeat the purpose of the statute.'

³ *M'Hutcheon v Welch*, 1794, n. r. Tait was a drover, who had borrowed from Welch £1200, for which he gave his bill, payable at Martinmas 1789. Tait's affairs got into confusion. While he was struggling, and almost desperate of resources, he, on 8th February 1790, sent from Norwich, where he was with his cattle, to Jackson, a banker in Westmoreland, bills to the value of £660, with these directions: 'Send a bill to Welch on account of my bill to him, and I have sent him another remittance on the same account.' Jackson accordingly sent to Welch on 1st March a draft on Meares & Co. for £660, payable 3d May 1790; Welch got it on 3d March. Tait himself sent by his servant two endorsed drafts by Kerrison & Co. of Norwich, on Ure, Williams, & Co. of London, dated 8th February 1790, at thirty-five days, for £120, and a Bank of England post-bill for £30. These reached Welch on the 4th March. Tait wrote to Welch in remitting these, 'I wish you to keep the money a little, as it may be wanted as before, and the interest cannot all be lost.' Jackson also sent his own bill to Copland for £100. A sequestration was applied for 23d February, and an order of service issued, subject to future objection. Afterwards, 6th March, the debtor concurred in another application, and sequestration was awarded. The endorsations were challenged.

The chief question regarded the application of the Act to endorsations and drafts from a distance. On that matter two questions were made: 1. Whether Jackson's transaction was of the nature of a *novum debitum*? and, 2. Whether the direct

remittances fell under the Act? Lord Justice-Clerk M'Queen was of opinion that, if the direct remittances were by bank-notes, they fell not under the Act; if they were not in bank-notes, they fell within the law. As to Jackson's bills, a cautioner may engage, and must of course, if he do engage to the creditor, be answerable for the debt; but if the bankrupt place bills in the hands of a third party to give to the creditor, it is the same as if he transferred them to the creditor direct. The letter shows Welch to have been apprised of Tait's situation, and that a preference was intended to himself. The Sequestration Act of 1783 enters into the question, which reduces all payments after the application for sequestration; and although the bankrupt did not concur in the first application on 23d February, and it was served on him, and a new application was made on 6th March, the first application was not discharged. Lord President Campbell drew a parallel between this case and Swinton's, where a cautioner was really interposed, and seemed rather to think that Jackson had bound himself as cautioner, and was secure in the possession of the drafts given him for immediate value. The bills sent by Tait he held to be directly under the Act, as a clear alienation in security. He disapproved of the report in Campbell's case as incorrect, and as leading to an endless discussion relative to degrees of distance. He said he had been counsel in Campbell's case; that one judge had said cases might be figured to which the Act might be inapplicable; that if a call is made for a debt in London, and the debtor sends a bank bill which he buys from a banker, this is payment, not security. But there was no such general doctrine laid down as that stated in the report. Lord Eskgrove said this preference was given *ex proprio motu*, and therefore a fraud; not a payment or remittance in cash, but an endorsation; the bills not instantly payable, but a conveyance in security; not in the fair course of mercantile contract. Even common law would set aside such a transaction.

The remittances were set aside.

drafts, are to be sustained, unless the transaction be manifestly fraudulent, and intended as an evasion of the Act. In the further discussion of this matter, it will be proper not to lose sight of the determinations in England; for the analogy of English jurisprudence has had great influence in establishing this exception. And, 1. Where a bill is due at a bank, and in due course a remittance is made to the bank, by sending to be discounted another bill for the amount, the statute is held not to apply.¹ 2. Where a remittance is sent to the creditor by a draft on a bank, to provide for a bill falling due, the statute does not apply.² 3. Where a bill is paid by means of a check on a banker, or by a draft, or by an endorsed bill at a discountable date, the difference being settled in money, it seems to be valid.³ 4. Payments and other operations in the course of a running account between two merchants, or between a banker and his customer, whether made in cash or by the endorsement of bills, are effectual, notwithstanding the statute.⁴

[219] But a different decision is to be given where the transaction is not in the due and ordinary course of trade. Thus, if a bill be past due and protested, the endorsement of another bill in extinction of it is held to fall under the statute.⁵

Wherever the circumstances indicate collusion, or a contrivance to evade the Act, or notice of insolvency, the transaction will be challengeable: as where the bill given in payment is of a distant date, which proves it to be a *security* rather than *payment*; or where the bill is given, not in payment of a *debt due*, but in anticipation of what is not yet payable;⁶ or where a debt due is paid not by a *bill*, but merely by a *promissory note*;⁷ or where an alarm has spread as to the debtor's credit.⁸

¹ Jamieson v Ferrier, 23 Jan. 1810, n. r., where a bill was remitted to retire another just due. This, though within the sixty days, was held good.

² Ferrier v Newton, 2 June 1808, n. r. The draft was on a London banker, at 25 days (20 being par), for £330.

³ In England, in Hawkins v Penfold, Lord Hardwicke held that there was no difference between an actual payment of money in satisfaction of debt and endorsing bills of exchange, for he considered it as a *medium* of payment. 2 Vesey 550.

⁴ Stewart, Tr. for Stein's Crs., v Sir William Forbes and Co., 1791, M. 1142. Here the judgment went entirely upon the specialty that the payments to the bankrupt within the sixty days had not only equalled, but *even exceeded, the value of the endorsements*; so that instead of a preference or advantage being given to Sir William Forbes & Co., they would, if restored to their situation as at the commencement of the sixty days, have been great gainers. But, at the same time, the opinion of the Court very strongly tended to support such dealings (whatever way the balance had gone) as unobjectionable.

In Richmond & Freebairn's Tr. v the Pelican Insurance Office, 1805, M. App. Bkt. No. 24, an account had proceeded regularly between the insurance office and their agent. Two remittances were made by bill within the sixty days, but the receipts within the same period were nearly equal. The Court held the two remittances not to fall under the Act. Lord President Campbell said that the principle held by the Court in the case of Sir William Forbes & Co. with Stein's trustee settled the case; that this was not a security for a prior debt, but a case of mutual debt and credit under a running account, which must be taken altogether as one transaction, the articles *hinc inde* being counterparts not to be disjoined. Sir Ilay Campbell's ms. notes.

In Dundas v Smith, 1808, M. App. Bkt. No. 28, the Court held payments to a running account, by the endorsement of two bills, to be *bona fide* payments in the ordinary course of business.

⁵ Blaikie v Wilson, 1 July 1803, n. r. Monach was debtor to Wilson for £110, by bill due 23d April 1800, which was protested when due. The debtor could not pay money; but holding bills of Steel & Co. blank endorsed, he offered them to Wilson in payment. But he hesitating to accept them, Monach got Cochran to put his name on them, and then Wilson took them and gave up his bill. These bills had three months to run, but were regularly paid when due by Steel & Co., without any demand having been made on Cochran. Monach was rendered bankrupt within sixty days, and the transaction was challenged. The Court held the statute to apply, on this plain principle, that here was a fund of the bankrupt's alienated, which would otherwise have become a part of the sequestrated estate, and that the interposition of Cochran's name made no difference in the case.

⁶ See Tamplin v Diggins, 1809, 2 Camp. Rep. 312, where bankers at Chichester, in use to draw bills for Visick's accommodation, received from him on 24th August money paid in for the purpose of taking up such bills not due till 24th September. Visick committed an act of bankruptcy 18th August. The commission was issued 24th September. Lord Ellenborough held that the payments protected are only payments upon bills actually due. But the sum in question was deposited, not in payment of a present debt, but to satisfy a demand which did not arise till after the suing forth of the commission. Verdict conformably, afterwards confirmed by the Court of King's Bench.

See above, Speirs v Dunlop, p. 202, note 1.

⁷ A bill is a proper mercantile document; but a promissory note, unless where it is to settle a purchase at the usual credit, is different. In paying by a promissory note a debt that is already due, the debtor confesses his insolvency for the moment: he does not mend the security, but merely procures further time for payment.

⁸ Hotchkis, Tr. for the Crs. of Bertram, Gardner, & Co., v the

A SALE IN MARKET for a fair price is not challengeable.¹ But it may be so contrived as to serve the purpose of conferring a preference on the purchaser, by enabling him to plead compensation against the demand for the price.² So, a consignment of goods to a factor to be sold is unchallengeable; but if made for the purpose of giving him additional security for his general balance, it is exceptionable. And, finally, a payment into a cash account is available to the banker and to the cautioners; but if brought about by the [220] cautioners to lessen their responsibility, it will be challengeable.³

Where a FACTOR employed to sell has disposed of goods and received the price, such price, while it remains specific as in bills, is the property of the principal, and may be vindicated by his creditors as distinct from the factor's funds on his bankruptcy; but if received in undistinguished money, the principal is merely a creditor. It seems, however, to be an effectual payment, if the factor buy bills to transmit to his constituent, or send him a draft in the usual course of trade.⁴ If goods are sent, the Act may be thought to apply; but will not the course of trade be a good justification of such an investment, so as to save the principal from the operation of the statute? If the goods sent were according to the principal's order, or even if sent in the usual course of the factor's employment, these seem to be fairly within the exception of dealings in the ordinary course of trade.

In concluding on this class of exceptions, it may be remarked, that the cases have not yet been sufficiently numerous to settle all the questions that may be raised on the subject; and the only general doctrine that can be hazarded is, that wherever the transaction is in the ordinary course of dealing, and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, although the effect may be to give a preference to one creditor over the rest.

NOVA DEBITA.—This class of exceptions comprehends all those cases in which a fair and present value is given for the conveyance or other deed executed by the bankrupt. In order fully to comprehend the spirit of the law of Scotland in this respect, it is necessary, in consequence of the disposition sometimes shown to confound the English and Scottish bankrupt laws, to recur to that important distinction already stated between the principle of the two laws. The English law gave the whole estate by a feigned conveyance to the

Royal Bank, July 1796, n. r. This was a case in the bankruptcy of Bertram, Gardner, & Co., in which the above principle was strongly acknowledged. A large advance was made by the Royal Bank to Bertram, Gardner, & Co., at a time when they were exerting themselves to avoid the bankruptcy which afterwards overtook them. This advance was made at ten o'clock in the morning. In the course of that forenoon the bank began to fear for the credit of the house; and having insisted for security, Bertram, Gardner, & Co. deposited bills with them to a large amount, and in the course of a few days became bankrupt. This transaction was challenged upon the statute, as the constitution of a security for a prior debt. When the cause came into Court, it was the general opinion of the judges that the security was objectionable, so far as it applied to prior advances; upon understanding which, the Royal Bank at once renounced any claim upon these bills as a security for the prior advance, so that the question did not come to judgment. See M. 2173.

¹ [Bruce v Hamilton, 1832, 10 S. 250.]

² Such a case has already been referred to, p. 199, note 1.

³ William Adamson Roddan v Wightman, Second Division, 29 June 1815, n. r. The cautioners in a cash-credit within sixty days of the principal's bankruptcy bought from him certain subjects, and paid the price, which was immediately,

in their presence, paid in at the bank to the credit of the cash account. The case was remitted to the Lord Ordinary for further inquiry; but it would seem that, if the facts were made out, there could be no doubt of the application of the Act.

[See Mitchell v Rodger, 1834, 12 S. 802; Blincow's Tr. v Allan & Co., 1829, 7 S. 753, 7 W. and S. 26.]

⁴ Wilkins v Casey, 7 Term. Rep. 711. Casey sold goods for Cann as a factor. Cann drew bills on Casey, which he, after a secret act of bankruptcy by Cann, accepted and paid. In an action against Casey by Cann's assignees to pay a second time, the Court of King's Bench held the payment good. This case presented the question in another shape, but the decision illustrates the point that payment by a bill is the same in such a case as payment by money.

[In Blincow's Tr. v Allan & Co., 1828, 7 S. 124, a banker, who was creditor under a bond payable by instalments, received in the course of business endorsed bills from his debtor within sixty days of his bankruptcy, and put the proceeds to his credit in an account-current, and which by an order from the debtor he applied in payment of an instalment past due, and another not due. Payment as to the instalment past due held good; as to the second, an issue ordered by the House of Lords on appeal. 7 W. and S. 56. See also Dixon, Langdale, & Co. v Cowan, 1828, 7 S. 132.]

commissioners as at the date of the first act of bankruptcy, and therefore every transaction with a bankrupt after that time was null; to correct the evils of which required the introduction of certain exceptions, as payments in the course of trade, and purchases for valuable consideration. But the bankrupt law of Scotland makes no such conveyance. It only provides that there shall be preserved or recovered for the benefit of creditors, what shall be found to be alienated to a creditor in payment or satisfaction of his debt in prejudice of other creditors. The consequence of this is, that in the very nature of the law there is an exception of all conveyances for full value; and the question for determination under that law is, whether the deed challenged shall be held as a conveyance for value, or as a security for debt to one holding the character of a creditor at the time of the constructive bankruptcy?

The words of the statute contain an express declaration, that to annul the deed it must be granted to a 'CREDITOR,' and must give him a preference over OTHER CREDITORS. But a person with whom the debtor enters into a new contract (whether the transaction be a sale of land or of goods, or even a loan of money upon security), is in no sense a creditor [221] at the time of entering into the transaction; nor does the deed granted by the bankrupt in such a transaction bestow a preference upon one creditor to the prejudice of the rest. Accordingly, in the very first case in which the question occurred, the Court held the statute inapplicable to an endorstation for money presently advanced.¹ And this is now settled, although certain doubts which arose in cases of a complicated nature have seemed occasionally to obscure the rule.²

The doubts which have so frequently disturbed the course of judicial determinations on this important question, and the discrepancies of those determinations, it is not easy to answer or reconcile. In general, it would appear, 1. That a loan of money, or a sale of land or goods for full value, is not objectionable, as it seems to be under the English statute. 2. That wherever the transaction has begun on the footing of debtor and creditor, and within the sixty days a security has been interposed, it is objectionable under the statute. 3. That wherever money has been advanced or paid on the footing of a real security or conveyance, such security, though granted before bankruptcy, and not completed till after the commencement of the sixty days, will be safe against challenge on the statute. 4. That the debateable ground comprehends all those transactions in which the money paid has been given on a promise or understanding that security was to be given for it; either a specific security, or security generally. And, 5. That the difficulty on this set of questions seems to be resolvable on the ground that every one who trusts his money or property on a mere personal engagement is a creditor; that there is in legal principle no distinction in the *jus ad rem*, to which alone he trusts, whether the obligation be to pay money or to grant a deed; and that bankruptcy, actual or constructive, stops the hand of the debtor from doing any act by which the condition of any one creditor is to be made better at the expense of the rest.

These principles, however, have not always guided the decisions of the Court, and considerable confusion and difficulty remain on the subject.

1. In examining the course of decisions, the first case of importance which arose related to a LOAN OF MONEY before the sixty days, the deed of security for which was granted at the same time with the payment of the money or other consideration; but the transfer was not *completed* by sasine till within the sixty days. When this question first arose, opinions varied greatly, and one view occurred which affected much the decision of the question.

¹ *Campbell of Glenderuel v Graham*, 1713, M. 1120-2. The question arose upon an endorstation, and the Court found that the Act of Parliament could not apply, unless 'the pursuer proved the endorstation to have been made, *not for present value*, but in satisfaction or security of a prior debt.'

² *Brugh v Gray*, 1717, M. 1125; *Grant v Duncan*, 1717, M. 1228-9; *Chalmers v Craig's Grs.*, 1726, M. 1231.

The grounds on which the rule is founded are well explained by Lord Kilkerran in *Johnson v Burnet & Home*, 1751, M. 1130. See below, p. 207, note 3.

It was supposed to be the object of the second clause of the statute,¹ in every case, to prevent creditors in possession of securities from keeping them latent; and that whenever the real right was delayed, the *jus in re* was separated from the obligation, the lender became a mere creditor, and the implement of the obligation, by completion of the security within the sixty days, was truly a security given for a *former* debt.² But the whole of this doctrine [222] was reversed in a case in which Lord Kilkerran, in stating the opinions of the Court, gives a review of the several previous cases, and states the above decision as having proceeded upon an erroneous opinion that the Act was intended to force a creditor holding a security to publish it, whether the transaction was old or new.³ 'But this construction,' he adds, 'appearing to be altogether imaginary, and to have no foundation in the statute, the Lords were now unanimous⁴ that the statute did not reach *nova debita*. They considered that the statute was only meant to supply the defects of the Act 1621, and to prevent the debtor's giving securities to some in prejudice of his other prior creditors; that he nevertheless remains to have power to exercise all other acts of ordinary or extraordinary administration, and therefore may, however notour bankrupt, borrow money, and grant securities for the same; or he may sell his land for a just price paid, whereof no creditor can complain, as the bankrupt's funds are not thereby lessened. But to suppose the clause in the statute, which enacts that the dispositions or assignments shall be held to be of the date of the sasine, did extend to such *novita debita*, were to suppose what nobody ever dreamt of, that the statute was intended to restrain the commerce of borrowing money by bankrupts; for, as the clause makes no distinction whether the sasine be taken recently or not, a creditor, who lends his money upon heritable security during the running of the sixty days, would lose his preference, though he took his infetment without delaying an hour, as there must always be some interval between the date of the bond and the date of the sasine. And to add but one consideration more, the most sanguine advocates for extending the statute to *nova debita*, can have no pretence for understanding it to comprehend irredeemable dispositions for a price paid; and surely, if the statute had been intended to oblige creditors, even for *nova debita*, not to defer taking their sasines, or *in pœnam* to be subject to that certification in the statute, it must have with equal reason done the same with respect to sasines upon irredeemable dispositions.' The doctrine here laid down was confirmed in a more recent case.⁵

Thus it seems to be settled, that no objection can be taken on the statute to an heritable security granted of the date of the advance, though sasine on such security shall not happen to be taken till within the sixty days before bankruptcy.⁶ See below, p. 208.

In the analogous case of MOVEABLE PROPERTY conveyed in security, the same sort of

¹ 'All dispositions, etc., whereupon infetment may follow,' says the statute, 'shall only be reckoned to be of the date of the sasine lawfully taken thereon.' By the 54 Geo. III. c. 137, sec. 12, the date of recording is the rule.

² *Grant v Duncan*, 1717, M. 1228-9.

Crs. of Merchiston v Colonel Charteris, 1735, Elch. Bankrupt, No. 5. 'An heritable bond for money, when borrowed, yet if infetment is not taken till after, and within sixty days of bankruptcy, it falls under the Act 1696.'

A distinction was admitted in the case of a security, where the granter was not himself infet, his whole right being held to be effectually conveyed by the disposition. Thus, in the case of the *Crs. of Scott of Blair v Colonel Charteris*, Scott was not himself infet, but only conveyed by assigning an heritable bond which had been assigned to him, and of which the precept was still unexecuted. It was held 'that this case did not fall under the Act, because, whatever might have been

the intent of the statute, the words respect only the cases where infetment is necessary to denude the bankrupt; and where it goes this length it has a most valuable effect, but cannot by construction be extended further than the words will bear.' 1734, M. 1239.

See also *Mathieson's Crs. v Smith*, 1735, M. 1240.

[*Cormack v Anderson*, 1829, 7 S. 868.]

³ *Johnson v Burnet & Home*, 1751; *Elchies, Bankrupt*, No. 27; M. 1130-1142.

⁴ Lord Kames, in his report, says: 'Elchies dissented, on the authority of *Merchiston's case*.' See above, note 2.

⁵ *Mitchell v Finlay*, 1799, M. Bankrupt, App. 10. Here an infetment in security to a wife proceeded on an antenuptial marriage contract: the husband himself was infet at the same time with his wife.

⁶ [*Fulton v Lead*, 1825, 4 S. 157.]

difficulty occurred. Thus, an assignation to a bond, or other personal ground of debt, is not a complete transference of the claim, so as to be effectual in competition with creditors of the assignor doing diligence, or getting a second assignation, unless intimation of the conveyance has been made to the debtor; and so the question might be raised, whether a conveyance not intimated till after the commencement of the sixty days should be regarded as of the date of the intimation, and as a security for a debt previously not secured? Formerly there was this difference in the case of heritable securities, that the date of [223] heritable securities was by the statute declared to be the date of the sasine, while there was no such rule in moveables. And it was formerly held, that when intimation was made in assignation, it had relation back to the date of the assignation, so that the date of the assignation was the date of the real right.¹ The rule is now made the same in both, the security being held as of the date of the completion of the conveyance by intimation or otherwise;² but should the question be raised on the same footing as in the case of heritable securities, the same rule which regulated the decision in the above cases of heritable securities would no doubt be applied to moveables.

If a bill be drawn by a merchant upon his correspondent, in favour of one who advances money for it, strictly speaking, it is neither a security nor a conveyance till accepted by the drawee; yet the date of the acceptance being posterior to the advance will not entitle the creditors of the drawer to challenge it as a security for a prior debt, incurred of the date of the draft.

In the same way, if money be borrowed upon the transfer of a ship, the vendition is not complete without making entry in terms of the statute;³ but the delay of this act of completion will not alter the lender's condition, nor endanger his security upon the statute, as granted for a prior debt.⁴

2. In all these cases the debtor is supposed to have done his part in completing the right of the person to whom the transference is made. The taking of sasine on the heritable securities, the intimation of the assignment, the procuring acceptance of the bill, the making entry of the ship's transfer, are all acts to be accomplished without the further interference of the bankrupt. But the question was more difficult where anything was required to be done BY THE BANKRUPT himself in order to make the right effectual; and this is a question of great importance in practice, from the frequency of such cases. It has been held in other questions under the bankrupt law, that a debtor can do nothing to alter the condition of his creditors;⁵ and if the creditor claiming the stipulated security is to be regarded as a *creditor*, the same rule ought to be applied; and the more so, as he has his remedy more effectual than other creditors, by an adjudication in implement. But the Court has not uniformly adhered to one principle in this class of cases. In the first place, it seems to have been held, that wherever the bankrupt interfered only to do that which both parties understood had been done at first, and upon the faith of which understanding alone the money was advanced, the act was not objectionable, nor such as could entitle creditors to separate the security from the advance. Of this there is an example in the case cited below, where a merchant having raised money on bills drawn on the consignee of a cargo, which the consignee rejected, the alteration of the consignment, and drawing of new bills in favour of the creditor on the new consignee, was held not to be a security for a previous debt in the sense of the statute.⁶ To this principle, perhaps, might such a case be referred

¹ *Hay v Sinclair & Co.*, 1788, M. 1194.

² 54 Geo. III. c. 135, sec. 13. [19 and 20 Vict. c. 79, secs. 6, 7.]

³ 6 Geo. IV. c. 110, secs. 37, 38. See above, vol. i. p. 156.

⁴ It is a very different question, whether in any of these cases the creditors of the person borrowing, or a trustee under a sequestration of his estate, could prevent the lender from completing his conveyance by taking possession, so as

to be preferable to him, if prior in the completion of their rights and diligence. See below.

⁵ See above, p. 198, cases of *M'Math* and of *Strang*.

⁶ *More, Tr. for Sinclair & Williamson's Crs., v Allan*. The case is stated very fully in the judgment of the Lord Ordinary (Armada). He found: 'That, about the middle of March 1796, Messrs. Sinclair & Williamson consigned a cargo of wheat belonging to them to Mr. Claud Scott, merchant in

as that of Smith and Pickering was, in England,¹ where a bill of exchange was [224] delivered over for a valuable consideration, but the debtor forgot to endorse it. It was held that he might endorse it after an act of bankruptcy. And it is likely that, had such a case occurred in Scotland, and the debtor had been desired to endorse a bill, on which he had thus raised money without endorsing the bill, the case would have been held not to fall under the statute 1696.

But another set of cases has created more difficulty, where the parties were sensible that the security was not at first completed, the advance being made on the faith of the DEED being AFTERWARDS GRANTED. In such case it scarcely can be said that the lender of the money is more than a personal creditor merely. This is a difficulty on which the decisions of the Court have vacillated in so great a degree, that they leave the law in very great uncertainty.

In the cases of this description which first occurred in Court, two grounds of argument were taken in support of the security: that the transaction is to be held as continuous, the security and advance of money being the counter considerations for each other; and that a security granted in consequence of such previous obligation, is not (as the Act requires a challengeable deed to be) 'voluntary.' The Court first held an obligation to grant a security, insufficient to exempt it, when actually granted, from the rule of the statute.² This was afterwards departed from in several cases; and where the transaction was, from the first, of the nature of an agreement for a loan on the one part, and a security on the other, the statute was held not to apply.³ More recently the Court returned to the opinion [225] which they had first entertained, and which ruled the determination in the case of Eccles. The judges, in the case of Robertson Barclay last quoted, had come to be nearly equally

London, and endorsed the bills of lading thereof to Mr. Scott; that upon the 16th March 1796, Messrs. Sinclair & Williamson drew a bill for £1000 sterling upon Claud Scott, to whom the foresaid cargo of wheat was consigned, and endorsed said bill to the defender, Mr. Allan, for value given of that date; that upon the 18th March, Messrs. Sinclair & Williamson drew another bill for £1200 upon Claud Scott, the consignee to the foresaid cargo of wheat, and endorsed said bill to the defender, Mr. Allan, for value given of that date; that the value of the cargo of wheat exceeded the amount of the foresaid bills; and that these two bills were drawn by Sinclair & Williamson upon Claud Scott, and endorsed to the defender, Mr. Allan, in the view of the consignment of said cargo; that Claud Scott, the intended consignee, refused to receive the consignment of the cargo of wheat made to him by Sinclair & Williamson, and likewise to accept the said bills drawn upon him and endorsed to the defender; that the foresaid cargo of wheat, and the bills of lading thereof, were thereupon given to Mr. Alexander Ross of London, who, upon 29th March 1796, accepted two bills drawn by Sinclair & Williamson, one for £1000, and the other for £1200, which were endorsed to the defender in lieu of the two former bills drawn upon Mr. Scott, the intended consignee. Sinclair & Williamson were rendered bankrupts in the beginning of April, and a challenge made of the second set of bills to Allan, as being granted for a prior debt, and so falling under the statute. The Lord Ordinary decided: 'That the two bills last granted ought not to be considered as a security falling under the Act 1696.' To this judgment the Court adhered, by refusing a petition, without answers. 23 Jan. 1800, n. r.

¹ Peake's Cases 50.

² Eccles v the Crs. of Merchiston, 1729, M. 1128.

³ These cases were:

Mansfield, Hunter, & Co., Crs. of Nisbet of Northfield, v Cairns, 1771, 5 Br. Sup. 386, Hailes 403. It was observed on the bench, 'that where money was advanced in consequence of a communing, that an heritable security should be granted, such bond was truly a *novum debitum*, and did not fall under the statute.' The judgment to this effect was first pronounced by Lord Kennet; and in the Inner House it was approved of by Lords Pitfour, Kames, Gardenstone, Ellick, Colston, and Lord President Dundas. It was stoutly opposed by Lord Monboddo; and in some notes by Lord Swinton on the case, he says: 'Monboddo found great fault with this decision, and said to me after it, "It is needless to study law."'

Houston & Co. v Stewart, 1772, 5 Br. Sup. 386, Hailes 468. Here the money was borrowed in June 1766, and a letter given by the borrower desiring the lender to employ an agent to draw out an heritable security therefor. There was some question as to the fact, but the case seems to have been decided on the footing that the above statement was correct. The Court repelled the reasons of reduction.

Spottiswood v Robertson Barclay, 1783, Hailes 931. Judgment was pronounced, sustaining an heritable bond of annuity, granted by a husband within sixty days of his bankruptcy, in respect of a prior obligation to grant it contained in his marriage articles. But the judges were much divided in opinion; and a hearing in presence was appointed, for the purpose of solemnly reviewing and settling the question. It never came again to trial, having been compromised. But if I can judge from the incidental opinions which I have heard of two judges in particular (Lord Justice-Clerk M'Queen, who sat upon the bench at the time, and Sir Ilay Campbell, who was counsel in the cause), there is much reason to believe that the ultimate decision would have been different from the first.

divided on the question. And in 1793 a set of cases came to be tried, in which the point of law was pretty fully discussed. In the one of those cases, there was an interval of a month before the granting of the security; but it had been stipulated at the first, and was the condition of a cautioner's engagement. In the other there was, of the same date with the cautionary engagement, a written obligation, in which there was this clause: 'And seeing I agreed to give you an heritable security, in relief of said sum, previous to your consenting to join me in said bill, I oblige myself to do so accordingly over my property in Register Street, and that as soon as the proper writings can be made out.' The heritable security was not granted till within the sixty days. In both cases, the Court held that the lender of the money was, under these engagements, a mere creditor, and that the securities were objectionable.¹ In another case, in which the opinion of Mr. Clerk (Lord Eldin) had been given in favour of a security stipulated at the first, but not completed before the sixtieth day, the Court still held that the statute applied;² and, in particular, the late Lord Meadowbank, who decided the case in the Outer House, accompanied his judgment with a [226] note, in which he condemned the decision in the case of *Houston & Co.* (*supra*, p. 209, note 3), 'as clearly contrary to principle, since an obligation to grant a preference cannot constitute an actual preference on an heritable subject, in a question with other creditors; and, accordingly, it is one of those decisions which are frequently quoted, and as often disregarded by the Court.' But in the time of Lord President Blair, a case occurred in which all these decisions were disregarded, and (returning to the opinion which ruled the case of *Mansfield* and others,—see *supra*, p. 209, note 3) the Court held, that where money is advanced in contemplation, and on the faith of a security to be granted, it is a *novum debitum* to which the statute does not apply.³

¹ *Trs. of Brough v Duncan & Jollie*, 1793, M. 1160; and the same parties against *Spankie & Jollie*, M. 1179.

On the first of these cases it was observed on the bench that 'there could be no difficulty whatever. The debt to the bank was contracted in March, and the heritable bond not granted till May. During the interval Messrs. Jollie & Duncan had only a personal claim of relief against Brough; the heritable bond therefore, being clearly a further security, falls under the Act.' And so the Court unanimously found.

On the second case it was said from the bench that the judgment in the case of *Houstoun & Co. v Stewarts* (*supra*, p. 209, note 3) was erroneous. 'Till the heritable bond was granted, Messrs. Spankie & Jollie were mere personal creditors; and it is contrary to the principle of our law, as laid down both by Lord Bankton, and M'Kenzie in his Commentary on 1621, that an obligation to grant an heritable security should entitle the bankrupt voluntarily to fulfil it, after he falls under the retrospect of the Act 1696.' And in this case also the Court unanimously sustained the objections.

² *M'Lean v Primrose*, 16 Nov. 1799, n. r. John M'Lean, merchant in Leith, was in the right of an heritable bond followed by sasine, and his right was also completed by sasine. This bond, with the conveyance and the two infeftments, he deposited with Sinclair & Williamson, to whom he was due £300, it being intended to convey the security regularly to them, for which purpose a scroll of the conveyance was made out. Mr. Primrose was prevailed on to advance the £300 to Sinclair & Williamson, and the heritable bond and infeftment were deposited with him, and the scroll of the conveyance delivered to him to have it extended in his own favour. The conveyance was not, however, completed, and M'Lean became bankrupt. A trust-deed was executed, and at a meeting of the committee of creditors M'Lean stated the transaction,

and expressed his anxiety to have the conveyance completed. The committee ordered evidence to be produced of the advance, and of the agreement at the time, and of the lodging of the writings, and they required an opinion from a lawyer or conveyancer that Mr. Primrose was entitled to the conveyance. An eminent lawyer was consulted, who gave an opinion that the Act did not apply. The conveyance was not, however, executed. Mr. M'Lean refused to do it, and Primrose brought an action against him for having him ordered to implement his obligation by granting a conveyance. Appearance was made for Mr. M'Lean alone, not for the creditors, and his defence resolved into this: That he had informed the committee of Mr. Primrose's demand; that without their orders he could not grant the deed; and that by doing so, he would risk the benefit of the *cessio bonorum* for which he had applied. The sheriff pronounced judgment against M'Lean. The cause was brought into the Court of Session; and Lord Meadowbank, as Ordinary on the Bills, 'remitted to the sheriff to alter his interlocutor, and to assoilzie Mr. M'Lean.' Upon a petition against this judgment, the judges seemed to be of opinion that where the creditors of a bankrupt oppose such an action as this, the bankrupt cannot be compelled to grant a deed which, if he granted without compulsion, would convict him of fraud and be reducible under the statute 1696; but as the only opposition was on the part of M'Lean, the Court returned to the sheriff's interlocutor.

³ *Bank of Scotland v Stewart & Ross*, 7 Feb. 1811, Fac. Coll. Tough and Stewart, who had money transactions together, applied to Ross for a loan of £220, 1s. 6d. The transaction was to be settled by Ross buying a feu from Tough for £150, and getting a security over a house of Stewart's for the balance, being £70, 1s. 6d. The money

This series of cases will show a degree of uncertainty in the principle to be applied in questions of this kind, which is very distressing in practice. But the fair result seems to be—1. That wherever money is paid or advanced, or property made over in consideration of a general promise of security, not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intent and meaning, the rule of the statute is understood to apply to the security, when it comes to be granted, as being truly a security for a previous debt. Thus, where a man in his contract of marriage binds himself generally to secure his wife in a jointure, an heritable bond granted within the sixty days would seem, on this view, to be held as a security granted for a previous debt, and the grantee as merely a personal creditor till the security is actually completed.¹ So, if a merchant purchase goods on an engagement to pay for them 'in cash or in good bills,' and receive delivery in reliance on his performance, and after an interval, but within sixty days of bankruptcy, he endorse a bill to the seller, this appears to be held as a security for a prior debt in the sense of the Act. Again, it is one of the most common stipulations in the sale of the goods, that they are to be paid for in 'approved bills' at the usual credit; and the line is to be correctly drawn, only by requiring that the bills should be exchanged for the goods at the time. But, 2. It has also been held, that wherever there is stipulated a *specific security* over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act.² This last point of doctrine, however, is still subject to doubt, and with the greatest deference is suggested, as deserving very serious reconsideration. It would indeed be expedient to settle this point legislatively, and to follow out decisively the great distinction between real right and personal obligation.

3. Where the security is granted, not to the creditor in a prior debt, but to a cautioner who becomes bound to that creditor, it would appear, that wherever the creditors cannot establish that there was a device to defeat the statute, and in which the cautioner is [227] participant, or at least of which he has notice, they will not succeed against the cautioner. In the case quoted below,³ the circumstances led to a question of this kind, but it was not

was advanced on the 6th May 1801, and Stewart's title-deeds immediately delivered to Ross to make out the security. The security was not written out till 29th June, and sasine not taken till 27th October. On 13th November Stewart was made a bankrupt. In a reduction by Stewart's creditors on the Act 1696, it was decided by Lord Woodhouselee in the Outer House that the Act applied, as the loan was not relatively to the security, *novum debitum*. The President said that, looking merely to the date of contracting the debt, 6th May, and that of the security, 27th October, this was a security for a personal debt previously existing. But it is stated, and seems to be admitted, that at the very commencement of the transaction it was stipulated that Mr. Ross was to have this security, and the title-deeds were put into his hands in order to get the security made out. This being the case, the loan is a *novum debitum*; the money is advanced on the faith of the heritable security, although some time intervened before the deeds were executed, as frequently happens. Lord Hermand was clearly of opinion that the Act 1696 did not apply. Lord Succoth had no other difficulty than upon the fact relative to prior transactions; but assuming the fact to be as above stated, that the money was advanced not for payment of a prior debt, the transaction, as relating to a *novum debitum*, was not within the reach of the Act.

¹ [Taylor v Farrie, 1855, 17 D. 639, where all the judges were consulted. In Moncrieff v Union Bank, 1851, 14 D. 200,

the obligation was to grant a security when required, and a security granted within the sixty days was held bad.]

² [See Cormack v Anderson, 1829, 7 S. 868; Anderson v Walker, 1842, 4 D. 1180; Horne v Hay, 1847, 9 D. 651, *supra*, p. 200, note 1.]

³ *Trs. for Swinton's Crs. v Sir William Forbes & Co.*, 1790, M. 1181. Sir William Forbes & Co. made a demand upon Swinton, and he offered, in security, a vendition of a ship. Sir William Forbes & Co. refused this; and Swinton then applied to Mr. Campbell, who agreed to interpose his credit with Sir William Forbes & Co., on receiving, as a security for his relief, a vendition to Swinton's ship. Swinton was made bankrupt three weeks after this transaction.—1. Mr. Campbell contended against the claim of Sir William Forbes & Co., that his obligation depended on the efficacy of the vendition, and that he could not therefore be forced to pay till that previous question were determined. The Court found that Sir William Forbes & Co. had no concern with the efficacy of the vendition. 2. Then the validity of the debtor's acceptance was challenged. It was found a good acceptance. 3. Another question remained, but it was properly a question between the general creditors and the cautioner, viz. the validity of the vendition, as a right granted in security of the cautioner's claim of relief. This question, however, was not tried. In giving his opinion in the case of *Blaikie v Wilson*, 1 July 1803, the late Lord Meadowbank said that this case of

tried. On two several occasions it has been said from the bench, that the security granted to the cautioner is to be deemed a bad one; and that if the question had been tried in the case alluded to, the security to the cautioner would have been set aside. But in the last case which occurred on the subject, the Court supported the security given to the cautioner, as not falling under the Act 1696.¹

Swinton's was not compromised; that he had given an opinion as counsel, that the vendition having been made over to Mr. Campbell in order to evade the Act, was objectionable. And in the case of *M'Hutcheon v Welch*, Lord President Campbell said, that if Mr. Campbell's right had in that case of Swinton's been tried, it would probably have been set aside.

In the papers in Swinton's case, reference was made to the case of *Grant of Artamford v Grant of Carron*; but that was a case in which no new cautioner was interposed. The circumstances were these: Artamford being creditor to Carron for £1500, received £500 in cash; and having occasion for the balance, the following transaction took place: The sum of £2000 was borrowed from Mr. Innes by Carron, and Artamford became his cautioner on receiving an heritable security in relief over part of Carron's lands called Allochie. On the day the £2000 was received, Artamford got payment of the balance of his debt, being £1050; and Carron having become bankrupt within the sixty days, Artamford was obliged, as cautioner, to pay the £2000, and claimed in Carron's ranking upon his heritable security in relief. An objection was stated to him, so far as concerned the £1050; and the Court found the heritable bond of relief struck at by the Act 1696, in so far as extends to the sum of £1050, with interest, for which Artamford was antecedently creditor to Carron; reserving the effect of the personal obligation of relief. Summer session 1788.

In ranking, a question occurred, Whether in claiming as an adjudging creditor on the whole estate, under the personal obligation of relief, Artamford was entitled to rank for the full sum, without deducting what he had received under the preferable security? or whether his claim on the adjudication was not to be restricted to the balance? The Court ranked him as an adjudger on the general estate of Carron, without deduction of what he had drawn in consequence of his heritable bond over Allochie. 2 March 1791. Sir Ilay Campbell's Sess. Papers.

¹ *Monteith's Trs. v Douglas*. Monteith being indebted to the Duchess of Douglas in £2500, her trustees agreed to supersede diligence against him, on his procuring security for £1250. He applied to Mr. Douglas and others, and they became bound for the £1250; Monteith disposing to them, in security, a house in Glasgow worth £5000. Sasine was taken, and recorded on this disposition, on the 17th October 1785; and Monteith was made bankrupt on the 7th November, fifty-two days after the sasine. A reduction was brought on the Act 1696. The Court first reduced the deed, but afterwards they supported it. 12th December 1794. M. 1146; Bell, Fol. Ca. 127.

On the abstract question, some of the judges thought the statute applicable; in which opinion they seem to have proceeded upon these grounds:—1st, They allowed that, in form, the debt, so far as the cautioner was concerned, was a new debt, since it was by his cautionary engagement that he first became debtor; and that, in this view, the statute did not

apply. But, 2dly, They said that the Act provides against indirect as well as against direct securities; and this is plainly nothing else than an indirect security, and must be included. It was admitted that a case might be supposed, of an indirect preference brought about by means of a security, which yet would not fall under the Act: as, where one borrows money, and with that money pays off prior creditors; for the lender has no concern with the application of the money. But where a man becomes cautioner, the natural question is, Why cannot you as well give the security directly to the creditor without my interposition? The answer is: 'That may be struck at by the Act, if I be rendered bankrupt in sixty days; but this comes to the same thing in the main, and the Act cannot trouble us.' This is, in effect, the very form of transaction which the law prohibits, under the description of an indirect security. These judges, in short, considered a decision which should exclude this case as equal to a repeal of the statute. The judges who thought the Act inapplicable to the case, seemed to rest their opinion upon the effects to commerce and the injustice to cautioners, with which an opposite judgment must be attended. Bankers do not like heritable securities; they prefer good personal obligations. When they give a cash account, and, rejecting heritable security, desire personal, it is natural for the person getting the credit, to offer to those who engage as his cautioners that security which the banker rejects; so the affair is settled. But the cautioners die, and new ones are demanded; the new cautioners require heritable security, and it is given them. Why should this be more objectionable than the other? The thing happens every day: new cautioners come into cash accounts, and new securities are granted. There may be cases where fraud can be proved, and, when proved, it authorizes a reduction; but, upon the general question, whether the Act applies to reduce such a security as this, given on such an occasion, there can be no doubt. The Act is against securities given to prior creditors for anterior debts; but this is not a security given to a prior creditor, directly or indirectly; no security is given over the debtor's estate; the creditor can avail himself nothing of the security given to the cautioner. That there is a defect, and possibility of evading that law, may be true; but that is for the Legislature to consider, not for a Court. Such were the different opinions on the abstract question. But one judge of high respectability moved a distinction in this case, founded upon the facts of the case, as indicative of the total absence of fraud. To this, however, the other judges would not agree. They held that the Act 1696 was made as a rule to preclude the necessity of inquiries into fraud, and for this purpose established a presumption of fraud, not to be got the better of by any proof. Although, therefore, in cases which do not fall under this presumptive rule, if fraud can be proved, it must annul the transaction, yet no proof of fairness can rescue those cases which do fall within the description from the penal effects of the statutory rule.

5. OF THE DATE OF THE DEED.—The Legislature, in giving to the bankruptcy a [228] retrospective effect, not only conferred upon the creditors a right to set aside all deeds which should be found to have been granted within the period of sixty days, but placed an instrument in their hand, by which, upon hearing of a deed of preference, they might, by rendering an insolvent debtor bankrupt, set aside the security. Such a law as this is perfect, in proportion to the facility which it gives to creditors in getting the better of secret preferences. Formerly the law was left imperfect, in so far as it was not fixed that the sixty days should be reckoned from the completion of the deed as a preference. The date of the sasine was indeed declared to be the date of the security, which was a great step to the true rule; but, to complete the remedy in the case of heritable deeds, the time of *registration* should rather have been taken as the date of the deed in questions upon the Act 1696; and a similar rule was required for deeds concerning moveables. By making the legal term of sixty days to run only from the moment of *publication* of the deed, the creditors have it fully in their power to act as their own protectors and guardians. On this footing accordingly the law now stands, and the history and effect of the change shall now be explained.¹

1. Although the Legislature did not at first adopt REGISTRATION as the criterion of the date of HERITABLE SECURITIES, something more public than the execution of the deed of conveyance itself (which might for a long time be kept latent) was manifestly necessary. And the sasine being in some degree a public ceremony, taken in open day, and by a notary, before two witnesses, and upon which the security depends for its effect in conveying heritage, it was enacted, that ‘all dispositions, heritable bonds, or other heritable rights whereupon infestment may follow, granted by the foresaid bankrupts, shall only be reckoned, as to this case of bankrupt, to be of the date of the sasine lawfully taken thereon, but (without) prejudice to the validity of the said heritable rights, as to all other effects, as formerly.’ But sasine may very easily, in most cases, be concealed; and accordingly it happened that latent infestments were daily brought forward, to the utter exclusion of creditors. [229] Many expedients were tried to get the better of the rule established by the statute. It was first argued that the Act of 1696, c. 18, relative to the records, made² the date of the registration the only effectual date in all questions with third parties; and that, in the interpretation of the bankrupt law, the date of the registration should be considered as substituted in place of that of the sasine itself. The Court would not, however, sanction this doctrine,³ but left this class of cases precisely upon the footing of the statute 1696, c. 5, although the judges often took occasion to express their conviction that the date of the registration ought to be made the rule of decision. And at last it has been enacted, that in all questions on the Act 1696, the dispositions, heritable bonds, or other heritable rights whereupon infestment may follow, shall, in time coming, be reckoned to be of the date of the registration of the sasine lawfully taken thereon. 54 Geo. III. c. 137, sec. 12.⁴

2. The expression used in the Act of 1696, of ‘dispositions, etc. whereupon infestment may follow,’ occasioned many difficulties; and it is much to be regretted that, in the renewal of the statute, the expression should not have been so varied as to remove those difficulties. 1. The first difficulty was, whether in those cases where, strictly speaking, sasine is not necessary to complete the conveyance, the date of the conveyance itself was

¹ 54 Geo. III. c. 137, sec. 12, 13. See below, Of Sequestration, for some important points as to the vesting of the estate in the trustee, as affected by the date of the completion of securities.

² ‘Our sovereign Lord,’ says the statute, ‘considering that unless sasines and other writs and diligences appointed to be registrate be booked and insert in the respective registers appointed for that effect, the lieges cannot be certiorate thereof, which is the great use and design of this registration: Therefore, etc., no sasine, etc., shall be of any force or effect

against any but the granters, and their heirs, unless it be duly booked and insert in the register.’ 1696, c. 18.

³ *Inglis v Dr. Menzies*, 1715, M. 981; *Douglas, Heron, & Co. v Maxwell*, 1782, M. 1244.

⁴ [By 19 and 20 Vict. c. 79, sec. 6, the date of a deed under that Act, or under the Act 1696, c. 5, ‘shall be the date of recording the sasine, where sasine is requisite, and in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual.’]

not to be held as the *terminus a quo*? Thus, where land is conveyed by a vassal to his superior, the transference is completed by the recorded instrument of resignation *ad remanentiam*. It was questioned, what should be held as the date of the conveyance in such a case, according to the true construction of the statute? The Court determined, 'that if the debtor was bankrupt within sixty days of the date of the instrument of resignation *ad remanentiam*, the deed fell under the Act 1696.'¹ It is not settled by the words of the subsisting Act, whether the date of the instrument or that of the registration shall be the *terminus a quo*, though there seems to be little doubt that the date of registration would be taken. 2. It was next doubted whether the rule, that the date of the sasine is to be held as the date of the security, applies to the case of a disposition or other conveyance, granted by a debtor *not himself infeft*? the *ratio dubitandi* being, that the sasine does not proceed, strictly speaking, upon such disposition, in terms of the Act, but upon the precept or procuratory in the debtor's own titles. The Act was held not to apply, on the ground that the debtor not being himself infeft, a sasine was not necessary to denude him.² It was generally understood at the bar, that this determination of the question had proceeded chiefly upon the opinion which at that time prevailed, that a conveyance by one holding only a personal [230] right to lands divested him entirely, but that the reversal of this doctrine, in the noted case of Bell of Blackwoodhouse (determined three years after the case above referred to),³ would probably have produced a reversal also of the determination in such a case as Scott's, had an opportunity occurred of deciding the question; and I was induced to lay down the doctrine thus in the former edition of these Commentaries. But it has since appeared that such a case did occur the year after the determination of Bell's case,⁴ when the Court, 'notwithstanding of the above decision in the case of Blackwoodhouse, found that the heritable bond fell not under the Act 1696; because the debtor's right was only personal, and was effectually conveyed by the heritable bond and assignation without infeftment, there being no complete real right competing.'⁵ In a more recent case, the same decision was given, before the above decision in Paterson's case was known to the bar.⁶ And in the last case upon the point (where Paterson's case was first mentioned on the bench), it was held that the rule of the statute does not apply.⁷ In this case, Lord Newton, who was an eminent lawyer, held that, independently of former determinations, the statute ought to be considered as applicable; but he assented to the decision, on account of the great importance of preserving uniformity in the determinations of the Court. It is much to be regretted, that in the late statute, where a very salutary reform was in part accomplished, provision should not have been made for this manifest defect in the ancient law. But by repeating the words, 'dispositions, etc. whereupon infeftment may follow,' in the 12th section of the Act, the whole difficulty remains, while the 13th section does not supply any remedy. And it is still possible for a debtor, whose right to lands is merely personal, to grant a con-

¹ *Dickson, etc., Crs. of Castlesomervil v Mitchell*, 1749, M. 1241. 'The ground,' says Lord Kilkerran, 'upon which the Court proceeded was, that where lands are disposed to a superior, the resignation *ad remanentiam* is truly the sasine, though it goes by a different name; what is called the instrument of sasine, on a precept contained in a disposition to a third party, being called an instrument of resignation, where a disposition is to a superior, containing procuratory of resignation *ad remanentiam*. And as the date of the disposition containing such procuratory cannot be the period from which the sixty days run, in respect of the clause in the statute which declares that all dispositions shall be reckoned, as to this case of bankrupt, to be of the date of the sasine lawfully taken thereupon; so as little could the registration of the instrument be the period, as even in sasines, properly so called, the time of the registration thereof is not respected.'

² *Scott of Blair's Crs. v Charteris of Ampsfield*, 1734, M. 1239. See above, p. 207, note 2.

³ *Bell v Gartshore*, 1737, Elchies' Notes, p. 103.

⁴ Lord Glenlee mentioned this case on the bench, in the case quoted below, note 7.

⁵ *Crs. of Paterson*, 1738, Elchies, Competition, No. 5, and Notes, p. 104.

⁶ *Bell, Tr. for Stark's Crs., v M'Lean*, 13 June 1805, n. r. Stark held a disposition with precept, but no infeftment. He gave an absolute disposition, taking a backbond as security for money advanced. Sasine was taken some months after, and within sixty days. Lord Cullen supported the security, and a petition was refused, without answers; the Court holding that deed not to fall under the Act, as in *Scott of Blair's* case.

⁷ *Wrights v Findlater*, 19 Jan. 1809, Fac. Coll.

veyance or security in favour of a prior creditor, of which the other creditors have no means of being informed until the security is completed by sasine, after the expiration of sixty days from the date of the conveyance. It is very true that the creditors in general do not in such a case rely on the records, but trust only to the personal obligation of the debtor; but when bankruptcy happens, the estate should be preserved as it is at that period, for the benefit of all who are then creditors.¹ 3. The only other difficulty upon the peculiar words of the Act arises in the case where the debtor, being himself infest, grants a conveyance without any procuratory or precept, which is completed by adjudication in implement and sasine. But this case would rather seem to fall under the rule of the Act, and the security would probably be held as of the date of the registration of the sasine on the charter of adjudication in implement, not of the date of the disposition. There are no precedents [231] on this question. But the argument used in the case where the debtor is not himself infest has no application, since the creditors, seeing their debtor infest, are entitled, on the faith of the records, to rely on the real right thence appearing. It cannot, on the other hand, be said that the debtor is divested by the disposition alone, while the creditor who receives that disposition can have no dependence but upon a sasine in his favour, supplanting that which stands in the person of the debtor. And the sasine which at last completes the security, though in strict words it does not rest upon the disposition alone, but on the adjudication in implement, may fairly be regarded as proceeding on that disposition, since it must be taken under a warrant obtained in *implement* of that deed.

3. But questions have also arisen respecting the dates of conveyances of moveables.—1. DEBTS are conveyed by ASSIGNATION; and the assignation is complete only when it has been intimated to the debtor.² Now, although the statute made no exception to the rule that the date of the conveyance itself should regulate the computation of the sixty days, excepting only in the case of sasine, the *spirit* of this exception seemed to regulate the case of assignments. It was accordingly argued, that when the Act speaks of ‘dispositions, assignments, etc., made and granted,’ it may well be taken to mean complete and effectual deeds, having the force of conveyances—which an assignation has not, till intimated; that although the debtor himself and his heirs are indeed barred by personal exception from objecting to a conveyance, it has no effect in competition with any other diligence or voluntary right completed before it; that till intimation the assignation is an unfinished, ineffectual conveyance; and therefore (independently of the expediency of publication to the creditors at large), that an assignation seemed hardly, even under the words of the Act, to entitle the creditor to found on it as a conveyance till it be intimated. But the Court held the date of the assignation, not that of the intimation, to be the rule.³ While in the Bankrupt Acts of 1783 and 1793 much care was taken to prevent the acquisition of partial preferences, by means of arrestment and poinding within sixty days of the bankruptcy, no notice was taken of this case of assignments; but at last, in the Act of 54 Geo. III., a rule was laid down, that ‘dispositions, assignments, and venditions which do not require sasine, but to which intimation or delivery are requisite in order to render them complete as transferences or as securities, shall be reckoned to be of the date of the intimation, delivery, or

¹ Had the following form of the provision which was proposed for regulating such questions been adopted, it would have avoided at least this difficulty: ‘And be it further enacted, that if any disposition, assignation, or other conveyance shall have been granted by the bankrupt, directly or indirectly, or by any person with his leave and under his authority, by which any part of the estate or effects or funds have been either alienated or burdened, in favour of any person being at the time a creditor of the bankrupt, for payment or satisfaction of debt already due by the bankrupt, the same shall be null and of no avail, unless the alienation has

been rendered complete, either by sasine or instrument of resignation recorded, or by delivery, or by notarial intimation, or in such other manner as in the particular case shall by law be requisite for rendering the conveyance complete, at least sixty days before the date of the first deliverance.’ [It would appear that the difficulties which are the subject of observation in the text, are now removed by 19 and 20 Vict. c. 79, sec. 6.]

² See above, vol. ii. pp. 15, 16.

³ *Hay v Sinclair & Co.*, 1788, M. 1194.

other act requisite for completing the same.¹ 2. Although the contract of sale is complete from the moment of full consent, the property is not transferred till tradition; and that is now, by the above provision, the date of the conveyance under the Act 1696. 3. It may be questioned what is the date of a bill of exchange or inland bill according to this provision. Previous to acceptance or presentment, a draft is equivalent to the promissory note of the drawer, but it is not as against the drawee a completed assignation: an arrestment in his hands would exclude the *porteur* of the draft. The spirit and the words of the 13th section of the statute would seem to require that the date of acceptance or presentment should be held the criterion as completing the assignation.² 4. Endorsations of bills are not in general dated. The doctrine of the Court seems to be, that an endorsement, if dated, is to be held as of that date till the contrary be proved;³ and that if it be not dated, the legal presumption [is, that the endorsement was made at the date of the bill.⁴ If the time of delivery of the [232] endorsed note can be discovered, that under the late Act will be the date. 5. The rule of the Act, as explained by the above provision, applies to assignations of leases and other similar rights. The term will run only from the intimation or other act by which the right shall be completed.⁵

IV. EFFECT OF THE REDUCTION.—Although this statute is conceived more in the spirit of bankrupt law than that of 1621, still it is very far from according with the true principles of this department of jurisprudence; at least, this is true of the construction which has been put upon the statute. The true principle of the law is, that all the creditors at the time of the bankruptcy form a community, to which the estate of the debtor belongs,—not to be alienated to particular creditors, but preserved for equal distribution among them. But the construction which has unhappily been given to this statute, tends to convert it from a guardian of the equal rights of the creditors into an instrument of partial preference. To confine the benefit of the challenge strictly to prior creditors, would, in the *first* place, entitle a defender, in a reduction under the Act, to have the benefit of the action restricted to those of the creditors whose debts were prior to the deed challenged; *secondly*, in ranking the creditors, it would entitle the holder of a reducible deed to claim a preference over every creditor whose debt was posterior in date to the completion of the deed of preference. But there does not appear any case in which this effect has been sustained in a ranking; and if the question were to occur, it appears to be quite consistent with the *words* (unquestionably it would be according to the *spirit* of the Act) to refuse such partial preference, and to hold all the creditors entitled to the benefit of the reduction.

1. Where there is a sequestration, in which the creditors are combined in common measures, the action is to be raised in the name of the trustee.

2. Where there is a general bankruptcy, but no sequestration, the creditors ought to vest their several rights in an assignee, so as to entitle them all to the benefit of the remedy. In granting a deed of this sort, it does not seem necessary to use an *ad valorem* stamp, but a common deed stamp, since it is truly a mandate only that is necessary to entitle the trustee to pursue. It might even be contended, on the principles already explained,⁶ that a stamp is not required; but it is unwise to risk the success of an action by setting out on questionable ground.

3. It does not seem safe to trust to the success of a reduction raised by one or two creditors. It has been found, for example, that a creditor against whom a reduction was raised, was entitled to insist for an assignation from the pursuer, of his debt and diligence, in order that he might make effectual his relief against the debtor's other funds.⁷

¹ 54 Geo. III. c. 137, sec. 13. [19 and 20 Vict. c. 79, sec. 6.]

² See above, vol. i. p. 422.

³ *Thistle Bank v Leny*, 15 May 1794, n. r.

⁴ *Smith v Home*, 1712, M. 1502; *More v Paxton*, 1766, M. 12259. Endorsations blank held in competition as posterior in date to an arrestment.

⁵ See *Russell v E. of Breadalbane*, 1822, 2 S. 62, N. E. 54; remitted by the House of Lords. Same case on the remit, 1827, 5 S. 891, N. E. 827.

⁶ See above, vol. ii. p. 28, *Lowrie's case*.

⁷ *Mann v Reid*, 1705, M. 3368.

4. It has been questioned whether a debtor can himself become, by assignation from his creditors, entitled to pursue a challenge on the Act 1696; and at first sight it seems quite incongruous that he should be entitled to challenge his own fraud. But, viewed as the purchaser of his own funds by composition, the absurdity is more apparent than real; and it is not impossible to reconcile with sound principle a bargain in which the bankrupt shall be held to purchase the whole of what the creditors might have recovered for the common benefit.¹

5. It may be questioned whether the success of the reduction is to be accompanied by a *restitutio in integrum*, so that the defender shall hold the same advantages when deprived of the security, which he would have enjoyed had he never accepted it. The answer [233] seems to be, that a *restitutio in integrum* is no part of the reduction on the Act 1696, nor necessarily implied as a condition of it; but that as the creditors are entitled to reduce only in so far as the deed is prejudicial to them, their success will be limited to the effect of restoring them to the full benefit of the rights they would have enjoyed had the deed never been granted. Thus, perhaps, distinctions may be taken in determining cases of this sort. And, 1. In so far as the creditor previously held an effectual security over any part of the bankrupt's estate, which he has agreed to renounce in exchange for the security challenged, and of which renounced security the reducers mean to take advantage, he will be entitled either to resist the reduction for want of interest in the pursuers, or to have the full benefit of his old security when his new security is annulled. For it is only to the extent of the difference that the security can be said to be prejudicial to prior creditors. 2. If the security which the creditor has exchanged or renounced for the one under challenge did not affect the bankrupt estate, the defender seems to be entitled to no relief against the creditors who have challenged the preference prejudicial to them. 3. This may be carried even a little further: If the security renounced was over property or effects belonging to the bankrupt which are not under the control of the challenging creditors, and out of which they will receive no part of their payment, the holder of the security does not seem entitled to demand restitution from those creditors. Suppose, for example, that a creditor who holds a bill, or a lien over goods, is induced by the offer of an heritable security to give up the bill, which is in consequence endorsed away, or to renounce his lien on the goods, which are forthwith taken possession of by the bankrupt, or perhaps sold, and that a second heritable creditor challenges the heritable security on the Act 1696, that creditor's success in his challenge will not be attended with a restoration of the lien to the defenders, or a preference over the moveable effects to the amount of the bill or value of the goods. The creditor has made his choice, and must stand to the hazard. He can be saved from the full consequences of the reduction by restitution of what he has parted with, only where he can state a personal exception to the pursuers, as availing themselves by their success of the preference which he has lost. 4. If a third party is bound as a co-obligant with the bankrupt, and his obligation has been cancelled on the bankrupt granting the security challenged, the holder of that security cannot, on its being reduced, have his remedy against the stranger, or oblige him to restore to efficacy his obligation which has been discharged.²

¹ See this matter treated below, Of Compositions in Sequestration.

² *Black v Cuthbertson*, 15 Dec. 1814, Fac. Coll. Here Black was creditor of Cuthbertson, and got from him a bill signed by him and his son for £1200. He delivered up this bill on receiving an heritable bond. This bond was within sixty days of bankruptcy, and, on a requisition by the trustee, Black was satisfied he could not avail himself of it, and agreed to renounce it. He then raised an action against Cuthbertson

for redelivery of the bill, or for payment. The late Lord Meadowbank, having considered the pleadings, 'where it seems to be argued that a reduction on the Act 1696 implies an obligation to replace the parties *in statu quo*, as in a *restitutio in integrum*, and that the pursuer is entitled to reduce his delivery even *quoad* William Cuthbertson's interest in that delivery,' dismissed the action, and found expenses due to the defender. The Court unanimously adhered to this judgment.

SUBSECTION II.—OF SECURITIES FOR DEBTS TO BE AFTERWARDS CONTRACTED, AND OF THE MANNER OF
SECURING A CASH ACCOUNT HERITABLY.

After providing against embezzlement and secret trusts, and protecting creditors against preferences granted on the eve of bankruptcy, there still remained a class of cases in which it was possible to commit frauds against the equal distribution required in bankruptcy. The laws respecting these it is now proper to examine.

[234] A bankrupt may contrive to confer preferences indirectly on his favourite creditors, by means of a conveyance to a trustee willing to undertake the arrangement of his affairs. The trustee has instructions to pay the debt of one creditor, to become guarantee for the claim of another, or to grant bills to a third; and while his obligations are available to those creditors, he has full indemnification under the security which he holds. In the end of the seventeenth century, this was an arrangement which had become exceedingly common with country gentlemen whose affairs were in confusion; and the Legislature felt, that without some restraint upon such arrangements, the provisions of the Act 1696, already commented on, were exposed to evasion. In order to avoid this evil, the second part of the Act was constructed. It is made to extend only to heritable conveyances and securities, which, at the date of the law, it was thought of chief importance to regulate; no legislative notice having been taken of similar arrangements on the security of moveable property.

Recollecting the forms of heritable securities for debt,¹ and the facility with which a debtor could, previously to the Act of 1696, c. 5, evade the provisions of the Act of 1621, and grant preferences to particular creditors by means of what was called a security for relief of all sums, debts, engagements, and cautionries, the ground of the provision made in the second part of the statute of 1696, c. 5, will appear to be truly set forth in the preamble, that 'infestments for relief, not only for debts already contracted, but of debts to be contracted for hereafter, are often found to be the occasion or covert of frauds.' To provide against these frauds, it was enacted that 'any disposition or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infestment following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points, as accords.'

Still the law against preferences might have been evaded had it been lawful to give securities for indefinite sums. And at one time the safety of creditors was thought to be much endangered by an opinion which began to prevail, contrary to the principles of the common law, that an effectual burden might be constituted over land, by a conveyance under burden of the granter's debts in general.² But this danger vanished on the decision of the House of Lords in the case of Cuxton, etc. (followed by the Court of Session as a rule in the case of M'Lellan's creditors in 1734,³ and in later cases),⁴ that securities granted for indefinite sums are unavailable; and it was not held a sufficient answer to the objection, that the estate itself, which was conveyed in security, was of a definite extent, viz. an heritable bond for £12,000 assigned.⁵

Thus, two points were fixed: 1. That no effectual heritable security could be granted for an indefinite sum; and, 2. That the security, even where the sum was definite, could not cover a debt contracted after the sasine or infestment.

¹ See vol. i. p. 712.

² 2 Dict. 67.

³ See below.

⁴ *Stein's Crs. v Newnham, Everet, & Co.*, 1789, M. 1158; aff. in the House of Peers, 25 Feb. 1791, 3 Pat. 345. And again, between the same parties, 1793, M. 14127, the Court held 'the conveyance granted by James Stein, etc. to be an indefinite security, and therefore that it cannot be sustained

so as to create a preference to Messrs. Newnham, Everet, & Co., in a question with the other creditors of James Stein.' And this judgment was affirmed in the House of Peers, 10 March 1794, 3 Pat. 345.

⁵ So found in the above case of *Newnham, Everet, & Co.* [The objection cannot be pleaded by the granter. *Brown v Bedwell & Yates*, 1830, 9 S. 136.]

But it was a matter of some difficulty to settle what was truly 'a debt contracted after the sasine or infeftment.'

I.—DESCRIPTION OF SECURITIES FOR FUTURE DEBTS.

The Act applies only to heritable securities, not to securities over moveables. [235] It is against debts 'contracted after the sasine or infeftment' that the provision is made. The description of future debts affected by the Act seems to be thus far settled:—

1. Where a person binds himself as cautioner for another for the payment of a debt due, there is, strictly speaking, no debt due by the principal debtor to the cautioner until the cautioner shall pay the debt. But, in the sense of the Act, this is not a debt to be contracted for the future, and a security given to the cautioner at the time he engages cannot on this account be objectionable.

2. A sale of lands is sometimes accompanied by a conveyance of other lands, in real warrandice. The effect of this security is entirely future and contingent; it is a security against eviction of the lands principally conveyed. But the Act does not apply to a security of that nature, and it is taken as an admitted point in all the arguments on cases of future debts.

3. It has been doubted whether a security created for the faithful discharge of an office would be comprehended under the Act.¹ But the debt is, in such a case, not a debt to be contracted for the future, although in its nature contingent, and it comes not under the description of debts which were likely to be covers to fraud.

4. Where the security is for a sum of which part only is advanced at the time, the security is good even for the balance, provided the lender grants bond or bill for it; or otherwise is absolutely bound to pay it to the granter, or to others on his account, so as to give a *jus quæsitum* to any creditor of the borrower attaching the balance by diligence. But if the balance is to be payable or not as the borrower shall require it, the security will not be effectual.²

5. Where the purchaser of land, or lender on an heritable bond, pays down part of the price or loan, and to the amount of the rest binds himself 'to pay to a list of creditors,' the security has been stated by a great authority as good.³ It may, however, be questioned whether this is not a transaction of the very nature which the Legislature had it in [236] contemplation to prevent. The point would certainly deserve reconsideration, and at least would require to be guarded by some qualifications to prevent fraud and collusion.

¹ In the note of Lord President Campbell's speech in *Newnham, Everet, & Co.'s case*, to be found in *Morrison* 1238, it is said: 'A security for the faithful discharge of an office would fall under the sanction of the Act 1696 as much as the security in question. The case of real warrandice is entirely different.' The word *sanction* here appears to have been used instead of *prohibition*. [This observation is not given in *Paton's Report*, vol. iii. p. 348.]

² *Dempster v Lady Kinloch*, 1750, M. 10290. See also *Elch. Forfeiture*, No. 13. Here an heritable security for £20,000 Scots was objected to, on the ground that only £8735 was paid at the date of the security, while in a backbond the holder of the security bound himself to pay at the next term the balance of £11,265, on intimation being made to him forty days before the term. The only difficulty in the case was to determine whether this was an absolute obligation. And Lord Kilkerran says the question did not turn on the point of law, but upon the construction of the obligation in the backbond; for it was by all agreed that, taking it as an absolute obligation for the £11,265, which could have been

affected by a creditor of Sir James, it would have been secured by the infeftment no less than if it had been advanced at the date of the bond, nothing being more ordinary than to make up a part of a sum by a bill or bond for a balance. But, on the other hand, supposing it not to have been such an obligation as was affectable by a creditor, but an obligation pendent upon the will of Sir James (the granter of the security), whether he would require the money or not, there was as little doubt but that the last was the just judgment, i.e. finding the security bad.

See *Johnston v Warden*, 1777, 5 Br. Sup. 386, Hales 773.

Fulton v Lead, 1826, 4 S. 740. Here a security was granted for £1400: of this, £800 was paid, and an obligation granted for the balance of £600, when a search of encumbrances should be shown; and the balance having been paid accordingly, on a search having been exhibited, it was challenged on the Act 1696. But the Court held it to be unexceptionable.

See *Maxwell v Drummond*, 1825, 4 S. 137, N. E. 139.

³ In the above case of *Dempster v Lady Kinloch*, Lord Elchies and other judges held this opinion. *Elchies' Notes* 146-7.

6. It is no sufficient objection that the money was not paid on the day the sasine was completed, provided the transaction was fairly and regularly carried on. A creditor who lends money on security is safe only when he sees an infetment taken and recorded, prior to any other. In strictness, therefore, no creditor will advance his money prior to the date of the infetment; and in cases where the lands lie in a distant part of the country, it may be long after the actual date of the sasine before the security can be delivered to the lender in this complete form. But that he does not incur the danger of an objection under the statute, by insisting that the transaction shall be managed in this way, has been very solemnly decided.¹

In all these cases, the security is saved from nullity by the absolute nature of the obligation undertaken by the lender. But there was a class of transactions of a mixed nature, which it was very important to establish as an exception to the rule of the Act, viz. securities for cash-credits with bankers.

II.—OF THE METHOD OF SECURING CASH ACCOUNTS.

The use of cash-credits with bankers or merchants having a great command of capital, has, both in Scotland and in all trading countries, been productive of great advantages, by enabling dealers to extend their trade further than they otherwise could do. The operations on such credits are carried on in various ways: by discounting, by drawing bills, or passing checks on the banker or granter of the credit, as if the banker actually held monies of the dealer. The trade of Scotland has been fostered by the cash accounts or credits which the public banks, from the time of their first institution, were accustomed to open with their customers, and which it is now the daily practice of all bankers in Scotland to grant, on the security either of a bond by sureties, or of a conveyance of [237] land, or heritable bond. But, in the application of heritable securities to this purpose, there was manifest danger, both at common law, and under the provision of the Act 1696 against securities for debts to be afterwards contracted. As a trader has on the one hand a power to draw upon the banker to the value agreed upon, and as on the other the sums drawn out are paid up by the daily profits of his trade, the debt is in a state of continual fluctuation. To-day the bank may have paid out the whole sum of the credit; to-morrow, again, it may be all repaid; and the third day the whole may be drawn out again. The

¹ *Dunbar's Crs. v Sir George Abercromby*, 1789, M. 1156, Bell's Oct. Cases 57. The transaction from which the question arose, was a loan of £5000 by Sir Robert Abercromby to Sir James Dunbar. The bond was made out, and sasine taken in November, and recorded 2d December 1774, and the whole £5000 was not paid up till spring 1775. In the ranking of Sir James Dunbar's estate, this security was objected to; and a very full inquiry was made into the circumstances of the transaction, from which it appeared, that although there was no absolute and written obligation upon the creditor to complete the loan, the agreement was for a loan of £5000, to be paid by the retiring of different bonds, bills, etc. due by the granter of the security, and of which the lender received a list; that these sums were accordingly paid up; that the security was deposited in the hands of a man of business till the whole sum should be advanced; and that, on the last part of the sum being paid, it was delivered up to the creditor. The Lord Ordinary (Swinton) drew a distinction: he sustained the bond 'as effectual for all sums advanced, or bills or other obligations granted by the lender to the borrower, which, previous to the taking of the sasine, the lender either took up, or for which he granted his own obligation to the

creditor; but as to all sums advanced, debts paid, or obligations granted, by the lender to the borrower, after the day on which the sasine was taken, he found the security ineffectual.' His Lordship, in this judgment, gave precise application to the principle established in the above-mentioned case of *Dempster v Kinloch*. But when the question came before the Court, they took it in another point of view. They viewed the transaction as indivisible,—the sum as one loan, which, from peculiar circumstances, took some time to be paid up; and the security as not effectual, till, by delivery of the deeds, after the whole money was advanced, it came into the power of the lender. They held, that to interpret the statute so judaically as the creditor contended for, was to put an end to heritable securities in Scotland; that the law which declared a lender's safety to depend upon a recorded infetment, could never mean to forfeit his security, merely because he insisted on seeing the deeds thus completed before he made any advance; and that the true intention of the statute was, to cut down general securities, and deprive a debtor of the power of contracting new debts under the cover of an old security. They therefore altered the Lord Ordinary's judgment, and repelled the objections to the security.

use of heritable securities in such cases was barred by the very nature of an infetment in security, since no debt can be secured under it which has not actually been advanced at the date of the security, or expressly and irrevocably engaged for by the lender; and it is not the purpose of a bank-credit to transact an immediate loan, but to enable a person to draw out money as he may have occasion for it in trade. The only way in which this objection could be removed, would be by drawing out the whole sum and again placing it in the banker's custody, or by the banker granting an absolute irrevocable obligation to pay the whole sum to the borrower. But both these are inconsistent with the nature and uses of a cash-credit. The banker would, in this way, not only renounce his power of recalling the credit when he might wish to do so, but he would also destroy the true character and use of a cash account, because the cash-credit would then cease to be personal to him who obtained it, and any of his creditors would have it in their power to attach the amount in the banker's hands, as the proper fund of their debtor. But further, an infetment in security is extinguished by intromission or payment; and when extinguished in whole or in part, the security and heritable right are to that extent annihilated; the debtor himself is reinvested with the real right, and to denude him of it again would require a new conveyance. The very object, however, of a cash account is, to permit the person who receives it to draw out or pay in money, as his hands may be full, or his necessities may require. These objections on the one hand, and the absolute terms of the Act 1696 on the other, made it impossible to carry on transactions of this sort by means of the ordinary form of heritable security.

To remove these obstacles to the use of HERITABLE SECURITIES in cash accounts, became an object of much solicitude. In 1772 the ruinous expedient of drawing and redrawing bills of exchange produced great mercantile distress; and though, by temporary expedients, the evil day was kept off for a while, this only increased the misfortune, and produced extensive bankruptcies both in England and in Scotland. The credit of all the Scottish houses was rapidly falling along with the decline of the Douglas Bank; and, to avoid a general failure, the attention of all ranks was directed to the discovery of funds of credit. In particular, much deliberation was bestowed upon the possibility of applying the heritable bond to the securing of bank-credits. The greatest lawyers of the time were consulted; and the late Lord Justice-Clerk M'Queen used to say that they fairly confessed themselves unable to devise a way in which this could be effected. In the great question that arose between the BANK of ENGLAND and the BANK of SCOTLAND, this point came into discussion. That was not the case, however, of a proper bank-credit. An heritable security was there granted for a large sum of advance actually made, but which was still allowed to continue the subject of operations by bills of exchange, the heritable right remaining as a collateral security. The Court sustained the security as effectual in this particular case. The report does not state the ground of decision, but it appears to have been, that as the security was given for a sum actually advanced at the time, the mere renewal of the vouchers was not to be taken as payment to the effect of extinction.¹

¹ *Governor and Company of the Bank of Scotland v the Governor and Company of the Bank of England*, 1781, M. 14121; Hailes 870; Sess. Pap. Adv. Lib. The partners of the house of Alexander of Edinburgh were possessed of extensive estates in the West Indies, and of an estate in Scotland, and they contrived to make this property a kind of prop to the credit of all the Scottish houses. Among other expedients, they, with the aid of Messrs. Walpole of London, prevailed upon the Bank of England, on the faith of securities over their estates in the West Indies and in Scotland, to give them a credit to a large amount. At the time that this agreement was entered into, there were lying in the Bank of England,

discounted under the acceptance of Messrs. Glyn & Halifax of London, who had stopped payment, bills to the amount of £47,000, besides acceptances to a very large amount by Messrs. Johnston and Smith of Edinburgh, also discounted for Messrs. Alexanders. The agreement was, that the Bank of England should continue to discount the bills of the Messrs. Alexanders for any sums not exceeding (with the above) £160,000. This credit, which in Scotland would have been managed by the means of a cash account, is managed, according to the common practice of the Bank of England, by discount. The bills are drawn at short dates; and when they fall due, other bills are drawn and discounted for the same

[238] The question in the case alluded to did not strictly relate to a bank-credit or cash account; but in several subsequent cases an heritable bond was found inapplicable to a proper cash account.¹

But although by these decisions it was fully established that an heritable security cannot be made to apply directly to a cash account, there seemed to be room for maintaining that, indirectly, the same effect might be produced by the interposition of a cautioner, who should become directly bound to the bank, an heritable security being granted for his relief. It [239] was decided, however, that a security granted to the cautioner was in no better situation than that granted to the creditor directly.²

sum. It was in this way that this transaction was managed. The two houses of Walpole & Ellison, and Walpole, Clerk, & Bourne, agreed to be guaranties, and a collateral security over their West Indian and their Scottish estates was to be given by Messrs. Alexanders. This agreement was settled in July 1772. In August 1773 an heritable security was granted over the estate of Clunie. Prior to the granting of the heritable security, the transactions had proceeded on the faith of the mutual obligations of the parties. The discounts had been made, and the bills retired regularly; one set of bills being discounted to retire another, and the deficiency or interest discounted being always paid up, till, on the eve of granting the security, the advances had mounted up to £6800 above the maximum of £160,000. The excess was paid up, and the advance stood at the stipulated maximum, when the heritable security was completed on the 13th August 1773. There was little doubt that the security in this case was not liable to the objection of having been granted before the advance of the money. The chief questions which arose were—1. Whether it was a security for a definite sum? and, 2. Whether the discounting of new sets of bills to retire the old, having proceeded after the date of the security as it did before, the security was not extinguished by payment, or novation at least? 'The Lords repelled the objections made to the real security on which the Bank of England claimed their preference on the ranking.'

¹ 1. *Pickering v Smith, Wright, & Gray*, 1788, M. 1155. See also Hailes 1040. An heritable bond was granted by King to Smith, Wright, & Gray, bankers; and by a separate deed it was acknowledged by them that they had not then paid the sum, but that the bond was intended to secure such payments as they already had made, or should thereafter make, during the currency of a cash account which they had opened in his favour. King drew in this way large sums; and, on his bankruptcy, a question arose between his creditors and Messrs. Smith, Wright, & Gray. The two objections occurred—1. That the debt was not a subsisting debt at the date of the security, since it neither was advanced nor absolutely and irrevocably engaged for so as to be attachable by creditors; and, 2. That the constant fluctuations of a cash account are inconsistent with the nature of a real security. It was observed on the bench, that so salutary 'an enactment as this (the Act 1696) ought not to be narrowed in its construction: far from introducing any innovation, it does no more than confirm the doctrine of our feudal law. The loan of the money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non-existence according as the money, during the currency of the cash account, should have been paid, repaid, and paid again; the creditor being

of course the vassal one day, the next not so; the third, a second time vassal, and so forth.' The Court sustained the reasons of reduction of the heritable bond, so far as respected the sums advanced posterior to the date of the sasine thereon.

2. *Stein's Crs. v Newnham, Everet, & Co.*, 1780, M. 1158, Hailes 1071. Here the question again occurred in somewhat of a different shape, for the security granted was a conveyance to an heritable bond for £1200 as a security for reimbursement of such sums of money as should be drawn from them by orders or receipts, which, being a definite estate, it was contended that one of the objections at least did not hold. But both objections were sustained—1st, 'That the infetment for the security of Newnham, Everet, & Co. could not avail for any sums paid, or obligations undertaken by them, posterior to the date thereof;' and, 2dly, 'That the conveyance granted by James Stein of the heritable bond by Robert to James Stein over the lands of Kincaple, belonging to Robert, was an indefinite security, and therefore cannot be sustained so as to create a preference to Messrs. Newnham, Everet, & Co., in a question with the other creditors of James Stein.' This judgment was affirmed in the House of Lords, 25 July 1791. Same case, 1793, M. 14127; affirmed 10 March 1794, 3 Pat. 345. In *Morison's Dictionary*, p. 1238, Lord President Campbell's note on this case is quoted.

² *Brough's Crs. v Selby*, 1791, M. 1159; Bell Oct. Ca. 40. Selby having become bound in a bond for a cash account granted to Brough by Sir William Forbes & Co., got an heritable security: no sums were drawn out at the date of the sasine, but afterwards the full credit was exhausted. Being held a fixed point, that an heritable security was not, in the first instance, applicable to a cash account, the Court would allow no distinction in favour of this secondary manner of performing the same operation. They considered the cautionary obligation as an accessory, which must follow the principal, and can be in no better situation; and they held the words of the Act (as striking against all deeds in security and relief of engagements) to be conclusive. They accordingly, with the exception of the Lord Ordinary (Dreghorn), preferred Selby, in virtue of his infetment, 'only for the sums that could be instructed to have been advanced by Sir William Forbes & Co. to Brough at the date of the infetment.'

Brough's Tr. v Selby, 1794, M. 14118. This case arose out of the reserved part of the above case. The first question was, Whether advances made prior to the date of the cash account were to be held as included under it, and consequently, as a prior debt, to be included in the security? This was a question of fact rather than of law; and the judges were all of opinion that Selby was liable for £402, which stood against Brough on his account, at the time the joint bond of cash-credit was executed. The only difference of opinion turned

It was thus established by a train of very deliberate judgments, that no debtor could give an infeftment in security over his heritable estate for a future debt, or for a cash account, or for securing the cautioner in such a transaction. But still it was possible to effect this object indirectly, by means of one of the forms already explained, viz. an ABSOLUTE CONVEYANCE and backbond (vol. i. p. 714). A proprietor has it in his power, unless prevented by insolvency, to convey his estate, even for gratuitous considerations; and where he chooses to convey it for the purpose of borrowing money (a backbond being taken from the disponee), the only right which remains in his person, or of which his creditors can avail themselves, is the right of redemption under the backbond, or a power of calling on the disponee to account. Such a deed may be objectionable on the statute 1621, c. 18, or upon the statute 1696, c. 5, if the granter be bankrupt (at least in so far as it is not a conveyance for a *novum debitum*); but it is not affected by that clause of the statute which is directed against future debts. Accordingly, the Court sustained this form of security as effectual for the debt due by the granter to the grantee.¹ This judgment has been frequently confirmed since, and declared by the judges to form a point fixed and at rest.²

Wherever the backbond is recorded in the Register of Sasines, or produced [240] judicially, the absolute disposition becomes from that moment a restricted estate in the person of the disponee—restricted to a security of the extent specified in the backbond.

Thus, then, the law stood respecting securities for future advances and cash accounts. It was competent to secure a cash account or a future advance, by no other form of heritable security but an absolute disposition. But the expediency of an alteration in this branch of the law was manifest; and a clause was introduced into the Act of 33 Geo. III. c. 74, for this purpose—a similar clause, with some alterations, being repeated in the subsisting statute.

In order to understand fully the object and extent of this law, it is proper to observe what the occasions were for which the securities were required.

1. The chief transaction which it was desirable to secure, was the ordinary cash account with banks or bankers. But—

2. A credit of another sort had been more recently introduced, and was found very useful in trade, which was of this nature:—A great mercantile house in London or in Glasgow agree to answer the drafts or to pay the acceptances of a person whom it is their wish to support in his general trade, or in the conduct of any particular speculation, and to take

upon the effect of subsequent payments by Brough, in extinguishing the security past the power of revival. In the judgment it was 'found that Brough did upon the 17th June 1783 owe Sir William Forbes & Co. the sum of £402, 16s. upon a current account; and that Selby having, in consequence of the bond of credit then subscribed by him and Brough, become chargeable with the said sum, therefore the sum must be understood to have been covered by the infeftment taken next day upon the bond of relief granted by him to Brough.' But in order to come to a discussion of the effect of the operations on the account in extinguishing the real security, the Court 'remitted to the Lord Ordinary, before further procedure, to hear parties upon this point, Whether the subsequent operations of the said John Brough, in drawing out or paying in money to Sir William Forbes & Co., ought not to have the effect of extinguishing or diminishing the preference competent to the heirs of the said Robert Selby, under the said infeftment?' And on this point the Court held that the subsequent payments on the cash account extinguished the original debt, and that the new debt arising from subsequent drafts on that account was not secured by the infeftment.

Geddes v Tr. for Smith's Crs., 1 Dec. 1810, Fac. Coll. Geddes was cautioner for Smith in a cash account with the Bank of Scotland, and Smith gave him an heritable bond of relief. Infeftment was taken on this security on 14th June 1793, and recorded 6th July. On 17th June 1793, *three days after* the sasine, the Act 33 of the King, c. 74, passed, authorizing heritable securities for cash accounts. On the bankruptcy of Smith, the credit having been exhausted, and the money paid to the bank by Geddes, the question arose, Whether this heritable security gave a preference to Geddes? Lord President Blair delivered the unanimous opinion of the Court that it did not; that precedents had settled the construction of the Act 1696 as applicable to such a case; and that the new law was prospective only, not retrospective, and could not support the security.

¹ *Riddell v Crs. of Niblie*, 1782, M. 1154. See *Burd's Crs.*, 1752; *Elch. Fraud*, 28.

² *Drummonds v Campbell*, etc. (Creditors of Sir James Cockburn, 1791), *Bell's Oct. Cases* 54; *Keith v Maxwell*, 1795, M. 1163, *Bell's Fol. Cases* 234. See above, Of Securities resulting from Possession.

reimbursement in the course of dealings, by the consignment of goods, the remittance of bills, etc. This sort of credit and support may obviously be carried on to a most beneficial extent in favour of those having lands to pledge in security of the operations; and the obstacles already stated stood as much in the way of this transaction as in that of the more ordinary and often less important transaction of a bank-credit.

3. Banks generally prefer good personal credit to heritable security. But such security is not easy to be had from those who are not themselves engaged in commerce, unless the relief of the cautioner can be secured heritably. It was therefore desirable that this sort of security should also be freed from the obstacles which we have seen opposed to it.¹

Although THE STATUTE² is not happily expressed, it seems fairly enough to meet those several cases. The preamble is in these words:—

After reciting the clause of the Act 1696, c. 5, relative to securities for future debts, it proceeds thus: ‘But it would tend not only to the benefit of commerce, but also of agriculture and manufactures, if securities by infestment for the payment or relief of future balances arising upon cash accounts or credits, or of sums paid on such cash accounts or credits, were made an exception from the rule laid down in the said recited clause.’ On this statement of the views of the Legislature it is enacted—1. ‘That it shall and may be lawful for persons possessed of lands or other heritable subjects, and desiring to pledge the same in security of any sums paid or balances arising, or which may arise, upon cash accounts or credits, or by way of relief to any person or persons who may become bound with him or them for payment of such sums or balances, although posterior to the date of the infestment, to grant heritable securities accordingly upon their said lands or other heritable estate, containing procuratory of resignation and precept of sasine for infesting any bank or bankers, or other persons who shall agree to give them such cash accounts or credits;’ and, 2. That securities may in the same way be granted ‘to such person as shall become cautioner for them, or jointly bound with them, in such cash accounts or credits.’ But, 3. It is made an absolute condition, on which the efficacy of the security is to depend, that ‘the principal [241] and interest which may become due upon the said cash accounts or credits shall be limited to a certain definite sum, to be specified in the security, the said definite sum not exceeding the amount of the principal sum, and three years’ interest thereon, at the rate of five per cent.’ And, 4. It is enacted, ‘That it shall and may be lawful to the person to whom any such cash account or credit is granted, to operate upon the same, by drawing out and paying in such sums, from time to time, as the parties shall settle between themselves; and that the sasines or infestment, etc. shall be equally valid and effectual as if the whole sums advanced upon the said cash account or credit had been paid prior to the date of the sasine or infestment taken thereon; and that any such heritable security shall remain and subsist to the extent of the sum limited, or any lesser sum, until the cash account or credit is finally closed, and the balance paid up and discharged, and the sasine or infestment renounced, anything to the contrary in the said recited Act notwithstanding.’

Under these provisions of the Act various forms of security may be attempted.

1. The ordinary cash account with a BANKER may be secured heritably, provided the sum to be secured be limited to a certain definite extent, to be specified in the security. The limitation is rather vaguely expressed in the Act, but the meaning seems to be, that the sum to be secured shall not exceed in amount the principal sum which the person who is to be accommodated shall have the privilege of drawing, together with three years’ interest of that sum.³ The transactions which may be comprehended under such a security are various. Sums drawn out by bank checks; sums for which the banker has accepted drafts; acceptances ordered to be paid at the banker’s; guarantees

¹ See above, vol. ii. p. 220.

² [54 Geo. III. c. 137, sec. 14. Its enactments, with some verbal alterations, are repeated in 19 & 20 Vict. c. 91, sec. 7.]

³ [Morton v Hunter & Co., 1828, 7 S. 172, 4 W. and S. 379.]

or letters of credit which the banker may give,—all these may be included within the security.

2. There seems to be no doubt that a similar credit granted by a MERCHANT to the person giving the security will be effectual. The law is not restricted to banks or bankers, but expressly extends to cash accounts or credits 'by others.' In such cases, two opposite questions have been moved.

In the *first* place, it has been doubted whether the law will give effect to a security for CREDIT IN COMMODITIES. A manufacturing house, for example, agrees to supply with commodities a merchant who has no security to offer but heritable security: may they safely accept of a security over the merchant's heritable property, conceived in the form of a credit to a limited extent? It has been, on the one hand, maintained that this is not a proper cash account or cash-credit, which alone is admitted by statute to form an exception to the feudal rule, and that of the Act 1696. On the other hand, it is argued that this is truly a mercantile credit, which it was the object of the Act to favour; that it can scarcely ever be productive of the bad effect of covering previous debts, and so giving preferences to prior creditors; and that the words of the statute are not expressly restricted to cash-credit. If a case were to occur in which the mercantile house granting a credit should, among their other transactions, have remitted goods to the granter of the security, it would seem quite inconsistent with the spirit and object of the law to say that this article of credit should be struck out of the account as not cash-credit, for the price of the goods is cash-credited. And if a single article is so to be adjudged, where is the line to be drawn? The object of facilitating mercantile transactions, and making heritable property convertible into a trading capital, is as fairly accomplished by a direct credit for goods furnished as for money advanced, or bills or drafts accepted. At the same time, the words of the law, and particularly the description of the operations by drawing out and paying in sums, has seemed so distinctly to confine the exception to the proper case of cash-credit, that great doubts have been entertained at the bar on the subject; and it would be well, in the renewal of the statute, to clear this matter by a plain and distinct enactment.

It has next been doubted whether it be fairly within the meaning of the Act, that in a mercantile credit a stipulation should be introduced that the operations shall be by [242] bills, and that the person granting the credit shall never be in advance, but shall be regularly supplied with remittances to provide for the engagements he is to undertake. There does not appear to be anything to prevent such a stipulation. And although there may be some room for declamation about wind-bills in such an arrangement, it is one of those by which mercantile credit is most aptly and most usually settled.

3. Where that sort of security is used which is now most commonly adopted by bankers in such cases, namely, by absolute disposition and backbond, it may be questioned whether, if the backbond be recorded so as to fix the nature of the arrangement to be just a security for future engagements, it will not be objectionable. If the bond be so expressed that the security is limited to a precise sum, and if the credit be of the nature and description sanctioned by the Act, there can be no objection; but if the debt be described as consisting of sums to be hereafter advanced, or the amount of cautionary obligations to be undertaken, and a nominal and random sum be fixed for the limitation, the objection would certainly be very formidable.

As the objection in conveyancing, as well as the prohibition of the statutes against securities for future debts, applies only to heritable estates, it is competent to give an available security over moveables for future debts. Bills may be deposited; moveables may be pledged; a ship may be mortgaged for debts to be afterwards contracted. A cash account may, independently of the saving clause in the late statutes, be secured by a mortgage over a ship. The abuse of the power thus conferred on the debtor forms no objection

against the security, unless there be collusion on the part of the lender. That is an indirect consequence, against which creditors can be protected no otherwise than against any other fraudulent payment by a debtor who can contrive to raise money on the eve of bankruptcy.

SECTION II.

OF ALIENATIONS AND SECURITIES OBJECTIONABLE AS FRAUDS AT COMMON LAW.

It has sometimes been made a question, whether the statutes of bankruptcy are not exclusive of any remedy at common law.¹

Whatever may be the right of each creditor to force payment of his own debt without regard to others, there can be no doubt that, at common law, a debtor acts fraudulently [243] who, conscious of his insolvency, gives away the funds which ought to be divided among his creditors; or who, after his funds have become inadequate to the payment of all his debts, intentionally, and in contemplation of his failing, confers on favourite creditors a preference over the rest.

This is indeed the fundamental principle of the bankrupt law; but of itself it cannot, without the aid of special regulations, produce very extensive effects in guarding the general creditors against preferences on the eve of bankruptcy. Where a creditor receives payment of his debt, he has no concern with the state of his debtor's affairs. Getting no more than he is entitled to, he cannot, without some proof of collusion, be forced to repay it; nor have the other creditors any right to set aside the preference. Where it can be clearly established, however, that the creditor who is preferred has been apprised of the debtor's situation and duties, and enters into a transaction with him for the purpose of deceiving and defeating the rest of his creditors, the fraud may be regarded as adopted by such creditor, and the preference which he has acquired is unjust and objectionable.² In such cases, accordingly, the right of the general creditors has been protected by courts of law, prior to any specific laws for aiding the operation of the general principle. Where, for example, a person is insolvent, and diligence is begun for attaching his estate, and a creditor, seeing himself anticipated by the greater activity of others, in danger of being too late with his diligence, prevails on his debtor voluntarily to convey a part of the estate to him, this is a fraud: the creditor, in such a case, participates in the debtor's wrong. Or if a debtor execute in favour of one or a few creditors a conveyance *omnium bonorum*, which of itself necessarily implies insolvency, unfair preferment, and collusion, this also is a fraud on the excluded creditors, in which the creditors preferred are participant. Accordingly, there are many reported cases of preferences of this sort set aside prior to the statute of 1696.³

¹ The same doubts seem to have been entertained on the Continent. Casaregis, one of the most eminent of the Continental writers on commercial jurisprudence during the last century, says, in treating of this subject: 'In aliquibus locis et civitatibus, reperitur per statuta dispositum, quod omnes contractus sive negotia censi debeant nulla et invalida, quæ facta fuissent à mercatore intra certum et determinatum tempus ante ejus decoctionem; sed non propterea deducitur, quod per hæc statuta derogatum fuerit dispositioni juris communis in omnibus aliis casibus in quibus etiam ante hoc tempus statutum, mercatores apparerent proxime decocturi propter eorum magna debita sine spe ea imposterum extinguenda. Cum dubitati juris sit quod quando per statuta inducta fuit aliqua præsumptio sive modus facilioris probationis in uno casu non per hoc intelligatur prohibitum aliud genus probationibus ab jure communi permissum.' And in proceeding

further to explain this rule, he says: 'Et ratio est quia statuentis sic disponendo intellexerunt liberare creditores ab ulterioribus probationibus necessarios ad terminos juris communis ad ostendendam simulatam mercatoris decoctionem cum ad eam probandum sufficere voluerunt, si per creditores ostensum fuerit quod decoctus illum occultaverat per certum et breve tempus antequam foro cederet.' Disc. 75, No. 9. See also Disc. 59, sec. 11.

² [It is now understood that a payment in cash cannot be set aside by proof of insolvency and collusion. A debtor, until actual bankruptcy, is entitled to pay *primo venienti*. The law of bankruptcy has only a retrospective operation in relation to gratuitous payments and alienations, and alienations (as distinguished from payments) in satisfaction or security of prior debts. See *Thomas v Thomson*, 1865, 3 Macph. 358.]

³ *Tarpersie's Crs. v Laird of Kinfauns*, 1673, M. 899-901;

These determinations in the early days of the Scottish bankrupt law, are at once proofs of the rule of common law, and of the inadequacy of it to check unaided the many complicated frauds which may be practised on the eve of bankruptcy. The statutes which have formed the subject of commentary in the preceding sections, were intended to afford the necessary aid for rendering more effectual the principle of the common law. The first branch of the Act 1621 established presumptions for facilitating the discovery of donations to the injury of creditors; the second branch pointed out what should be held as notice of diligence begun; and the Act of 1696 was intended to destroy preferences by retrospective disability. The helps thus afforded to the operation of the principle of the common law, give unquestionably great aid to the creditors; but they were meant as *aids*, not as *substitutes*, for the common law; and the efficacy of the principle which they were enacted to assist, is left unimpaired in those cases to which the statutes do not apply.

Those cases are of two kinds: 1. Where posterior creditors are in the field who, according to the interpretation hitherto put on the Act, can take no benefit from it; or, 2. Where either there is no bankruptcy under the Acts, or the transaction is beyond the term of sixty days. It is settled that in those cases the principle of the common law will afford a remedy.¹

The whole of these laws against fraud, consisting partly of the rule of the [244] common law, partly of the auxiliary statutes, form a system which has for its object to preserve the common property for division among the creditors, and to secure perfect equality in the division of it. Every case, then, which cannot be brought under the words of the statutes, must be disposed of upon the principle of the common law; and if it be found, either that collusion has taken place in a case not provided for by express statute, or that a fraudulent evasion of the words of the statute has been practised, the preference will be set aside, and the property restored to the common mass.

In questions on the common law, the difficulty arises from this: that a creditor preferred has received nothing more than, as between the debtor and him, it is just that he should receive. It is only in its effect on the interests of the creditors, as a third party, that any objection can be maintained against such a transaction; and therefore it will be objectionable or otherwise, as the creditor shall be proved participant in the fraudulent design of the debtor to cheat his other creditors. Each case must no doubt depend on its own circumstances, the judgment to be pronounced resolving into a conclusion of law upon facts and intentions. But it may be useful, in the form of distinct propositions, to set down the result of some determinations on this subject.

1. Conveyances *OMNIUM BONORUM*, to the exclusion of some of the creditors, are manifest frauds—implying, necessarily, unfair preference on the part of the debtor, and collusion in the creditors who claim benefit under them.² These are justly held objectionable at common law.³ Similar determinations have been given in England.⁴

Scrymgeour v Lyon, 1694, M. 908; *Kinloch v Blair*, 1678, M. 889; *Pollock v Kirk-Session of Leith*, 1679, M. 890; *Brown v Drummond*, 1685, M. 891.

¹ Erskine lays it down: 1. That 'creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the statutes, are not excluded from the remedies competent to them by the common rules of law. They are therefore entitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own ground of debt, if it carry in it evident marks of fraud.' 2. That 'much more is this right of reduction competent to creditors whose grounds of debts are prior to the alienation, if fraud appear *ex facie* of the right, though their reasons of reduction can receive no support from any of the two statutes.' B. 4, tit. 1, sec. 44.

² Quamvis non proponatur consilium fraudandi habuisse,

tamen qui creditores haberi se scit et universa bona sua alienavit, intelligendus est fraudandorum creditorum consilium habuisse.' Julianus in l. 17, sec. 1. Quæ in fraud. cred. Dig. lib. 42, tit. 8.

³ *Cramond v Bain & Henry*, 1737, Elchies, Fraud, No. 5, Notes, p. 158, and M. 893. 'A disposition *omnium bonorum* to a creditor, in payment of his debt, though really within the value of his debt, reduced *ad effectum* to bring in the whole creditors *pari passu*, although they could not subsume in terms of the Act 1621 or 1696.'

The case of the *Duchess of Buccleuch v Sinclair & Dougl*, 1728, M. 893, may be taken as a confirmation, the judgment having proceeded on the ground that the conveyance was only of a part. An early case was decided the other way. *Paterson*, 1629, M. 4885.

⁴ In the cases of *Sir E. Worseley v De Mattos & Slader*, 1

2. Where the deed of preference, though it does not bear to be so, yet truly is a conveyance of all, or at least of the great bulk of the debtor's estate, near RELATIONSHIP or CONFIDENTIAL CONNECTION may perhaps, as a proof of collusion, be entitled to some consideration.¹ The tenor of the deed itself, or other circumstances, plainly indicating that the conveyance is of all the debtor's property, or at least that it necessarily makes him [245] insolvent, may prove decisive. Either the conveyance must be concealed, which is of itself a plain badge of fraud, or the debtor must proclaim his insolvency by quitting the possession.²

3. A debtor is bound to give, and a creditor entitled to receive, PAYMENT; but if the payment be given or received in circumstances manifestly indicating an advantage gained over the other creditors, it will be set aside. If an insolvent debtor, for example, pay before the day of payment arrive, and fail immediately after, the fraud and collusion appear to be such as will entitle the creditors to relief.³ But it is not enough that the debtor is insolvent, and that the payment may eventually defeat the object of the bankrupt laws. If it is a payment in the ordinary course of transactions, in regular discharge of a debt at the time of payment, or in consequence of a demand made, unless there be some circumstances indicative of *mala fides* in the person favoured, it will be sustained.⁴ It may be observed also, that whatever may be the case under the statutes, payment made by discounts, etc. in the usual course of trade, should, in a question at common law, be held as payments in cash.

4. PAYMENT of a debt in the ordinary course does not indicate failure; but where, instead of payment, SECURITY is given, the debtor may be suspected of some embarrassment. This, notwithstanding the Roman text,⁵ is not alone sufficient to entitle the other creditors to set aside the security. It will be requisite that the deed of security shall have been executed on the very eve of failure, and accompanied with circumstances of concealment or false appearance for deceiving the other creditors, in order to ground a challenge at common law.⁶

Burr. 467, and in *Wilson v Day*, 2 Burr. 827, the circumstance of the conveyance being of ALL was held fatal to it, as a fraud on the bankrupt laws.

In *Compton v Bedford*, 1 Blackst. 362, Moore, finding his circumstances on the decline, but willing to give a preference to favourite creditors, made, at midnight, a bill of sales in trust to pay those creditors their full debts, leaving £900 of debt unprovided for. Next day he absconded. Lord Mansfield held the deed fraudulent and void. 'The deed,' he said, 'creates an insolvency. The assigner must go off the next morning, else his possession will be colourable. The interest which is omitted is too minute to make a difference. The assigner has given up all his power of trading for the future.' 'Another strong badge of fraud is the suspicious hour at which the transaction is done, being only twelve hours before he went off.'

A similar case, *Butcher v Easto*, Doug. 282.

¹ In *Scrymgeour v Lyon*, 1696, M. 903, the deed was to a near relation, and set aside.

Yet see *Bean v Strachan*, 1760, M. 907, where payment was made to a sister, and sustained; and *Broadfoot*, 9 Dec. 1808, below, note 4. In the *Duchess of Buccleuch v Sinclair & Doull*, 1728, M. 893, the deed was to a stranger, and sustained.

See *E. of Rosebery*, 1823, 2 S. 443, N. E. 394.

² In *Cramond v Bain & Henry*, 1737, *supra*, p. 227, note 3, the enumeration was such as could leave no doubt of its being a conveyance of all.

³ 'Si cum in diem mihi deberetur,' says Ulpian, 'fraudator

præsens solverit; dicendum erit, quod in eo quod sensi commodum in representatione, in factum actioni locum fore; nam Prætor fraudem intelliget etiam in tempore fieri.' Dig. lib. 42, tit. 8, l. 10, sec. 12, Quæ in fraud. cred.

⁴ *Broadfoot, Tr. for Philip's Crs., v the Leith Banking Co.*, 9 Dec. 1808, Fac. Coll. This was a very strong case. A payment into a cash account was found effectual, being eighty days before bankruptcy, although it was alleged the debtor knew himself to be ruined, and although his own father was one of the cautioners in the cash account. It was held that there was no sufficient evidence of any collusion on the part of the father, who had merely by the operation of the cash account gained a consequential advantage. And this the Court was unanimous in holding not to be liable to challenge.

⁵ 'Si cui solutum quidem non fuerit, sed in vetus creditum pignus acciperit, hac actione tenebitur, ut est sæpissime constitutum.' Dig. *ut supra*, sec. 13.

⁶ In the case of *Marshall's Tr. v Provan & Co.*, 1794, M. 1144, the Court went as far as seems to be justifiable. They proceeded on a presumption somewhat like that of the Act 1696 that a fraud *might* have existed, and that it might endanger the purposes of the whole bankrupt law to allow such a transaction.

In *Rust v Cooper*, Cowp. 629, decided by Lord Mansfield, the proper limits seem to have been more correctly kept. H. and R. Papps, clothiers and bankers at Salisbury, were in difficulties during the summer of 1772. Cooper lent them £1000 on bond. Their difficulties increasing, they at a meeting agreed with one of the creditors to apply for a commis-

5. Where the debtor makes such an ARRANGEMENT as to enable favourite creditors [246] to acquire a preference, the Court has refused to sustain the preference; but in all such cases there must be clear proof of the creditor's participation.¹

6. Where, to accomplish a preference which if done directly would be objectionable under the statutes, a CIRCUITOUS TRANSACTION is entered into, it will be set aside as a fraud upon the bankrupt laws, provided the party concerned was privy to the scheme. Thus, in a case where it was first intended to give a preference directly by a vendition, this having been refused as exposed to challenge, a person was engaged to become surety to the creditor, on receiving the vendition, which directly the creditor could not safely take; it has been thought that the security to the cautioner, who could not be ignorant of its nature and object, would have been entirely set aside if it had come to trial.² So a security granted

sion, and they settled who should be the petitioning creditor. On returning from this meeting they went on as usual, but that night told their clerk they must stop in a few days. On 25th September they bade the clerk shut up the shop and not open it next morning, but on recollection desired him to open it, and wait till the post came, after which it was shut. In order to give a preference to Cooper, a bill of parcels was made, dated 22d September, and delivered to Cooper on the 24th, with an order on several persons who held the goods to deliver to him, which was done. The assignees claimed the goods for the creditors. Lord Mansfield said: 'In all its circumstances there is perhaps no case exactly similar to this. But the law does not consist in particular cases, but in general principles which run through the cases and govern the decision of them. The general principle applicable to the present case is this: that a fraudulent contrivance with a view to defeat the bankrupt laws is void, and annuls the act. This principle is established by many cases. Every case that has determined a conveyance by a trader of his *whole* effects to pay a creditor to be an act of bankruptcy, proceeds on this foundation, that it is fraudulent against the bankrupt laws, and therefore void. Every case which says it is an act of bankruptcy if *one* creditor only is *excepted* out of such conveyance, goes upon the same principle. It was long ago determined that a conveyance of *all a man's effects* was clearly a fraudulent conveyance, and leaving out something or a part by way of colour will not mend it.' 'I am of opinion that a fraudulent transaction which is not a deed, is in itself an act of bankruptcy. But then such a transaction is void. Where a sale of goods is fraudulent, and 'done with no other view whatsoever but to defeat the equality of the bankrupt laws, it is void on account of such intended fraud.' Then, after discussing the circumstances of the case, he concludes thus: 'The whole is a secret clandestine contrivance, with no other view or intention than to give a preference and to defeat the consequences of a certain bankruptcy, though it purports to be a *bona fide* sale. If,' he continues, 'in a fair course of business a man pays a creditor who *comes to be paid*, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, yet, being a fair transaction in the course of business, the payment is good, for the preference is there got *consequently*, not by design. It is not the *object*, but the preference is obtained in consequence of the payment being made at that time.

'Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods and delivers possession, *that is*, and at any time may be, a transaction in the

common course of business, without the creditors knowing there is any act of bankruptcy in contemplation, and therefore good. It is not to be affected by what passes in the mind of the bankrupt. But in the present case there is not a single thing but what is a step towards fraud, and a proof of an intended preference; and to support it would be to overturn the whole system of the bankrupt laws. The present, therefore, is a fraudulent sale upon all the other creditors, and all the laws concerning bankrupts. The present determination will not affect the case of a fair mortgage of goods delivered, arising out of a transaction in the common course of business. It will only affect cases where there is no object but that of defeating the bankrupt laws, and committing a fraud on all the other creditors.'

The preference was accordingly set aside.

¹ *Brown v Murray*, 1754, M. 886. Gillespie, an insolvent debtor, was apprehended upon caption and liberated, but, thinking it full time to dispose of his property, he sold his farm and stocking for full value. It does not appear what his intention in this really was; but, in effect, the transaction enabled some of his creditors, better informed of his situation than others, and in particular some who had one of his sons bound along with them, to acquire a preference over the price by diligence. The other creditors challenged the preference so acquired. The sale was obviously not objectionable in itself, and so the Court 'did not reduce it as to the purchaser, but as to the creditors they did reduce it to the effect of ranking all *pari passu* upon the price.' [The development of the principles of bankruptcy law, which are the subject of consideration in this chapter, has freed the subject from some of the specialties which were at one time supposed to embarrass its operation. It is no longer held necessary to prove complicity on the part of the creditor (*M'Cowan v Wright*, 1853, 15 D. 494); and where a deed would have been absolutely reducible under the statute 1696 as a security for a prior debt, if bankruptcy had followed within sixty days, it will be reducible at common law although bankruptcy has not followed within that period, provided the creditors injured or their trustee can prove that the debtor was insolvent at the time it was granted (*Thomas v Thomson*, 1865, 3 Macph. 358). Circumstantial fraud does not seem to be a material element in any case. The fraud consists in the act of giving security when the debtor is insolvent, or in giving away his estate gratuitously when insolvent (*Edward v Grant*, 1853, 15 D. 703).]

² See above, p. 212, note 1. See also the case of *Monteith*, *ib.* note 1. *Blaikie v Robertson*, 1781, M. 887.

to a son, in consideration of his accepting a bill for a debt of his father, the bankrupt, was set aside.¹

7. Where the debtor, insolvent, and in contemplation of failure, gives a PREFERENCE unasked to a creditor, though safe from challenge under the statutes, it has been held ineffectual, on the ground of collusion, or consciousness on the part of the creditor to whom such spontaneous security is given as a provision against impending bankruptcy.²

¹ *Millar v Low*, 1822, 2 S. 77, N. E. 71. See *Barbour v Johnstone*, 1823, 2 S. 351, N. E. 309.

² *Sir A. Grant v Crs. of Grant*, 1748. 'A person insolvent having privately employed a notary to write three heritable bonds to his favourite creditors, and caused him to sit up all night writing them, and enjoined him secrecy, and infest the creditors privately, and registrate the sasines about the end of the sixty days in the General Register, omitting one, who was his greatest creditor, with whom he kept up communing for eighteen months, and then gave him an heritable bond, whereon he was infest,—that creditor pursued reduction of the three heritable bonds and sasines: 1. As being to more persons than one; 2. On the Act 1621; 3. On the Act 1696. The President thought there was some weight both in the first reason and in the first branch of the Act 1621. But the Court disregarded them. But we unanimously agreed to reduce, on the common law, on actual fraud to the effect of bringing them all in *pari passu*.' 1748, Elch. Fraud, No. 19, Notes, p. 162.

Lord Kames' original note of the judgment is in these terms: 'The Lords were all of opinion that the Acts of Parliament had nothing to do with the matter; but they considered the dispositions granted to the creditors, executed in a hidden way, to be fraudulent, and therefore reduced the same to the effect of bringing in *Sir A. Grant pari passu*.' Sess. Pap. Adv. Lib. See also *Kilk*, 55.

Harman v Fishar, Cowper 117, is very instructive on this doctrine in England. Fishar had lent to Fordyce a large sum on 6th June. On 9th June Fordyce sat up all night arranging his affairs in contemplation of absconding, and at five in the morning he enclosed and gave to his clerk, for Fishar, two notes for part of the amount he owed him. At six o'clock he went to France. The clerk called on Fishar with the enclosed notes at ten o'clock, but did not find him. A commission issued at eleven o'clock. Next day the clerk delivered the enclosed notes. The action was by the assignees against Fishar. Lord Mansfield, after stating the case: 'The defendant, Mr. Fishar, is a very meritorious creditor of Mr. Fordyce, and in this last transaction did him a very great act of friendship. I have therefore been very sorry, as far as one can be said to be sorry in the administration of justice, that I could not see in this case any circumstances which could give rise to a question, for they are so very particular as not to lay the foundation for one.'

'The question is, Whether the plaintiffs are entitled to recover in this action? which depends on this: Whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I say duly and regularly, because that excludes fraud.'

'There has been much argument upon a general question, Whether a trader, in contemplation of an act of bankruptcy, can give a preference to a *bona fide* creditor? Perhaps the stating it as a general question involves a great impropriety,

because no trader can do an act of fraud contrary to the spirit of the bankrupt laws, and to the injury of his creditors. He cannot assign his effects to all his *other* creditors in exclusion of *one* whom he thinks dishonest or unjust, nor even to be equally divided amongst all his creditors, because he cannot take his estate out of that management which the law puts it into. If any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed. If without deed, it is void in respect of those whom it prejudices.

'But all questions of preference turn upon the action being complete before an act of bankruptcy committed, for then the property is transferred, otherwise an act of bankruptcy intervening vests the property in the hands and disposal of the law.'

'In the case of *Worseley v De Mattos*, whatever the Court might think of the case of *Small v Oudley*, there was no intention to lay it down that the determination of that case was wrong at that time. But no case ever came before us where we were warranted to say that no case can exist of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the Act of Parliament, and in a course of dealing and trade, it would be good: or suppose legal diligence used by a creditor, and an execution or *ca. sa.* is in the house, and under terror of that he makes an assignment and delivery of his effects, it would be valid, the object not being to give a preference, but to deliver himself. In *Cook v Goodfellow*, the act done was fair; it was done several months previous to the act of bankruptcy, and was no more than what the Court of Chancery would have compelled the party to do. Where an act is done that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference.'

'In *Small v Oudley*, upon a *stipulation* to replace so much stock, the *day* agreed upon was *past*; the estate had had the benefit of the solemn agreement, and the bankrupts gave a security for part of the debt only; a distinction was likewise taken, because the security was upon their effects in a separate trade. That was a very favourable case; but I think it extremely shaken by the case of *Linton v Barlett*, in the Common Pleas, which goes further than any other. For that case has determined, that though the act be complete, yet if the mere and sole *motive* of the trader was to give a preference, it shall be void; and if by deed, is in itself an act of bankruptcy. In that case the money was advanced by the brother, from motives of friendship, and without interest. Possession of the goods was delivered instantly upon the assignment being made, and a clear act of ownership exercised by the brother, by his exposing them to sale, and carrying on the trade; nor had he the least knowledge or suspicion of the insolvency. But the material circumstances which made that a fraudulent act are these: The brother did not arrest, or threaten, or even call upon the bankrupt for

A subsequent case has recently been published, in which the Court appear to [247] have taken a different view of the question. But there does not seem to be a good ground for such alteration of opinion, and the original decision appears to be according [248] to law.¹

8. It is not essential to a challenge at common law, that the DEBTOR should be made BANKRUPT under the Act 1696, or later statutes, if the debtor has, to the knowledge of the favoured creditor, actually failed. It may be a part of the fraud to prevent bankruptcy. Thus a debtor may, in collusion with his creditor, give to him a draft on a correspondent abroad, in the West Indies, or on the Continent, which will operate as a payment. If no notice is taken of this in the books, and the bankrupt call his creditors together, and lay before them states of his affairs, while no steps of diligence are taken against him, it is probable they will unanimously agree to a private trust, which of course produces no bankruptcy under the statute. It cannot be till after a long time that the trustees come to hear of the transaction; while the creditor preferred, having received his payment, does not appear at the meetings. In such a case as this, whatever may be the decision, at least the challenge cannot fail on account merely of there being no bankruptcy; for there being a notorious and proclaimed insolvency, together with a renunciation to the creditors of the estate, which is, strictly speaking, their common property, this is sufficient to entitle the creditors to recover the part of the common fund fraudulently alienated. From the moment of *irretrievable insolvency*, the debtor can legally give no voluntary preferences; and creditors who are aware of his situation, are not entitled to take benefit by the fraudulent device which he invents for their advantage. The only effectual advantages, after this happens, are to be obtained by diligence, which gives warning to the creditors to protect themselves against injustice.

9. It is not a transaction objectionable at common law, any more than under the statutes, that one has advanced MONEY ON SECURITY to aid an insolvent trader, unless it be done collusively, for the purpose of bestowing a preference. Factors frequently in this way assist their principals, to prevent their immediate failure; and beneficial interpositions of this sort have saved the most considerable houses from ruin. A great authority in the law

the money; but the bankrupt, of his own *voluntary* act, gave him the assignment. With what intent? Why, to give him a preference. The goods assigned were not more than one-third of his effects. Upon what, then, was the opinion of the Court founded? Not upon one-third being the same as an assignment of all his effects, but upon the trader's giving a preference, and upon his sole motive being to do so. If he can give it to one, he can give it to another; which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper. That case goes further than any former decision. It had before been held, in *Worseley v De Mattos*, that an assignment of *all* was a clear act of bankruptcy; and an exception of part, if colourable or fraudulent, will not take it out of the general rule.

'But the present case affords no circumstances that can give rise to a question. A trader, at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt, pursuant to no contract, in performance of no obligation, in no course of dealing, without the privity of the creditor, or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects shall be apportioned after his bankruptcy. He delivers the letter to his own servant, and might have countermanded it;

here it falls in with the case of *Temple v Alderson and Hague v Rolleston*. The act was not complete, and therefore the act of bankruptcy revoked it. Suppose the drawers had been insolvent, was Mr. Fishar bound to take the notes in satisfaction of his debt? Besides, the amount of the notes exceeded the debt by several hundred pounds. But what is the nature of the transaction upon the face of the letter? It is, in terms, a declaration that he *means* to give a preference. This the law does not allow; and if it had been by deed, it would itself have been an act of bankruptcy. But it is much stronger where the trader mentions that to be his *sole* motive, and where the act cannot be completed till after an act of bankruptcy actually committed.'

¹ *Crs. of Stowe v Thistle Bank*, 1774, 5 Br. Sup. 383. This was the case of a bank agent, who having applied the money of the bank to his own use, secretly wrote out, without any demand by the bank, and unknown to them, an heritable bond for £2000, which he sent to them, and they took infestment. He was not a bankrupt in terms of 1696, c. 5, and could not be made so. In a reduction, Lord Kames, following out Grant's case, reduced the security. But the Court, on a hearing in presence, altered this judgment, and sustained the security; 'for as Stowe was not a bankrupt in terms of the Act 1696, there did not appear any fraud in thus giving an heritable bond to an onerous creditor, without that creditor's knowing of it.'

of merchants has said, that 'a notion that lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, upon mortgage, is fraudulent, and [249] consequently the contract void in case a bankruptcy ensues, would throw all mercantile dealing into inextricable confusion. Men lend their money to traders upon mortgages, or consignment of goods, because they suspect their circumstances, and will not run the risk of their general credit.'¹

10. CONCEALMENT of a security granted for a prior debt is a fraud upon the law, since the policy of the statute is to put an instrument in the hands of the creditors, by which, on finding the debtor alienating his property in suspicious circumstances, they may render him bankrupt, and so be entitled to set aside the preference.

SECTION III.

OF PAYMENTS MADE AND TRANSACTIONS ENTERED INTO BY THE BANKRUPT AFTER SEQUESTRATION.

By the recent Bankrupt Acts it has been declared, that the whole estate and effects, of whatever kind, belonging to the bankrupt at the period of the sequestration, or the produce thereof, after paying all charges, shall form the fund of division, the sequestration being held to be a public act, of which all are bound to take notice. As corollaries from this rule it has been enacted—1. 'That all payments made by the debtor to any of his creditors after the date of the first deliverance, shall be void and ineffectual to the receivers in the event of a sequestration taking place, and the trustee shall be entitled to recover the money so paid as part of the bankrupt's estate;' and, 2. 'That all transactions of the bankrupt subsequent to the said date, from which any prejudice may arise to the creditors, shall be null and void.'² Two limitations, however, have been introduced as to the effect to be produced by the publicity of the sequestration. Payments to the bankrupt are made effectual; 'and the debtor of a bankrupt, who has paid his debt to him *bona fide* before he knew of the bankruptcy, shall not be obliged to pay it a second time to the trustee.' And purchases made from the bankrupt *bona fide* of any of his moveable effects, in his actual possession, and for a price truly paid, are declared effectual.

PART II.

OF PROCEEDINGS AGAINST THE ESTATE OF A BANKRUPT OR INSOLVENT DEBTOR.

[250] THE history, nature, and effects of those proceedings are now to be explained, by which the estate of the debtor is placed under the control of the creditors. The subject may properly be divided into three parts:—

1. Of the Process of Judicial Sale and Ranking, by which the heritable estate is sold and distributed among creditors; with a short view of the processes in use for accomplishing the distribution of moveable funds where there is no sequestration.
2. Of Mercantile Sequestration. And—
3. Of Voluntary Trust-Deeds for the behoof of creditors.

¹ Lord Mansfield in *Foxcroft's case*, 2 Burr. 931.

² 54 Geo. III. c. 137, sec. 38.

CHAPTER I.

OF JUDICIAL SALE OF LANDS, AND OF THE RANKING OF THE CREDITORS UPON THE PRICE.

THE statute which introduced equality among adjudgers,¹ left them exposed, during the term of redemption, to all the confusion of a divided possession. To remedy the evils of this state of things, the action of judicial sale and ranking was introduced, by which any creditor who held a real security over an insolvent estate was empowered to bring it to public sale, and to have the price divided.

The Scottish Legislature entertained an early and strong repugnance against every measure which might deprive a landholder of his estate; and, under the influence of this feeling, the power of redemption was first introduced into the common execution by appraising, originally an absolute sale. The consequence of that change, combined with other circumstances, was to annihilate the sale, to make appraisings mere judicial mortgages over the whole of the debtor's lands, and to involve subsequent creditors, as well as the debtor, in great distress. Notwithstanding the wish shown by the Legislature to redress the evils which had thus arisen—first, by declaring appraisers who should enter into possession liable for the money they should draw from the estate; afterwards, by the introduction of the *pari passu* preference; and finally, by the substitution of adjudications in place of appraisings,—still the diligence continued unfit for cases of insolvency. A creditor who held a real security, instead of having it in his power to bring to sale the estate of his debtor, could only enter into possession and draw the rents: he could in no way convert his redeemable into an irredeemable right. A personal creditor had no resource but to adjudge, and after adjudging he could do nothing more than enter into possession, or get a share, if possible, of the rent, and wait till the expiration of the legal term should permit him to convert his redeemable security into a right of property.

This state of the law was attended with two evils: 1. Although the statute of 1661 placed all adjudgers within year and day upon an equal footing, as if the first effectual [251] adjudication had been a general diligence for the behoof of them all, yet during the legal, however numerous the adjudgers might be, and however inadequate the estate or rents, nothing else could be done than to have the estate sequestrated by authority of the Court, and placed under the management of a factor, who should draw the rents, and pay them rateably to the creditors. The smallest excess of the interest above the rents occasioned thus an annual loss to the creditors, which was much increased by the expense of management. The creditors who were not entitled to share in the *pari passu* preference, were, in such a situation, entirely deprived of the interest of their debts during the legal. 2. But even after expiration of the legal, matters were not easily settled. The creditors who held real securities, were entitled, if they all consented, to have the lands exposed to sale; but not only was it difficult to get them to agree, it was not even to be expected that a full price should be got for an estate about which there were so many concerned, and to the sale of which the debtor perhaps might refuse his concurrence, and disturb the purchaser by subsequent challenges.

These evils called for a legislative remedy, but it was applied with a timorous hand. The Legislature seemed to forget that they were providing for a case of insolvency, and their reluctance to deprive the debtor of his power of redemption restrained those exertions which were necessary for redressing the injustice of the law. A creditor holding a real security over land was allowed to bring the land to sale before the Court of Session, without the consent of the other creditors; but still it was under the restriction, that while the term for redeeming was unexpired, the debtor's consent was necessary.²

¹ See above, vol. i. p. 754.

² 1681, c. 17.

This imperfect law relative to the sales of bankrupt estates subsisted for nine years only. The proof of the value of the estate, and of the amount of the debts, was taken before the Court of Session; a commissioner was named, commonly one of the judges, before whom the sale proceeded, the lands being exposed at the price affixed by the Court. If no purchaser appeared, the pursuer of the action got the lands at the upset price. The purchaser's title was completed by a conveyance signed by the commissioner, approved of by the Court, and ordered to be recorded; the concurrence of the bankrupt being also necessary where the right of reversion was unexpired. The distribution of the price was made in an action raised by the commissioner or by the purchaser, stating the amount of the price, and calling upon the creditors to appear for their interests, that the purchaser might pay safely and be discharged; and a conveyance by each creditor of his debt and diligence to the purchaser, with a warrantice binding the creditor to refund in case of the estate being evicted, fortified the title and closed the whole.

In the year 1690 a great improvement was introduced.¹ The Legislature ventured now to act more freely; and, in the true spirit of bankrupt law, they opened the reformed judicial sale to all real creditors in cases of insolvency, without regard to any right of redemption in the debtor's person. They improved and made more simple the title to be offered to the purchaser, moulding it into the form of a general and irredeemable adjudication. The purchaser's right was declared to depend upon a decree of sale to be pronounced by the Lords, adjudging to him the lands sold, and ordering that he should thereupon be infeft in the same way as in other adjudications. Besides this, conveyances by the creditors were to be given as a fortification of the purchaser's title. Where there were no purchasers, the Legislature, instead of allowing the lands to be given up to the pursuer of the action, ordered them to be divided among the creditors according to their rights and diligences; which, however, was found so impracticable, that the Court of Session introduced the obvious remedy of lowering the upset price and exposing the lands again to sale.

[252] Five years after the passing of this law, the Legislature, in providing against the frauds of apparent heirs, bestowed upon them the privilege of bringing to sale the estate of their predecessor when burdened with debts;² and this distinction was made between those sales and sales by creditors, that the apparent heir being the only person interested in the reversion, should be entitled to bring the action, 'whether the estate was bankrupt or not.'

As the law now stood, an estate might be brought to sale in two ways: 1. By a creditor holding an heritable security, provided the estate was insolvent; and, 2. By an apparent heir, in case of the debtor's death, whether the estate was insolvent or not.

But although, originally, the action was directed merely to the sale of the lands, it came gradually to include an action also of ranking. The ranking of the creditors was originally carried on in a separate action called multiplepoinding. This action proceeded on an allegation, that the pursuer, being possessed of a fund belonging to the common debtor, was in danger of being distressed for payment of it by several competitors, and therefore all who had claims were called to settle their preferences, that the pursuer might pay safely. Instead of this separate action, the practice was introduced of including in the summons of sale a conclusion for ranking the creditors on the price, with certification, that the creditors who neglected to apply should not afterwards be suffered to challenge the sale or the division of the price. But as the security of the purchaser greatly depended on the production of all the debts, and his assignation to them all, and as the action proceeded only in case of insolvency, it was thought necessary to adopt some method of forcing the creditors to appear, or at least of disburdening the estate of their debts if they did not choose to do so. For this purpose, the best expedient which occurred to the lawyers of

¹ 1690, c. 20.

² 1695, c. 24.

those days was afforded by the action of reduction-improbation. This is a form of action by which a deed that is forged and objectionable is declared null, the action proceeding upon an allegation of forgery; to remove which, the deed must be produced within an assigned term, under the certification of the forgery being held as proved. In applying that action to the purpose of judicial sale, the summons affirmed the securities and vouchers and diligences of all the creditors to be false and forged; and the decree of certification proceeding thereon operated as a complete annulment and exclusion of all rights which had not been produced. The necessity of this separate action of reduction-improbation was taken away by Act of Sederunt,¹ and it now makes a part of the combined action of ranking and sale.

Among the other benefits derivable from a general process of attachment for behoof of all the creditors, it is not the least, that the private diligence of individuals is superseded and rendered unnecessary. But this was not the case with the process of judicial sale. Nay, this process not only wanted that character of a general attachment for behoof of all the creditors which could enable it to supersede the use of individual diligence, but things had taken a turn still more unfortunate. As it is a part of the security of the title of the purchaser in a judicial sale, that it is corroborated by an assignation to the debts of the creditors, it was thought necessary, in order to connect those debts with the estate, and to give them effect as confirmations of the title, that every creditor should adjudge, even when he was beyond the term of the *pari passu* preference; and unless he did so, the purchaser was entitled to retain his proportion of the price. Thus the law itself compelled individual creditors to adjudge—wasting the debtor's reversion with useless proceedings, or consuming the fund of division which belonged to the postponed creditors. This was avoided in the sale by an apparent heir, for it was held that the apparent heir was a trustee for the general body of creditors; that by his action of sale he adjudged the estate for behoof of them [253] all; and that this adjudication not only precluded the necessity of postponed creditors adjudging in order to draw their shares, but admitted all the creditors to the benefit of the *pari passu* preference, provided the decree of sale was pronounced within the year. But there was no principle upon which a similar construction was at common law applicable to a sale by a creditor. He was not in law held as a trustee for others, but as an individual prosecuting legal diligence for his own advantage; and the only relief from the accumulation of separate diligences was afforded by a provision in an Act of Sederunt,² by which the factor, who should be appointed by the Court for managing the estate previous to the sale, was empowered, upon the application of creditors, to lead one adjudication for them all. In the year 1794 the sale at the instance of a creditor was placed, in this respect, upon the same footing with that at the instance of an apparent heir. By Act of Sederunt, made in execution of the powers vested in the Court by the 33 Geo. III. c. 74,³ it was declared that a decree of sale at the instance of a creditor should operate as a common decree of adjudication in favour of all the creditors who should be included in the decree of ranking. This provision, in an improved state, is incorporated in the statute of the 54th of Geo. III. c. 137.⁴

There is one other suggestion which still seems to be necessary to complete the improvement, viz. that the debtor himself, conscious of the approach of insolvency, should be empowered to apply to the Court of Session for a judicial sale and ranking. This measure deserves well the attention of the Legislature. When a landed proprietor feels his embarrassments so multiplying around him that he is under the necessity of calling his creditors together, he is immediately involved in difficulties which obstruct his fairest intentions; he is in the power of discontented or self-interested creditors, who may effectually oppose any plan of trust that may be proposed; and adjudication after adjudication is led against his

¹ Act of Sederunt, 17th Jan. 1756.

² Act of Sederunt, 23d Nov. 1711.

³ Act of Sederunt, 11th July 1794.

⁴ Renewed by 19 and 20 Vict. c. 91, sec. 4.

estate, to his irretrievable ruin. It is not easy to perceive upon what ground the power of bringing on a judicial sale and ranking should be denied to such a person, to the effect at least of superseding the diligence of individual creditors, and bringing the whole affairs into a course of economical and expeditious adjustment. The establishment of a power of this sort in the case of apparent heirs, which has been productive of nothing but good, seems to give assurance that the principle may, with advantage, be allowed to operate to the full extent. What has already been done in declaring the action of sale to be equivalent to an adjudication by every creditor, has remedied a great part of the evil. But when it is recollected that this action is competent only to creditors who hold heritable securities and are in possession, it will be seen how much the remedy is restrained.

SECTION I.

DESCRIPTION AND NATURE OF THE ACTION OF RANKING AND SALE—DISTINCTIONS WHEN PURSUED BY A CREDITOR OR BY AN APPARENT HEIR—LEGAL EFFECTS OF THE COMMENCEMENT OF THE ACTION.

In the introductory view of this action, it has appeared how gradually, from a simple action of sale, it grew into a complicated action of sale, reduction-improbation, and division. These are the three essential parts of the action, and they are combined in one process, that they may mutually co-operate for the benefit of the creditors and the security of the [254] purchaser, in order to accomplish, in one course of proceedings, the double object of bringing the property into a divisible shape, and having it distributed among the creditors according to their respective interests.

The complicated nature of the action gives little interruption in practice, for the business of each separate part of it proceeds independently of the others. This enables us to consider the subject in two distinct views—taking first, the Judicial Sale; and next, the Ranking or Division of the Price; while the action of Reduction-Improbation, as it bears a mutual relation to both the sale and the ranking, will of course be fully explained in discussing those two subjects. These shall be explained in the two following sections. In this section it may be proper to consider some points applicable in general to the whole process of ranking and sale, and relating chiefly to the several ways in which the action may be commenced; the difference of proceedings thence arising; and the effect of the commencement of the process.

SUBSECTION I.—NATURE AND OBJECTS OF THE PROCESS OF JUDICIAL SALE.

The general nature of the action of judicial sale and ranking will be understood from what has already been explained. Both the process at the instance of creditors, and that by an apparent heir, have two objects in view: the sale of the estate upon such a title as, by its safety to the purchaser, may ensure the best possible price; and the fair distribution of the price among the creditors, according to their respective rights.

1. The action of ranking and sale at the instance of a CREDITOR is regulated by the terms of the statute of 1681, c. 17, by which 'the Lords of Session are authorized and empowered (upon a process at the instance of any creditor having a real right) to cognosce and try the value of such estates where the heritor is notoriously bankrupt and the creditors in possession of the estate, and to value the same according to the true worth thereof, in its rents, casualities, rights, and holdings, according to the use and custom of the country where the lands lye; And to commissionat persons to sell these lands and estate, or any part thereof, at the saids rates, or more, as can be had for the same, with consent of the debtor where there is a legal reversion competent to him, and without his consent where there is no legal: And the said sale is ordained to be by a publick roup, not being under

the rate and price appointed by the Lords of Session; and that the roup be made after publick intimation at the mercat-cross of the head burgh of the shire where the lands ly, and at the head burgh of the bailiary, stewartry, or regality, if they ly within the same, and at the paroch kirk where the lands ly, and at six other adjacent paroch kirks (to be named by the Lords of Session), at the dissolving of the congregation on a Sunday after the forenoon's sermon, by letters of intimation under the signet, upon the Lords' deliverance: Which letters shall specially express the time and place of the roup: And the creditours having real rights and in possession shall be specially cited, upon twenty-one dayes, and all other persons concerned, whether within or without the kingdom, at the mercat-cross of the head burgh of the shire, stewartry, or regality, and at the mercat-cross of *Edinburgh*, and peer and shoar of *Leith*, upon sixty dayes; and a copy of the said intimation shall be affixed at all the places foresaids, expressing the lands to be roup'd, the price appointed by the Lords of Session, and the time and place of the roup. Which alienation so made, and reported to the Lords, and by their warrand registrat in the books of Council and Session, his Majesty, with consent foresaid, declares to be as effectual, upon payment of the price, as if the same were made by the debtor, and all the apprisers, adjudgers, or other creditours, who are so cited, and have any rights affecting the saids lands; and that a signature shall pass thereupon in Exchequer, and an warrand for charging the superior to enter the purchaser, upon payment of a year's rent; declaring alwaies, that the price which shall be gotten for the saids lands conform to the roup shall be distribut by the commissioners [255] appointed to sell the lands, or by the purchaser of the same, amongst the creditours, proportionally, according to their several sums, rights, and diligences, as they are or shall be ordered and found preferable by the saids Lords, whether the saids creditors have compeared or not.'

By the statute of 1690, c. 20, on a preamble that the above Act is 'made ineffectual, no person being willing to dispoise other men's lands, neither will the bankrupt ever consent with any such person: For remeid whereof, their Majesties, with consent of the said Estates statute, enact, and declare, That the buyers of bankrupts' estates shall have right thereto by the decreet of sale to be pronounced by the Lords adjudging the lands sold to the buyer for the price decerned, and that the buyer shall thereupon be infeft in the same way as upon other adjudications, and that the sale may proceed so soon as it shall be found that the debtor is bankrupt and utterly insolvent, whether the legal be expired or not; and if no buyer be found at the rate determined by the Lords, it shall be leisume to the said Lords to divide the lands and other rights amongst the creditors, according to their several rights and diligences.'

The summons proceeds upon a recital of the statutes permitting bankrupt estates to be sold judicially; of the ground of debt, and real security or diligence in the person of the pursuer; of the bankruptcy of the debtor; and of the circumstance of the creditors being in possession.¹ The conclusion is thence deduced thus:—*1mo*, That as the pursuer cannot procure payment of his debt otherwise, the whole lands and heritable rights of the debtor should be sold judicially for that purpose; that a proof of their value should be taken on the one hand, and a proof of the debts on the other; that an upset price should be fixed, and the land exposed (after due intimation) to public roup and sale; that they should be adjudged heritably and irredeemably to the purchaser; and that, upon payment of the price, the purchaser should be discharged, the lands declared free of the debts, and the superiors ordered to receive the purchaser, and infeft him in the lands: *2do*, That the whole creditors should be ordered to produce their claims, under the penalty of their being held as false and forged in all questions with the other creditors, and with the purchaser: and, *3tio*, That the price should be divided among the creditors according to their respective

¹ [The titles are called for to prove their contents; but if them. *Findlay v Mackintosh*, 4 D. 1550; affirmed, 4 Bell they are held under a lien, the action may proceed without 361.]

rights and interests; that the creditors should be ordained, upon payment of the sums assigned to them in the division, to convey their respective rights and diligences to the purchaser, in order to be held by him as securities and corroborations of his right as purchaser.

2. Where the action is raised, not by a creditor, but by the DEBTOR'S APPARENT HEIR, there is a considerable difference in the form of the summons. It is under a different statute that the apparent heir is authorized to bring his ancestor's estate to sale, and he may do so, whether there be a bankruptcy or not.¹ The summons therefore recites the permission of the statute of 1695, c. 24; declares the pursuer's intention as apparent heir to take advantage of it; and concludes as the other summons of sale does—with this difference, that there is no necessity for a proof of the bankruptcy, and that there is not in general any conclusion of reduction-improbation.

The great distinction between the process by creditors and the process by an apparent heir rests upon this principle, that the former is a process of general attachment and distribution adverse to the debtor, and authorized only as the last resource of legal diligence in cases of insolvency; the latter is a process begun by one who has right to whatever surplus of the debtor's estate shall remain after paying his debts, and who acts therefore for the benefit, *first*, of the creditors, and *secondly*, of himself (as a sort of creditor, by right of [256] succession), in selling the estate for the purpose of distribution. Insolvency, therefore, enters not into consideration in a process of sale by an apparent heir, while it is the first point to be established in a sale by creditors; and even the consent of the debtor would not perhaps be admitted to supply the want of it, to the exclusion of the diligence of individual creditors.

IN A SALE BY CREDITORS, the original view of the law was, that creditors should be empowered to bring to sale the heritable estate of their debtor, only when it was insufficient for answering from the rents the interest of the debts really secured on it; or when it was inadequate upon a division, after expiration of the legal, to satisfy the creditors who by their real securities were entitled to shares. The law took no account of personal debts in this question of insolvency, but left personal creditors to the common remedy of adjudication. As the law now stands, even personal debts must be taken into account, since the decree of sale renders them real, by operating as an adjudication for all creditors whose debts are included in it. It is for the purpose of settling the competency, that the comparison of the value of the lands, and of the amount of the debts, is made the first step in the action of sale at the instance of a creditor. And in order that the comparison may be fair, the most effectual means are taken for comprehending the whole heritable property of the debtor on the one hand, and for securing production of all the debts against him on the other. Thus, both the debtor and the creditor have a mutual advantage, from the strict observance of a rule introduced for quite a different purpose.

1. In order to ensure that all the heritable estate of the debtor shall be included in the action of sale, it was formerly a rule that the lands should all be specially named, and that the omission of any of them should be fatal to the sale.² To put an end to all the delays and inconveniencies attending this state of the law, a rule was made, authorizing a general clause, under which any estate subsequently discovered might be brought to sale.³ No sub-

¹ By 1695, c. 24, an apparent heir may bring his predecessor's estate to judicial sale, whether the estate be bankrupt or not.

² Sir Harry Monro, 1749, M. 13362. Here the omission was of lands to which the debtor had succeeded, but to which he had not made up titles.

The remedy for such an omission was to raise a new action of sale, and have it conjoined with the former. This the Court allowed, though not without some hesitation, in a case

where the debtor's right to the coal in the lands of another was left out of the summons, and not discovered till after the proof was taken in the sale. *Crs. of Mrs. Margaret Balfour*, 1751, M. 13324.

³ By Act of Sederunt, 17th Jan. 1756, sec. 12.

'In respect it may happen that a bankrupt may be possessed of an heritable estate, which either does not admit of an infeftment, or where the bankrupt is not actually infeft, and thereby such estate may possibly escape the knowledge

ject which is included in the securities of the creditors, and mentioned in the summons of sale, can be dropped out of the action and neglected in the proof, without the clearest evidence that it does not belong to the debtor.¹

2. To a due investigation of the debtor's condition, production of the claims is [257] necessary. This is not with a view to the trial of insolvency merely, but chiefly with a view to the safety of the purchaser and the division of the fund. It is enforced by the conclusion of reduction-improbation, contained in the summons of ranking and sale. By Act of Sederunt, 17th Jan. 1756, sec. 1, a term is to be appointed by the judge for the creditors to produce their claims, under the same certification as in a reduction-improbation. Provision is likewise made for the proper advertisement of this term, and for supplying the creditors with diligence for recovering their documents and securities. When the first term expires, a second is appointed, upon the application of the common agent; and the decree of certification is extracted ten days after the expiration of this second term, excluding all creditors who have not then produced their claims.

The process of sale is an Inner House cause, and the Lord Ordinary acts under special remits from the Court, and in a ministerial capacity merely. He prepares the cause for decision by the whole Court, to whom, when the proof is concluded, he reports it. The first step of proceeding taken before the Lord Ordinary is to obtain a warrant for a proof, and for production of the claims. The statute 1681 authorizes a sale only where the debtor is 'notoriously insolvent.' But though the debtor may appear, and may oppose the issuing of a warrant by denying the insolvency, he will not be entitled to quash the proceedings in this stage, without decisive and unquestionable evidence of solvency.²

In ascertaining the bankruptcy, by the comparison of the debts and funds, the rule of the statute is, 'That a judicial sale at the instance of creditors may in all cases proceed, where the interest of the debts, and the other annual burdens, exceed the yearly income of the subjects under sale;' and as in mercantile bankruptcies the creditors have an option of selling the heritable estate by judicial sale rather than by voluntary roup, under direction of the trustee, it is provided that the sale may proceed where sequestration has taken place, 'without other proof of bankruptcy or insolvency.'³

Besides the two ordinary forms of judicial sale, by creditors and by the apparent heir, there is another intermediate sort, called a JUDICIAL COGNITION and SALE; in which the Court, as a court of equity, having the guardianship of minors, interposes where the proprietor is a minor under puberty, and the estate is so overloaded with debt that there is no reasonable prospect of conducting the guardianship so as to save the estate. In such cases,

of the raiser of the process of ranking and sale, and this hath proved very inconvenient to the creditors: For remeid whereof, it is hereby enacted and ordained that every summons of ranking and sale shall contain a general clause, mentioning all other lands and heritable estate belonging to the bankrupt, or to which he may succeed as heir to any of his predecessors; and it shall be competent to the raiser and carrier on of such process of ranking and sale, upon his discovering any heritable estate belonging to the bankrupt, during the course of the ranking and sale, to bring a proof of the rental and value of such lands, and other heritable estate so discovered, notwithstanding they were not specially libelled; providing always, that upon such discovery, and before granting warrant for a proof of the rental and value of the newly discovered estate, application shall be made to the Lord Ordinary in the ranking, and he shall give directions to give notice of the estate being discovered to belong to the bankrupt, and that the same is to be sold as part of the bankrupt's estate, by advertisement in the *Edinburgh Evening Courant* weekly, for three weeks successively; and upon such

notification being reported to the Lord Ordinary, in manner foresaid, he shall grant warrant for proving the rental and value of such new discovered estate, in the same manner as if it had been particularly libelled in the original summons of ranking and sale.' [See *Renny*, 1828, 6 S. 488.]

¹ *Macpherson v Tod*, 1784, M. 13363. [The life interest of an heir of entail is a saleable subject under the process. *Ferrier v Gartmore's Crs.*, 1835, 13 S. 1121.]

² *Cunningham & Co. v Marshall*, 1780, M. 13313. A debtor appeared before the Lord Ordinary, and opposed the issuing of a warrant for proving, upon the ground that he was not bankrupt, the estate not affected by adjudication, and the creditors not in possession. The pursuer answered that the summons of sale stated the bankruptcy, the possession of the creditors, and the real burden in the pursuer's person, and that it was the very object of the proof which was asked, to establish by evidence those facts which the debtor had denied. The Lord Ordinary repelled the objection, and granted warrant for proving, and the Court confirmed the judgment.

³ 54 Geo. III. c. 137, sec. 7.

an action is to be raised at the instance of the pupil and his tutors, calling his next heirs and all his creditors, and concluding that the Court shall take cognition of the value of the estate and amount of the debts, and if necessary, authorize the estate to be sold. The summons must comprehend the whole of the heritable estate, and either in the summons or in a condescendence the whole personal estate must be set forth, that cognition may be taken in proof of the necessity. The grounds of debt, on the other hand, must be produced, and to this the creditors are compelled by the danger of exclusion. On due inquiry, the Court authorizes the estate to be sold, the price to be paid to the creditors, and the reversion, if any, to be secured for the pupil.

The Court at one time exercised a discretionary power in authorizing sales for the [258] manifest benefit of the pupil.¹ But recently the Court has adopted the rule, that such sales are to be authorized only in cases of necessity.²

The process of cognition and sale is proper only to the case of pupillarity; and although it has sometimes been adopted in practice, in order to bring a better price for lands sold by minors and their creditors,³ the Court has refused to sanction the practice, or to interfere, 'the minor and his creditors having power to sell without judicial authority, and no decree of the Court being effectual to prevent a reduction by the minor.'⁴

SUBSECTION II.—TITLE TO PURSUE AN ACTION OF SALE AND RANKING.

1. In sales by CREDITORS, the pursuer must be a 'real creditor;' that is, one who holds a real security over the subjects to be sold. This process was devised for the benefit of those creditors who had already proceeded as far as the common law allowed with individual diligence. A creditor who holds a real security over the lands, either by voluntary deed or by adjudication, can do nothing more than attempt to get into possession; and as that is often unavailing to him, the extraordinary remedy of judicial sale was given. A real creditor is, strictly speaking, one who is infeft in the lands; yet sales have been allowed to proceed at the instance of creditors whose rights were not thus completed.⁵ No such remedy is open to personal creditors. Not having yet exhausted the execution which the common law allows, they are denied the benefit of a remedy intended merely for supplying the defects of that execution. It is only after having adjudged that they can raise an action of ranking and sale; and although at one time it was held necessary that the adjudication should have been completed, it is, in modern practice, sufficient if the creditor have obtained decree of adjudication.⁶

By the statute 1681, c. 17, it is further required, in a sale by a creditor, that the creditor should be in POSSESSION of the estate, the attainment of possession being one of the most obvious means of recovering payment at common law. This expression is not repeated in the statute of 1690, c. 20, nor in any of the Acts of Sederunt made for regulating this action; yet possession is generally held to be necessary. The requisite is complied with—

¹ Vere's Tutors, 1787; *Plummer v his Tutors*, 1757, M. 16358; *Colt v Colt*, 1800, M. 16387, note.

² *Vere v Dale*, 1804, M. 16389. The Court, on the ground stated in the text, reduced the sale formerly authorized in Vere's case. *Colt v Colt*, 1801, M. App. Tutor, No. 1; *Finlayson v Finlaysons*, 22 Dec. 1810, Fac. Coll.

³ 2 Beveridge, Form of Process, 590.

⁴ Wallace, 8 Mar. 1817, Fac. Coll.

⁵ In the Sale of Balcomy, 1699, M. 3096, several objections were taken to the action of sale, and, among others, this was stated against the pursuer's title: 'That it was only an infeftment of annualrent, which is but a servitude, whereas none can pursue a sale but a creditor having a right of property.'

The pursuer, however, contended that an annualrent was, strictly speaking, a real right; and a former case was cited, from the sale of the estate of Nicolson, where that had been sustained. 'The Lords repelled the defence, in respect of the answer.'

⁶ In *Newton v Anderson*, 1729, M. 16115, an adjudication, with a charge against the superior, was sustained as sufficient. And afterwards, a mere decree of adjudication was sustained without a charge of infeftment. *Cra. of Robertson v his Children*, July 1731; *Ouchterlony v Sir George M'Kenzie of Grandville*, 1738, M. 11985. See also *D. of Gordon v M'Pherson*, 1714, M. 16108.

1. By any of the creditors taking natural possession of the lands; or, 2. By the civil possession of an action of mails and duties against the tenants, for forcing them to pay their rents to the creditor who pursues it; or, 3. By a sequestration of the rents. The possession of a part is sufficient to authorize a sale.

2. In sales by APPARENT HEIRS, the apparency alone is a sufficient title to pursue. [259] The statute 1695, c. 24, declares: 'That the said APPARENT HEIR may bring the said estate to a roup,' etc. But as this is a privilege given to an apparent heir only, various questions have been raised as to the right of the heir to raise the action after he has incurred a passive title.

(1.) It was questioned whether the heir did not deprive himself of it, where, by 'behaviour as heir,' he had made himself liable, as the proper debtor, for all his predecessor's debts. The Court decided that the heir was still entitled to pursue a sale.¹

(2.) It was next doubted whether a service as heir in general, '*cum beneficio inventarii*,' did not take the heir out of the description of the statute of 1695; and upon a search of precedents, it was decided that the sale might proceed.²

(3.) Where the heir is actually entered and infeft as heir *cum beneficio inventarii*, he cannot carry on a sale under the Act 1695, c. 24. The common course in such cases is to bring an action of valuation of the estate given up in the inventory before the Court of Session, calling the creditors, and concluding that, on payment of the value as judicially ascertained, the heir may be free from the representation. If in this action there is no opposition, the payment of the value fairly to the creditors is a full exoneration.³ If the creditors, however, choose, they are entitled to bring to sale the estate given up in the inventory, and are not bound to take it at the value judicially put upon it in an action of valuation at the instance of the heir.⁴ The apparent heir entering on inventory may voluntarily sell, where he is not interpellated by any of the creditors, and pay *primo venienti*. If interpellated, he cannot pay safely but under a process of multiplepoinding.

A deed of entail not made by real infeftment, has been held not to bar an apparent heir of line who is a substitute from bringing a judicial sale on account of the debts [260]

¹ Blair v Stewart, 1733, M. 5247.

² Blair, petitioner, 1751, M. 5353. In the search for precedents ordered at determining this case, two were found, one on the 14th July 1742, M'Dowall v Crs. of Kelton, where a disponee from the heir served *cum beneficio* was 'found entitled to bring the subjects of the inventory to a sale on the Act 1695.' The other was on the 30th July 1748, where Andrew Rutherford having raised a sale as apparent heir to his father, the creditors objected that he had been served *cum beneficio*; but the Court found: 'That notwithstanding the pursuer was served heir in general *cum beneficio* to his father, yet it was competent to him to carry on the sale on the Act 1695.' The case is stated thus generally by Lord Elchies: 'Found that sale on the Act 1695 may be pursued, though the pursuer be served heir in general *cum beneficio inventarii*, if he be not served in the lands; *me referente*, without information.' Elchies, Ranking and Sale, 15.

³ Ersk. iii. 8. 69. In the Sale of Kingsgrange the question occurred, whether an heir who had entered *cum beneficio inventarii*, and been infeft in the lands, could bring an action of declarator of sale, containing a conclusion of ranking against the ancestor's creditors. The Court doubted whether such an action was competent, as it was unusual, seemed to be unprecedented, and was unnecessary—the heir himself having sufficient power, without judicial authority, to sell. A search of precedents was ordered, and, in a memorial, the heir stated the cases from Lord Kilkerran, which are quoted

in the preceding note; and in particular, that in the case of M'Dowall, the person whose disponee was there pursuing the sale had been not only served heir, but infeft in the lands, as appeared from the records. The memorial was lodged 8th March 1780. How the question was decided I cannot discover. The minute-book of the Court of Session is not printed of so early a date, and although I have examined the record of decrees I can find no decision of it; but I see that the estate was afterwards sold at the instance of the creditors. 7 Feb. 1786, Rec. of Decrees. [See also Darling's Forms of Process, p. 932, note.]

⁴ In two cases it was held that the creditors were barred from proceeding with a ranking and sale. These were Gray v M'Caul, 1733, M. 5345. The Court found that the heir was entitled to persist in such action, and that the creditors had no option of taking the subjects and making the most of them.

Murray v Pilmuir's Crs., 1736, M. 5346. Such an action was held a complete bar to a judicial sale by the creditors.

But in Strachan's Heirs v his Crs., a solemn hearing was ordered, when these decisions were overturned, and the creditors found entitled to proceed with a sale. 1738, M. 5348.

Lord Elchies says that the Lords, after long and full deliberation, 'found that the creditors have a right to bring the estate to a sale, notwithstanding of the offer by the heir of the proven value.' Elch. Heir Cum Beneficio, No. 1.

of the entail.¹ The objection to such a sale, where the entail has been made effectual, is that an apparent heir is not, like a creditor, obliged to show insolvency; so that, on pretence of debts of the entailor's, which might amount to only a small part of the value of the estate, the heir might succeed in disentailing the lands.

A process of sale by an apparent heir does not infer a passive title.²

3. As applicable to both processes, that at the instance of the creditors, and that at the instance of the apparent heir, it may be observed—1. That where there is a concurrence of the two actions, the process at the instance of the apparent heir is preferred;³ 2. That if the pursuer should die during the course of the action of sale at the instance of a creditor, any other creditor may proceed.⁴ If the sale is by an apparent heir, the Court refuse to authorize creditors to interfere.⁵ But where the pursuer under the Act 1695 died after the sale of the lands, the Court held that the next apparent heir and the purchaser (who also was a creditor) were entitled to carry it on.⁶

4. Where, in a sale by a creditor, there occurs any objection to the title of the pursuer of the sale, not discovered till after the proceedings have been carried on some time, another creditor, whose title is unexceptionable, may adopt the action, and persist in it for the common benefit.⁷ For all actions of competition being, as it were, a congeries of all the actions which otherwise would have been required for the effectual competition of the several creditors, are to be considered, from the moment of other creditors appearing and taking part in them, as truly adopted by them, as in a very different state from ordinary actions, and as not so much depending on the title of the original pursuer, as on the existence of that necessity which occasions the competition. The Court has accordingly allowed sales to proceed at the instance of another creditor, where a nullity in the original pursuer's title has been discovered.⁸

5. If the action began against the original debtor, and he has died during its dependence, [261] the action does not fall; it proceeds after his heir has been called to appear for his interest.⁹

SUBSECTION III.—SUBJECTS LIABLE TO JUDICIAL SALE.

As judicial sale was introduced as a remedy against the imperfections of the diligence of adjudication, it would seem that every subject which is adjudgeable is capable of being

¹ *Mitchell v Tarbutt*, 4 Feb. 1809, Fac. Coll.

² 1695, c. 24; 1 Bank. 418, sec. 34.

³ *Belchies' Crs. v his Apparent Heir*, 1776, 5 Brown's Sup. 561, Hailes 693.

⁴ *Sale of Arkland*, 1750 *Elchies*, Ranking and Sale, 17. It is held to have been with a particular view to the sale at the instance of a creditor, that the Court, in the 4th section of the Act of Sederunt, 23d Nov. 1711, provided that 'if the pursuer of a process of sale and ranking shall during the dependence die, or forbear to insist, or if his title and interest shall happen to be satisfied and extinguished, the factor, if any be, or otherwise any other real creditor, may, upon special warrant from the Lords, take up the process where it left, and carry it on to its final issue, for the common behoof of the whole creditors.'

By 54 Geo. III. c. 137, sec. 10, 'any creditor who is in a situation to adjudge, is entitled to carry on the action of sale to a conclusion, although deserted or abandoned by the original pursuer.' [19 and 20 Vict. c. 91, sec. 4.]

⁵ *Crs. of Hamilton*, 1749, M. 13323.

⁶ Lord *Elchies* reports this decision thus: 'Sale on the Act 1695. The apparent heir, the pursuer of the sale, dying after the lands were sold but before the creditors were ranked, the

next apparent heir and the purchaser, who was also a creditor, joined in a petition praying for a warrant to one or other of them to carry on the action. The Court all agreed that one or other of them had right to carry it on, but were not agreed which of them, and therefore found only in general that the petitioners had right to carry it on.' Ranking and Sale, No. 22.

⁷ [*E. of Dunmore v Dickson*, 1835, 13 S. 1107.]

⁸ In *Blackwood's* case, 1748, *Elchies*, Ranking and Sale, No. 14, the Court first held a sale to be void and null, in consequence of an objection to the title of the pursuer; but afterwards they altered this judgment and sustained the action, with this qualification, that the objecting creditor, who stated a *jus quæsitum* in the annulling of the action, should be heard on his interest.

In the case of *Stewarts*, 29 Feb. 1812, F. C., where the pursuer's debt was discovered to be objectionable, as the bill had been written on a wrong stamp, the sale was allowed to proceed. Had there not been a sufficient principle for this decision, independently of the Act of Sederunt, 23d Nov. 1711, sec. 4, which was founded on, it seems to be a bad judgment under that Act.

⁹ Act of Sederunt, 23d Nov. 1711, sec. 5. [See *Ferrier v Ross*, 1833, 11 S. 531.]

brought to a judicial sale. If the subject, indeed, be of the nature of a debt (as where the bankrupt is creditor by heritable bond, or by adjudication over another estate), the most direct and obvious course for the creditors to take is, after adjudging the heritable security, to force the debtor in the bond to pay, or to bring his estate to sale as if it were the estate of their own debtor. But in the case of leases, liferents, or other inferior or limited rights upon land, the creditors have no other way of obtaining the value of them than by means of a judicial sale.

SUBSECTION IV.—LITIGIOSITY.

The dependence of the action of ranking and sale, considering it as a general process of attachment, has the double effect of preventing any voluntary alienation or security, and of stopping all diligence by individuals.

1. Against voluntary acts to the disappointment of the object of the process, the dependence of the action of sale operates as a complete embargo. But mere citation will not be enough: the summons must be called in court.¹ Not only direct and absolute alienations are barred, but it has been also found, that acts of extraordinary administration, to the prejudice of the principal or accessory rights, the benefit of which it is the object of the process to liquidate and divide, are objectionable. Hence leases at a low rent, or leases granted before the expiration of the current leases, have been held ineffectual. But it has not been held a good objection, that the leases were of long duration, the rent being adequate.² The litigiosity of this action, however, cannot be pleaded in exclusion of creditors whose debts have arisen subsequently to the first calling of the action in court. It required an express provision of the Legislature to exclude creditors subsequent to the date of the first deliverance in mercantile sequestration; but there is no such exclusive provision in the statutes relative to ranking and sale.

2. Formerly a process of sale, even at the instance of an apparent heir, had no effect in stopping adjudications by individual creditors, or preferences from being acquired by those adjudgers, unless the decree of sale had been pronounced within year and day from the date of the decree in the first effectual adjudication. In one case,³ the decree of sale was *within* the year and day of the first effectual adjudication; and the Court found that the sale by the apparent heir, as trustee, 'being *within* year and day of the first adjudication, it ought to be beneficial to all whether they had adjudged subsequent to it or not, and that the whole creditors on the estate were to be ranked *pari passu*.' In a subsequent case an opposite decision was given, where the decree of sale was *beyond* the year.⁴ In a sale by creditors,

¹ See above, vol. ii. p. 144.

² In *Carlyle v Lowther*, 1766, M. 8380, a lease at a low rent, granted after the ranking and sale was in Court, was challenged as an act of extraordinary administration, to the detriment of the creditors, and found ineffectual.

In *York Buildings Co. v Fordyce*, 1778, M. 8380, a similar decision was pronounced in the Court of Session, although the rent was adequate, the leases being of thirty-seven years' endurance. 'The Court was of opinion that, in the circumstances of the company at the time, they had no power to grant the lease in question, and that the long endurance of the lease is sufficient objection to it, though the rent might be adequate. It was observed on the bench, that, after a process of sale is brought, the debtor, even before a petition for sequestration, cannot grant leases for any length of time, for such leases must have a bad effect on the sale; and it was said that the edictal citation is sufficient intimation to all and sundry of the debtor's situation.' In the House of Lords, 16th April 1779, a distinction was taken. There were two cases under appeal: in one, the lease was granted on the expiration

of the former lease, and so was an act of ordinary administration; in the other, the lease was granted during the currency of a former lease, and so was an act of extraordinary administration. The House of Lords supported the lease in the former case, and set it aside in the latter.

³ *Irvine v Maxwell*, 1748, M. 5264. The Court 'considered the decree of sale as an adjudication for the benefit of the whole creditors, being obtained by the apparent heir, who was empowered by law to act as trustee for them and himself; and that being within year and day of the first adjudication, it ought to be beneficial to all the creditors, whether they had adjudged or not.' Lord Elchies also reports the case, under the title of Competition of the Cra. of Blair v Netherwood, *voce* Ranking and Sale.

⁴ *Haldane v Palmer*, 1791, M. 5299. In June 1775 a process was begun by an apparent heir. In September decree of adjudication was obtained by a creditor. The decree of sale was not pronounced for several years after; and it was argued by the general body of the creditors (some of whom had adjudged after the year and day), against a preference

not only was there no stop to adjudication, but adjudications were *required* as necessary adjuncts to the purchaser's title. The contrast between such sales and sales by apparent heirs was drawn in the case of *Massey*.¹ But a most wholesome reformation has taken place in this respect, the Legislature having declared that the effect of the decree of sale by creditors as well as by an apparent heir, shall, as a general adjudication, draw back to the 'date of the first calling of the process of sale;' and that it is to be considered as a general adjudication of that date, all separate adjudications being prohibited during the dependence of a judicial sale.²

It is to be observed, however, that it is not the mere libelling of the summons, or even citation, that will intercept the proceedings of other creditors. It is only from the first calling of the process in court that this effect is produced.

SECTION II.

OF SEQUESTRATION OF HERITABLE ESTATES, AND OF THE MANAGEMENT PREVIOUS TO THE JUDICIAL SALE.

NATURE OF THIS PROCESS.—Before the action of judicial sale was introduced, a creditor, who by the older law might have been excluded from the possession by a prior adjudger, or by any other real creditor, was entitled to apply to the Court of Session to have the property sequestrated, and the possession given to a factor, accountable to all the competitors.³ At present, the estate is sequestrated during the dependence of the ranking and sale, in order to preserve the rents, and to have the estate properly managed in the meanwhile for the common advantage.

[263] Sequestration is a judicial assumption by the Court of the possession of property which is in competition before it, that it may be placed in the custody of a neutral person, accountable in court for his management, and sufficiently responsible, in order to be preserved and properly managed, for the benefit of those who shall be preferred in the competition. It is only in consequence of such diligence or competition as shall affect the entire right of the debtor in the subject sequestrated, that sequestration can be justified. Hence the rents, so far as they are attached and subject to a competition, may be sequestrated; or the entire possession of the estate, and its accruing rents, if affected by diligence.⁴

The circumstance which gives power to the Court to sequester is the competition, in which all are before the Court who have a claim to the property,⁵—either where the entire subject belongs to them in common, or where a contest is depending who shall have it preferably, or where the subject is attached by diligence to its full extent, no one of the competitors having obtained possession, or having an exclusive right to it. It follows from this—

1. That if an estate which is attached by creditors, but still in the debtor's possession, be not insolvent, the debtor cannot be deprived of the possession by a sequestration, as long as he continues to pay the interest of the debts.

contended for on the part of the first effectual adjudgers, that the summons of sale was to be held as an adjudication for all the creditors. 'The Lords unanimously found that, in the circumstances of this case, the creditors were preferable, according to the diligences used by them respectively.'

¹ *Massey v Smith*, 1785, M. 8377.

² 54 Geo. III. c. 137, sec. 10. There occurred, under the former law, several bankruptcies of landholders, in which adjudications continued to be led during the whole course of the action of ranking and sale. In one of those cases the debtor would have had a very handsome reversion could it

have been possible to stop the creditors from proceeding with adjudications, but his estates were reduced by these accumulated expenses very far indeed below the amount of his debts. The new regulations will at least prevent the recurrence of so great an evil. [See 19 and 20 Vict. c. 91, sec. 4.]

³ 1661, c. 62.

⁴ *Graham v Fraser*, 1745, M. 14345, and the case of *Gartshore*, there quoted. See below, p. 245, note 9.

⁵ *Ersk.* ii. 12. 56. [Sequestration is sometimes granted, even where there is no action depending in Court. *Anstruther v Anstruther*, 1831, 10 S. 185.]

2. That when the rents fall short of the debts; when there is any interruption to the regular payment of the interest, or any confusion or encroachment on the rights of the real creditors, by the forwardness of individuals wishing to acquire the possession; or a competition for the lands or the possession of them,—it is competent for any real creditor to raise an action of ranking and sale, and, as an accessory of that action, to apply to the Court for sequestration, or even to apply for sequestration without such action of ranking and sale.¹

3. That if a particular creditor be already in lawful possession, he cannot be deprived of it by other creditors insisting to have the rents sequestrated.² This doctrine, however, does not seem to apply to the case, or accord with the object and nature of a ranking and sale, as a process for the general benefit.

4. That although it might be thought that a trustee in possession for the benefit of the creditors under a private trust should not be obliged to yield to sequestration, the Court has held otherwise in a recent case.³

5. Wherever an action of sale is in dependence at the instance of creditors, sequestration of the estate in the debtor's possession is competent.⁴

6. It does not follow necessarily that sequestration may be applied for on the dependence of a sale by an apparent heir, which often proceeds without any bankruptcy. But where there is insolvency, it is now held that sequestration is competent in this case, as well as in a sale by creditors.⁵

EFFECT.—The effect of the sequestration is to give the possession and the administration of the accruing rents to the factor, for the benefit of those whose diligence covers [264] the estate, and to stop all diligence that might otherwise have been competent against the right of possession,—as the attachment of rents, etc.

FORM AND PROCEEDINGS IN SEQUESTRATION.—Sequestration is applied for by petition to the Court in which the contested rights depend. In ranking and sale, which is an action competent only to the Court of Session, the petition is presented to the whole Lords, stating the dependence of the action, and praying that the estate should be sequestrated, and a factor appointed to manage the rents and to take care of the estate.⁶ The application, consistently with the principle of the whole proceeding, was formerly admitted only at the instance of creditors holding real securities.⁷ Perhaps a different rule would be followed now that the process of ranking and sale has become a general adjudication for all the creditors producing interests.

The application may be opposed by the proprietor of the estate, by creditors in possession, or by any one having an interest to keep the rents, etc. open to diligence. 1. The proprietor of the estate may oppose the sequestration, by denying the bankruptcy and the deficiency of the rents. 2. If a creditor have actually attained possession he may resist sequestration.⁸ A creditor, though he neither has attained possession nor holds an heritable security over the lands, may have an interest to oppose sequestration, where there is no general process of attachment and division, in order to accomplish diligence already begun by him, or competent.⁹

¹ *Robinson v E. of Fife*, 1825, 4 S. 134, N. E. 136.

² *Buchanan v Gray*, 1782, M. 14350. And indeed this seems to have been long the established understanding and practice. *Catenach v Fraser*, 1707, M. 14342. [*Munro v Grahame*, 1849, 11 D. 1202; *Watson v Shand*, 1849, 12 D. 394. *Contra*, *Elliot v Pringle's Trs.*, 1843, 5 D. 1875; *Russell v M'Inturner*, 1847, 9 D. 989.]

³ *Maxwell, etc., Crs. of Scott v Russell*, 9 June 1819; *Berry v Anderson*, 1822, 2 S. 97, N. E. 91. [See *Littlejohn v Hamilton*, 1834, 12 S. 451; *Gilmour v Gilmour's Trs.*, 1850, 12 D. 1266.]

⁴ *Paterson v Anderson*, 1764, M. 3691.

⁵ *Blackwood*, petitioner, 1781, M. 14349; corrected by *Campbell*, 1782, M. 14350.

⁶ It would appear both expedient and consistent with the arrangement of judicature in the Court of Session, that the Legislature should authorize this proceeding to take place before the Lord Ordinary on the Bills.

⁷ *Sir James Hall v Crs. of Broomhall*, 1702, M. 14341.

⁸ See preceding page.

⁹ *Graham of Balgowan v Fraser*, 1745, M. 14345. In that case, Lord Pitfour, at the bar, quoted that of *Gartshore* of

OF THE FACTOR.—In the interlocutor awarding sequestration, the Court appoints a factor to manage the estate. This is a point of great importance in the sequestration. The factor is appointed by the Court, but the recommendation of the creditors is followed in this appointment; and the factor finds caution for his faithful administration, according to the rules appointed for his conduct by the Court. An extract of the act of sequestration and factory vests the factor with all the powers which belong to his office.

There does not seem to be any peculiar disqualification for holding this office, that of the Act of Sederunt, 23d Nov. 1711, not being in observance.

As the factor is appointed to take the full intermediate management of the estate for behoof of those concerned, his duties and powers may in general be described as those of an administrator. But it may not be improper to enter a little into detail:—

1. He must recover, or follow the proper measures for recovering payment of the rents, both of those which are in arrear, and of those which arise during his factory. In particular, he must take the proper steps for removing tenants who are in arrear, or forcing them to find security, as pointed out in the Act of Sederunt 1756.¹

2. In removing tenants whose leases are expired, he has all the powers which belong [265] to a proprietor infeft.² But he has no title to raise an action of removing and reduction of a tack as granted contrary to the terms of an entail.³

3. Where the lands are let at a reasonable rent, and the tenant is willing to continue at that rent, the factor must allow him to continue from year to year, unless there be good grounds for believing that at a public auction a rent would be got for them so much higher as to recompense the additional expense.⁴

4. Where the lands will not bring the former rent though exposed to public auction, the factor must apply to the Court for authority to let them at a lower rate; and this the Court permits to be done, on short leases of two or three years.⁵

5. A factor has no power to enter into submissions. This is not a part of the power conferred in the factory; and it would seem that the Court cannot grant such powers to a factor of this sort.⁶

6. The object of the sequestration and intermediate management is only to preserve the subject, not to improve it upon speculative views of benefit to the creditors.⁷

7. In all cases of difficulty with respect to the management, the factor should, in ranking and sale, take the advice of those who are elected by the creditors as their committee of management, and apply to the Court for authority where any extraordinary act of administration becomes necessary. But it is a general rule with the Court, not to interfere with the administration of estates placed under guardianship,⁸ or even in the hands of a factor, in the sequestration of land estates, as it may tend to relieve the factor of the whole-some responsibility under which he is placed, and without the Judges having any opportunity of knowing the full extent of the adverse interest. But in the recent state of agricultural distress, in which an abatement of rent to tenants became absolutely necessary, the Court

Gartshore, who having concurred with some of his creditors in applying for sequestration, a creditor who had not been informed of these proceedings was found entitled to go on with diligence; for, till the subject be completely affected, so as to entitle the Court to take the custody of it for behoof of those who have right to it, the title to proceed with ordinary diligence must be left unrestrained. [See *Robinson v E. of Fife*, 1825, 4 S. 136.]

¹ [See *M'Gregor v Beith*, as to right of action against intruders, 1828, 6 S. 853.]

² *Thomson v Elderson*, 1757, M. 4070.

³ *Whitson v Ramsay & Co.*, 21 Feb. 1807.

⁴ *Edgar v Whitehead*, 1714, M. 4053.

⁵ *Shaw*, 1750, M. 4070.

⁶ *Crs. of M'Dowall v M'Dowall*, 1778, M. 4058. [See *M'Dougall*, 15 D. 776; *Anderson*, 17 D. 596.]

⁷ *Thomas Lawrie of Corkelferry*, supplicant, 1734, Elch. Ranking and Sale, No. 2. Lord Elchies reports this case: 'The subject being a new tenement of land in Edinburgh, never finished or inhabited, the Lords refused to authorize the finishing of it, and to declare the expenses a preferable debt; because, during a process of sale, though it is necessary to preserve and uphold the subject, yet not to ameliorate and improve it.'

⁸ *Anderson*, petitioner, 1822, 1 S. 363, N. E. 340.

were induced to grant their sanction to an abatement by the judicial factor, on evidence of the consent of the creditors interested.¹

8. The factor is bound by Act of Sederunt, 22d Nov. 1711, within six months after the extracting of his factory, to make up a rental of the estate, specifying the arrears, and to lodge it with the clerk of the process, in order to serve as the rule of charge against him. He must make such alterations on this rental as may be necessary, from any increase or diminution of the rents, within three months of the change, and make up a yearly account of the charge and discharge, and lodge it with the clerk, that the creditors may be enabled to check it properly (secs. 6, 7, 8).

9. The factor is of course entitled to pay the necessary expenses of management, but he cannot make payments to creditors without a special warrant from the Court.

10. It is peculiarly the business of the factor to show the lands, or at least to appoint proper persons to show them, that those intending to purchase may have a fair opportunity of examining the subjects, and satisfying themselves as to the advantages or disadvantages of the purchase.

11. When the lands are sold, the factor's duties and management are at an end. [266] He has then only to account for his intromissions, to have his allowance settled, his accounts approved of, the balance paid over and discharged, and an act of exoneration pronounced in his favour, authorizing also the delivery of the bond of caution.

12. If the factor should become insolvent, legal measures must of course be taken to recover from his funds any balance which he may be due; and a warrant will be granted for recalling the factory and interdicting him from levying rents, etc., and for recording the bond of caution, that diligence may be done against his sureties.

13. As the factor is entrusted with the duty of showing the lands, or appointing proper persons for that purpose, he will not be permitted to become purchaser of the lands. It has been settled as a general rule, that in all such cases the possibility of undue advantage is to be avoided by an absolute disability on the part of the person holding an office of trust.²

SECTION III.

OF THE ELECTION, POWERS, AND DUTIES OF COMMON AGENT IN THE SALE, AND OF THE COMMITTEE OF CREDITORS.

The creditors in this, as in all the other processes devised for the accomplishment of a fair distribution, form a sort of corporation, having amidst their individual differences one common interest. For the management of this common interest, and its discrimination from the interests of the individual creditors, two arrangements have been devised—namely, 1. The appointment of a common agent; and, 2. The nomination of a standing committee of creditors.

SUBSECTION I.—OF THE COMMON AGENT.

The judicial sale being a process devised for bringing the estate to a sale, for forcing production of all claims, and for dividing the produce of the estate among the creditors according to their several interests, it is necessary that proper means should be taken for managing the common interest with strict impartiality. For this purpose, a common agent is appointed, who, while the agents of the individual creditors are striving for preferences

¹ *Peddie*, petitioner, 1822, 2 S. 88, N. E. 79; *Robertson*, petitioner, 1823, *ib.* 150, N. E. 137. [See *Brodie*, 1843, 5 D. 1024.]

² See *York Buildings Co. v M'Kenzie* (below, p. 250, note 1),

1793, M. 13367, as reversed, 3 Pat. 378; *M'Kellar v Balmain*, 1817, Fac. Coll., where the same principle ruled the case. [For the same reason, the factor may not act as the paid law agent of the factory. *Flowerdew*, 1854, 16 D. 263.]

to their respective clients, has the duty devolved upon him of watching over the general interest, conducting all the requisite steps of proceeding, seeing that proper intimations are made, the proofs of value fairly taken, the estate brought to sale, and the price divided.

The right of electing agents, factors, trustees, and managers of all kinds is one of the most important to creditors; and it has been the object of all the regulations in such cases to establish, upon good principles, this right of election,—to fix such a criterion of the qualification to elect as may prevent undue elections, and guard against the admission of men who may act with partiality or favour to individuals against the general interest. After an attempt in 1756 to regulate this matter by Act of Sederunt, which left great room for litigation and dispute, to the prejudice of the creditors and delay of the proceedings, a new code of regulations was prepared by the Court, when, under the Bankrupt [267] Act of 1793, they were called upon to deliberate on the ‘necessary regulations for carrying the Act into effectual execution.’¹ It was provided—1. That the Lord Ordinary should appoint intimation of the time and place of meeting for the choice of the common agent to be made in the minute-book, and by one advertisement in the Edinburgh Gazette, at least fourteen days previous to the meeting. 2. That every creditor should be entitled to vote (by himself or his agent), who should have produced his ground of debt, with an oath of verity upon the same (by himself if in Britain, or, if out of the country, with an oath of credulity by his agent), twenty-four hours at least previous to the election. And, 3. That the election should be decided by a majority in value, exclusive of penalties and bygone or current interest (unless in so far as bygone interest shall have been accumulated by a decree of adjudication); and it is declared that, in computing the amount of such debts as consist of annuities or liferents, they shall be estimated at ten years’ purchase of the annuity or liferent. 4. Respecting the qualification to be elected, it is provided: ‘That no person shall be capable of being elected as common agent who is himself one of the creditors;’ that being ‘a conjunct or confident person, with respect to the common debtor,’ shall be a disqualification; that if, after his appointment as common agent, the person named ‘shall act, either by himself or by a confidential person or clerk, as private agent of any creditor or class of creditors, or of the common debtor, in any matter relative to the ranking, or to the division of the price, while the same are in dependence before the Court,’ it shall be an *ipso facto* disqualification.

To abridge the litigation upon such questions, and the staying of proceedings during their dependence, without depriving the creditors of the benefit of discussing a matter which may be important, it is declared that the judgment of the Lord Ordinary shall be subject to review only of the whole Court, and that only once; the person approved of by the Lord Ordinary being in the meantime entitled to act, and the person who is ultimately unsuccessful being liable in costs.

The person officiating as clerk to the meeting for election is directed, by the Act of Sederunt, 11th July 1794, to ‘report the person duly chosen common agent;’ and the common agent, when chosen, ‘shall take an oath *de fidei administratione* before the Lord Ordinary, at the first calling of the cause after his election is confirmed.’

Where there is any bar to the proceedings, the election will of course be stopt, or, even after the common agent is elected, his nomination will be recalled,—as where the creditors had agreed to supersede proceeding in the ranking, and to settle the bankruptcy by a private trust.²

Without pretending to lay down all parts of the common agent’s duty, it may be proper to take notice of the more important:—

1. ‘After his nomination is confirmed by the Lord Ordinary, he shall take the most effectual steps for ascertaining the nature and extent of the subjects belonging to the

¹ Act of Sederunt, 11th July 1794.

² White, 1823, 2 S. 337, N. E. 297.

common debtor, together with the encumbrances affecting the same; in order to which, he shall, if necessary, cause search the public registers, and apply to the Lord Ordinary for letters of first and second diligence.¹

2. In the conduct of the sale, he must be particularly careful to clear up all obscurities, and supply all defects in the debtor's titles,—to make complete searches in order to satisfy the minds of the creditors, his constituents, that they are safe from future questions of relief, and give confidence to purchasers in the title proposed, as unexceptionable. He must not only take care that all the prescribed advertisements be punctually made, but that the [268] sale of the lands should also be advertised in such newspapers as the creditors or the committee of management may think most likely to promote the sale.

3. With a view to the ranking and division, he must, immediately after his being confirmed, apply to the Lord Ordinary, 'to assign a second term for the whole creditors of the bankrupt to produce their claims, with the vouchers thereof, with certification that what shall not be produced shall be held false and forged;' ² and notice must be 'given of the second term, by advertising the interlocutor in the Edinburgh Gazette, weekly, for three successive weeks immediately following the date of the foresaid interlocutor.' ³ These notifications being reported to the Lord Ordinary, a minute made thereon is to be held as sufficient evidence of the said notice against all parties concerned.

4. Upon elapsing of the second term so assigned, he must apply to the Lord Ordinary for decree of certification *contra non producta*, and have the extract made as soon as possible after the expiration of ten days from the date of the judgment.⁴

5. He must then make up a full state of the debts and claims of the creditors, and of the objections thereto, and the questions thereon, distinguishing those objections or questions which go to the enlargement of the common fund, or to prevent its diminution from those which only affect the interest of particular creditors or classes of creditors, in competition with one another; and also suggesting the order of ranking,—which state shall be printed, etc. And if any new interest or objections arise, a supplementary state is to be made up, pointing out the variations thereby occasioned; and in these states it shall be set forth whether there is any probability of a reversion to the common debtor, and in what view, or different views, such a prospect arises.⁵

6. The common agent is required to keep a minute-book of his proceedings, and of his official correspondence, open to the inspection of all concerned.⁶

These are all the particulars specified in the Acts of Sederunt relating to the office and duty of the common agent. What remains may be comprehended in one general proposition, viz. that his duty is to superintend, for the common interest, all the proceedings in the action, to conduct the sale, to call the factor (if there be a sequestration) to account, to prevent any of the creditors from gaining an advantage to the prejudice of the general interest, to prevent undue delays, and to discuss all questions in which the creditors or the funds are concerned.

That there may be a more complete check over the proceedings of the common agent, it is appointed in the Act of Sederunt 1794, that minutes of the state of the process shall be periodically printed.⁷ The object and intention of those periodical minutes have been ill understood in practice. It has been the custom to print most voluminous states, which do not in truth serve the purpose of explaining clearly the situation of the process and

¹ Act of Sederunt, 11th July 1794, sec. 6.

² Act of Sederunt, 17th Jan. 1756, sec. 3.

³ Act of Sederunt 1756, sec. 3; Act of Sederunt 1794, sec. 1. There is in this section a very awkward omission of the advertisements of sec. 2 of the Act of Sederunt 1756. This, however, may be considered as supplied by the reference to the Act of Sederunt, 9th August 1735.

⁴ Act of Sederunt, 17th Jan. 1756, sec. 4.

⁵ Act of Sederunt, 11th July 1794, sec. 7.

⁶ [The debtor is entitled to inspection. *Farmer v Rose*, 1836, 14 S. 559.]

⁷ Act of Sederunt, sec. 14.

the causes of delay, while the expense upon the funds is enormous. Some new regulation on this subject is required.

It is declared by sec. 5, that the common agent shall at all times be obliged to answer for his conduct, on summary application to the Court, at the instance of any party interested; the Court being entitled, upon cause shown, either to remove him from the office of common agent, and to appoint a meeting of the creditors to choose another, or to give such other redress as the circumstances of the case may require.

[269] The common agent cannot lawfully be purchaser at the sale. This question was fully tried in the case of the common agent for the York Building Co., in which some difference of opinion arose in the Court of Session;¹ but both in that case in the House of Lords, and in many similar cases since tried both here and in the English courts, it has been held that all such questions ought to be disposed of on one general principle, which shall exclude the possibility of collusion and clandestine advantage, no court being equal to the investigation and ascertainment of the truth.²

SUBSECTION II.—OF THE COMMITTEE OF CREDITORS.

The committee of creditors, introduced by the Act of Sederunt 1794, seems to have been intended merely to exercise a superintendence over the common agent,³ in order to prevent unnecessary delays. It consists of three of the creditors, or agents for creditors; who are to be appointed at the same meeting at which the common agent himself is elected. The only duty specifically pointed out for them in the Act of Sederunt is, to inquire into the reasons of delay, if the proceedings are not finally closed within two years after their commencement, and to have these stated in a printed report or minute. But they perform the duties of a standing committee for advising the common agent in all difficult points of management, and giving notice to the creditors of any important crisis requiring their united deliberations.

SECTION IV.

OF THE SALE OF THE LANDS.

In conducting the sale, it seems at one time to have been the practice to expose the whole estate together; and it must therefore have been an object of considerable import-

¹ *York Building Co. v M'Kenzie*, 1793, M. 13367. Upon a search of the records in that case, it was found that, since the year 1756, common agents had been offerers in no less than one hundred and thirty-five sales, and had become purchasers in eighteen instances. But it was contended—1. That a common agent, as being himself the seller, could not become the purchaser. 2. That it would be most dangerous and inexpedient to permit him to do so, as too strong an inducement to his misleading the creditors. The Court first decided that, 'in respect the defender was common agent when the sale of the two lots of Seaton in question took place, the sale must be reduced.' They afterwards decided in his favour, on the ground that there was no legal disability in his situation as common agent. In the House of Lords the sale was set aside. 3. Pat. 378.

As to the ground of that determination, the following statement has judicially been made by Lord Chancellor Eldon:—'We have heard much of the case of *M'Kenzie*. I well recollect that Lord Thurlow never thought there was any ground of reflection on the conduct of Mr. *M'Kenzie*. I

think I was counsel in the case; and it was a surprise upon us that the imputation was made, as it had been stated that one of the judges of the Court of Session had purchased property sold in the course of a cause in which he had acted as judge. But this House thought upon a great principle, applicable to the high as well as to the low, that as persons in these situations had an opportunity of knowing a great deal more about the subject than others, of which, though honourable men would not, yet men less scrupulous might, take an improper advantage, persons in such circumstances ought not to be permitted to deal for the property at all.' 4 Dow's Reports, p. 379.

² See this question resumed under Mercantile Sequestration, where the leading English cases will be found collected. See 2 Brown's Cases in Chancery 400, for an elaborate note on this question. [The Court have recently refused to appoint a judicial factor to carry through a sale for the purpose of enabling the heritable creditor exposing the subjects to become a purchaser. *Stirling's Trs.*, 1865, 3 Macph. 851.]

³ See Act of Sederunt 1794.

ance that the sale of the clear property should not be hurt by any combination with questionable rights.¹ But these dangers do not affect creditors, since the practice has [270] been introduced of exposing the estate in such divisions or lots as seem to promise the most advantageous sale. The rule now is, that all the debtor's property, whether of doubtful or of clear right, must be exposed to action, either together or in lots, as may be deemed most expedient.²

SUBSECTION I.—PROOF OF THE VALUE OF THE LANDS.

The proof of the value of the estate, for the double purpose of ascertaining the bankruptcy and fixing the upset price, is one of the first steps in the action.³ To prevent collusion in the proof of the rental and value of the estate, it is provided by Act of Sederunt, 24th Feb. 1692, that any creditor appearing and producing a real right shall be allowed to concur with and insist in the action along with the creditor who pursues it. The common debtor himself may also appear and adduce witnesses.⁴

A proof of value, with all the appointed precautions, has been deemed so essential, that the Court have refused to allow a small piece of ground which gave less than £100 Scots of rent, to be added to the upset price, at a value agreed on both by the debtor and by the creditors.⁵ This, perhaps, was too strict.

1. In order to prove the value of the lands, it is necessary that the feu-duties and other deductions from the rental should be known, and for this purpose that the pursuers of the sale should have possession of the title-deeds. Indeed this is necessary also on another account; for as far as possible all defects in the progress of titles must be supplied, that the purchaser may be satisfied, and the estate have a fair chance of drawing a full price at the sale. To get possession of the title-deeds was, however, in the days of Lord Fountainhall, a matter of considerable difficulty. 'The great difficulty' (says he) 'which creditors meet with is to recover the charter-chest and writs of the lands, to instruct the holding and *reddendo*, and to satisfy a buyer of the sufficiency of the progress; for bankrupts abstract the writs, and lodge them in obscure corners, till they make their bargain and get a sum of money from the creditors to produce them.'⁶ It is by the force of the first and second diligence, for which the Lord Ordinary grants warrant in the interlocutor [271] allowing the proof, that the title-deeds as well as the documents of the creditors' claims are recovered. Where the title-deeds are in the repositories of a person deceased, a

¹ In the case of *Ramsay of Laithers*, 1712, M. 13326, 'the Lords saw that the Acts of Parliament ordained the bankrupt's whole estate to be roup'd; but thought this could be only understood of his clear, liquid, and undoubted property, but not of uncertain claims and claspers he might have on other men's estates, and therefore allowed the roup to go on without including the questionable lands, or else that they might be exposed to sale separately by themselves. And here a new difficulty occurred, what price or value could be put on such dubious claim? for it was not to be expected they could sell at eighteen, nineteen, or twenty years' purchase, as clear lands did.'

² *Macpherson v Tod*, 1784, M. 13363.

³ The days of execution being elapsed, and the returns of the execution produced, the summons is in common form called in court; and when it comes before the Lord Ordinary, he pronounces an interlocutor, allowing a proof to be taken of the rental and value of the estate and of the bankruptcy of the debtor, and granting a commission to the Judge Ordinary, or some proper person, to take the proof; and this he accompanies with a warrant for letters of diligence for en-

forcing the attendance of witnesses, and of persons possessed of papers and documents. Act of Sederunt, 17th January 1756, sec. 1.

⁴ In the sale of Lord Dundonald's estates, he was allowed thus to interfere in the valuation of the woods of Culross and the old walls of the Abbey.

⁵ *Sale of Greenyards*, 1750, Elch. Ranking and Sale, No. 19. Lord Elchies reports the case thus: 'In a ranking and sale of the estate of Greenyards, a small piece of ground possessed by the bankrupt, about £93 Scots of rent, being overlooked in taking the proof till after the letters of publication were executed, though the creditors and bankrupt concurred in praying to add it to the price without any new letters of publication, but only to adjourn the roup, yet we could not agree, but ordered a proof of the ground omitted, and new letters of publication; for though, after once exposing to sale, we often lower the price without new letters of publication, yet we never increase the price by reason of a subject omitted.'

⁶ 2 Fount. 729.

warrant for opening the repository is given;¹ and where they are in the hands of an agent, the Court will order him to deliver them up on the conditions for which, by his right of retention, he is entitled to insist.²

2. The rental is proved by the evidence of the tenants and the tenor of the leases, attention being paid to any peculiarity in the leases, as *grassums*, and to the value of lands in the neighbourhood.³ If the lands be in the natural possession of the debtor, recourse must be had to the proper evidence for ascertaining the produce and fair rent per acre.⁴

3. After the rental is fixed, the value of the land, the number of years' purchase at which it may be expected to sell, is commonly ascertained by the evidence of respectable men of business acquainted with the part of the country in which the lands lie, and whose attention has by their profession been naturally directed to such kind of information. And the Court has refused to allow the proof of value to proceed in Orkney, where the lands lay, where alone the peculiarity of this situation could be known.⁵

4. Difficulties, however, may sometimes occur in the valuation of particular subjects. The following rules are delivered by Lord Kilkerran:—1. Services due to the debtor by his tenants, etc. are not to be valued, unless the debtor has in the tack an option of requiring money. The like judgment was pronounced as to poultry, even where the tenant was in use of paying a conversion for them (23d February 1749); and also as to coal-leading, shearing, harrowing, tilling (27th July 1749, Cochran), 'though the tilling particularly,' says Lord Kilkerran, 'be of a considerable and determinate value.' 2. 'Where teinds are not saleable, and not in tack, no value at all is put upon them in a sale, on account of the kindly right to obtain a tack; but where teinds are saleable, though not in tack, five years' purchase is put upon the kindly right; and where unsaleable teinds are in tack, the value is according to the endurance of the tack,—that is, the tack is supposed to be worth three years' free teind, and the years to run are rated at a proportion thereof: and so it was found.'⁶ The pasturage of sheep was deducted in one case, but afterwards the Court ordered it to be valued.⁷ In the valuation of liferents, the value must be taken at the market-price of a liferent of the same extent, equally well secured, according to the tables of life.

5. The valuation of estates subject to liferents is attended sometimes with difficulty. There are two ways of making up the value: to find, either what is to be paid at the [272] termination of the liferent; or what should be paid instantly, with the burden of the liferent. The Court thought the subjects should be valued both ways.⁸

¹ M'Gillivray, 1750, M. 13353.

² See above, vol. ii. p. 108.

³ Lord Fountainhall makes the following remarks upon this subject, vol. ii. p. 729: 'There is no such difficulty in constituting the rental as in recovering the title-deeds, for the tenants' oaths or tacks do that, unless where the estate is in the debtor's own hand; for that puts creditors to prove the sowing and increase, what it might produce if laboured, and if grass, how many souns of cattle it could hold. As to the price which such lands may give in that part of the country, the Lords have very justly refused to allow any witnesses to depone upon it but only landed gentlemen in that shire, what lands of that holding used to give betwixt buyer and seller; and by their testimonies they (the Lords) set a price, even somewhat within, to encourage bidders.'

⁴ [The valuation roll would probably be held to fix the value.]

⁵ Cromarty and Factor, 1822, 1 S. 561, N. E. 512.

⁶ 23 Feb. 1749, Kilk. 471.

⁷ Lord Elchies reports the matter thus: 'Capons, poultry, and carriages deleted out of the rental, because not converted. *Item*, a privilege of pasturing ten sheep. 17 Nov.

1733. But in another sale, in February 1742, pasturage of sheep was ordered to be valued and added to the roll.' *Voce Ranking and Sale*, No. 1.

⁸ Lord Elchies reports this case: 'In a process of sale of two houses subject to a liferent, valued, the one at nine, and the other at ten years' purchase, payable at the determination of the liferent, they were put up to sale several times, and none appeared to offer; and all the creditors applied to have them set up at two years' purchase, the purchaser to have the burden and hazard of the liferent, and said, that though the heir was not in the country to give his consent, yet he could sustain no prejudice, because the debts far exceeded the value of the subjects. The Lords refused the petition, because without precedent; but several thought it would be a very proper regulation in valuing subjects to be sold that are subject to liferents, to value them both ways, that is, the price payable at the determination of the liferents as is now practised, and the price to be paid instantly, or at the first term, and the buyer burdened with the liferents,—to be sold either way, at the option of the creditors, to draw that part of the price, and as purchasers should offer.' *Crs. of Roderick Chalmers*, 1752, Elchies, Sale, No. 9.

6. The holdings and *reddendos* are stated from the title-deeds, and the necessary deductions made from the rental. Questions sometimes arise as to the effect of an erroneous deduction, whether it forms a separate estate unsold, or whether the purchaser be entitled to claim the benefit of the mistake, and to hold the subject free from the deduction. Of this, below.

7. If, in an action at the instance of creditors, the value of the estate as proved should exceed the amount of the debts, there is properly no bankruptcy; but the rule of the Act of 54 Geo. III. c. 137, sec. 7, is, that the sale may proceed where the interest of the debts, and the other annual burdens, exceed the yearly income of the subjects under sale.¹ Where an heir brings the lands to sale, after the creditors have abandoned their action, he is allowed to take the benefit of the proof in the former action.²

The proof of the value is stated, along with the amount of the claims, in a memorial and abstract, which is reported to the Court by the Lord Ordinary, for judgment on these two points: 1. Whether there is insolvency? and, 2. What ought to be fixed as the upset price at the public sale? At the enrolment, therefore, before the Lord Ordinary, for the purpose of taking the cause to report, parties may appear and show, either that the bankruptcy is not established, when the action must fall; or that the value is not fairly estimated, so as to be a fair criterion of the upset price.

The price is fixed at the number of years' purchase which the proof fairly entitles the Court to take as the reasonable value to be put upon the lands. But it may happen that the price has been fixed too high, either from ignorance on the part of the witnesses, or from accidents between the fixing of the price and the sale, which may prevent the lands from selling at the upset price. The statute of 1690, c. 24, provides only one remedy for the accident of a purchaser not being found, which is, to divide the lands among the creditors according to their respective preferences and rights; but as this left creditors to all the evils of the common law,³ the Court listened to the only proposal which could relieve [273] the creditors, viz. the lowering of the upset price.⁴ The reduction of the upset price is a matter of daily practice now, care being always taken to advertise, with the same precision as at the first, the adjournment of the sale and reduction of the price.

¹ If the debtor himself should consent to the sale proceeding, surely the Court would be entitled to give their sanction. [See 19 and 20 Vict. c. 91, sec. 3.]

² Case of *Brownlee* in 1771.

³ Lord Stair says (B. iii. tit. 2, sec. 55): 'In case there be a division, the creditors have their choice of the lands effeiring to their share; but the Lords will not allow fractions, but whole rooms (farms) to be chosen, the excresce to make up the price being paid out, to be divided proportionally, and the choice to be made by the apprizers and adjudgers, according to the date of their apprizings or adjudications; but if there be more persons who have right to the same appricing or adjudication, they must have preference of their choice by lot, and none may choose in the middle of contiguous lands, but at a side.' Lord Fountainhall says: 'That where a buyer cannot be got, then the Act of Parliament ordains the lands to be divided among the creditors according to their respective preferences on their diligences, and which happened in the case of *Bruce of Kennet's Crs.*; but such inextricable difficulties arose, that it is not adjusted to this hour, seeing particular rooms will not answer to particular creditors' sums; so they are forced to stay in an involuntary communion, by dividing the rents of the lands, without getting the property ascertained and parcelled out to them conform to their preferences. 2 Fount. 729.

⁴ *Hamilton of Wishaw*, 1709, M. 13319. This related to the sale of Cleland. The Lords had fixed the upset price at nineteen years' purchase, but no offerers appeared, for the price was thought high, and the holding was not eligible. The creditors therefore applied to have the price lowered, and the Court made an abatement, taking care to order new intimation of the sale. It was contended that the law had provided the remedy of dividing the lands among the creditors. 'But the Lords remembered that this division had been attempted in the case of *Bruce of Kennet* and others, and was found utterly impracticable; and then observed, that the probation of the value of lands was only founded on credulity and opinion, some neighbouring gentlemen deponing they thought the lands worth so many years' purchase, wherein the Lords themselves were as good judges as they; and finding here, from the holdings and other motives, a just ground of abatement, they brought down the price to eighteen years' purchase; but, for intimation to the lieges, they ordained new letters of publication to be executed before they should be again exposed to sale at that price.' 2 Fount. 512.

In speaking afterwards (p. 729) of this decision, Lord Fountainhall says, 'It was a great step.'

SUBSECTION II.—PLACE, AND TIME, AND NOTICE OF SALE.

1. Judicial sales always proceed in presence of the Lord Ordinary, in the New Session House at Edinburgh. Sometimes it may appear that it would be more advantageous for all parties to expose the lands elsewhere, but it never is done. An application to have this done was made, and refused.¹

2. The sale is fixed at the time most likely to give a fair chance for a good market. This of course is during the time of session, when men of business are in town, and attentive to matters of this kind. There seems not to be any absolute incompetency in a sale during vacation, since it always proceeds before the Lord Ordinary on the Bills; and it is said that in one case such a sale was held good.² But the Court was struck with the danger of such proceedings; and although no Act of Sederunt was made against the practice, it was resolved that it should never be repeated.

When, on the report of the Lord Ordinary, the sale is allowed to proceed, a warrant is issued by the Court for letters of publication to pass the signet. This is a writ in the king's name, signed by a clerk of Session, and containing an order upon messengers-at-arms to make intimation to all and sundry of the intended sale. Certain forms of publication were laid down in the original statute of 1681.³ But these forms of publication were found to be enormously expensive compared with the benefit derived from them; and the Legislature directed the Court of Session to devise some more effectual publication, at less expense. Accordingly, by Act of Sederunt, 13th Nov. 1793, the Court of Session 'appointed and ordained that, in time coming, it shall be sufficient to execute the letters of publication at the market-cross of Edinburgh, and pier and shore of Leith, and to intimate the interlocutor of the Court granting warrant for such letters by an advertisement in the newspaper entitled the Edinburgh Gazette.'⁴ This is all the advertisement of the sale that is required [274] by law; but the practice is to advertise the sale very carefully in all the Edinburgh newspapers, sometimes even in the English newspapers, and especially in any newspaper published in the part of the country where the lands lie. This it is much the interest of the creditors to order the common agent to do, that the market may be more extensive, and that they themselves and the purchaser may be better secured against any claim of eviction.

SUBSECTION III.—OF PREPARATIONS FOR THE SALE; ARTICLES OF ROUP; AND CONSIGNATION AND DISCHARGE OF THE PRICE.

In preparing for the sale, it is the duty of the common agent to have everything in such order as may give to persons intending to purchase the most complete information respecting the situation of the estate, the state of the title-deeds, etc. He also must have the articles of sale prepared, that purchasers may examine the conditions upon which their offers are to be made.

¹ Colquhoun of Kenmure, 1712, M. 13320.

² This case is said to have occurred some time about the year 1781, but it is not reported.

³ The sale was to be published at the head burgh of the shire where the lands lay, at the kirk of the parish, and at six other parish kirks (to be named by the Court), at the dissolving of the congregation after the forenoon's sermon, and at the market-cross of Edinburgh, pier and shore of Leith. Special intimation was also necessary to the creditors holding real rights. The publication at the market-cross, pier and shore, was ordered to be made sixty days before the sale, and the personal citation to real creditors twenty-one days before it. Copies also of the intimation must have been left at the different places. See above, p. 236.

⁴ [By Act of Sederunt, 24th Dec. 1838, it is enacted that the practice of granting warrant for letters of publication in processes of sale shall cease, and that, instead of the intimation of sales now in use to be made by virtue of such letters at the market-cross of Edinburgh, and pier and shore of Leith, it shall be deemed sufficient intimation to all concerned, that at least four weeks' notice of the day of sale shall be given in the Edinburgh Gazette, and at the Edictal Citation Office in Edinburgh. See the Act for further provisions as to advertisements, and cases of *M'Gregor v Stirling*, 11 S. 138; *Hope v Moncreiff*, 11 S. 324; *Patten*, 13 D. 1219; *Melville*, 16 D. 419.]

PLANS of the ESTATE are proper or necessary, in which the lots must be distinguished as they are to be exposed to sale. A purchaser may in this way see the situation of the part for which he wishes to offer, and has an opportunity of examining whether the title-deeds be correctly applicable to the respective lots into which the lands may have been divided.

INVENTORIES of the TITLE-DEEDS of each lot must be made up, to be signed by the Lord Ordinary, stating the whole progress of the titles, so as to enable a purchaser to satisfy himself of his safety. The title-deeds themselves must also be accessible to purchasers.

The ARTICLES of SALE are made out by the clerk to the process of sale, and revised by the common agent. They are generally drawn up in one uniform style. But one important clause deserves particular notice.¹ It is stipulated that the highest offerer is to be bound to find security for the price, with interest from the term of entry, within thirty days after the sale; and 'that in case the highest offerer for any of the said lots should fail to find caution within the aforesaid space, then the next immediate preceding offerer is to be preferred to the purchase—he always granting bond, with a sufficient cautioner, for payment of the price offered by him, in terms above written, within thirty days after the failure of the next immediate highest offerer; and in case he likewise fails to find caution within the limited time, then the other offerers to be preferred in their order, they finding caution, as said is; without prejudice to the creditors to insist against the several offerers for the surplus price offered by them respectively, more than the price offered by the offerers who shall find caution; as also, the penalty aforesaid for not finding caution—intimation being always made to the preceding offerers, on the several offerers above them failing to find caution, and that within ten days after the purchase has devolved upon them respectively.'

1. If no such article were inserted in the conditions of sale, the exposers would, upon failure of the highest offerer to pay the price, or to find security for it, have a right to annul the sale, to expose the estate again, and to claim from the person preferred the damage arising from his breach of contract. It was to avoid the delay and expense of this, that the above condition was devised and adopted, declaring every bidder in his turn liable, in the order of the amount of his bidding, to have the purchase fixed upon him at the sum which he had offered; the difference between that and the highest offer, with the expenses, being demandable from the bidder who fails to perform. This expedient, adopted [275] for the benefit of the exposers alone, is attended with no inconsiderable hardship to persons who bid at the sale. Even the second highest bidder may in this way be precluded from becoming a bidder for any other estate during at least forty days, as he would be liable to have two purchases fixed upon him; and the bidders under him must each be disabled from the free employment of their capital for still a longer time. No case has occurred in which the question purely as between the exposers and the second bidder came to be determined; as, for example, where the price of the land had risen so much in value that the creditors might derive great advantage from again exposing it to sale, or where accidents had concurred to prevent competition when the lands were first sold, or where the highest bidder was unable to pay the difference between his offer and the next in amount. In such cases as these, it is very doubtful whether the exposers have a right to insist on re-exposing the lands to sale. It has indeed been the prevailing opinion on the bench, and taken for granted in all cases where this clause was brought into question, that the exposers have this right. But although the terms of the condition may justify that opinion, much is to be said in support of a *jus quæsitum* to the other bidders; and it will be observed, that the reports of the cases are expressed as if the question had been with the exposers, while they were only between the bidders.

2. But whatever may be the right of the other bidders, where the exposers do not make

¹ See below for Clauses affecting the Title, p. 262.

election to hold them bound by their offers, it is settled, that where the exposers have, under the provision of the above clause and within the prescribed term, intimated to the second offerer that the purchase has devolved on him, from that moment the second offerer has full right to the purchase. In the first case of this sort, indeed, the second highest offerer claimed right to the purchase, in consequence of the failure of the highest; but the exposers had made no demand on him as a second bidder, and the Court found him not entitled to insist for the purchase.¹ But a different judgment was pronounced where the common agent had made a call on the preceding offerer.²

3. The responsibility to the creditors on the part of the highest offerer for the difference between his offer and the second, may at first sight appear to be of the nature of a penalty [276] or damages. It is now, however, fixed clearly, that it is not so, but a proper debt, arising by contract.³

4. From the nature of this contract, each offerer at a judicial sale has a strong interest to insist upon the offer that succeeds his being recorded in the minutes of the sale; for if an intermediate offer shall be omitted, he may, upon failure to find caution, be called upon to pay a difference much greater than otherwise he would have been bound for.

As no man purchasing a large estate can be supposed to have the money ready to be immediately paid down, it is necessary that the exposers should accept of security till it be possible for the purchaser to command his money. The clerks of Session are bound to satisfy themselves with the security offered, and are liable, if they take a man who is not at the time sufficient for the price. But even if the cautioner should afterwards fail, and the purchaser be unable to pay, still the land itself continues bound to the creditors till the price shall be paid, or their debts discharged. The statute of 1681, c. 17, declares the sale effectual only upon payment of the price; and by 1695, c. 6, the lands are declared

¹ *Walker v Gavin*, 1787, M. 14193. The question here was between the two bidders, the exposers not being parties.

² *Hannay v Stothert*, 1788, M. 14184, Hailes 1046. 'The Court,' says the reporter, 'in giving judgment against Mr. Hannay, the highest offerer, were principally moved by the intimation that had been made to the immediately preceding offerers. It was observed, that although the readiness which Mr. Hannay had shown to rectify the error into which he had fallen might have the effect, in a question with the exposers, to relieve him from the penal consequences, those whose offers were next to his, by being called on to perform their part of the agreement, had thus acquired a right to demand reciprocal performance, which no equitable consideration in favour of third parties could take away.'

Another case occurred in 1799 similar to that of Walker. In a sale, certain lands were purchased by Mr. Boswell, and the Earl of Dumfries was the immediately preceding offerer. Mr. Boswell signed the bond, but by accident his cautioner did not receive it for his subscription, so that it could not be presented till after the expiration of the term; and an application was made to the Court for their authority to its being received. The application was opposed by the Earl of Dumfries, who claimed his right as second purchaser. One of the judges observed, upon the moving of the petition, that the Court proceeded, in the case of Hannay, upon the general principle that this clause in articles of roup forms a proper contract or condition, not a penalty, and that failure to perform gives a double right—1. To the creditors the alternative of a new sale, if that should be thought beneficial for them; or a call upon the second offerer as purchaser, and upon the highest offerer for the difference between the offers. 2. To the preceding offerer a right, if the old sale should be adhered

to, of insisting upon being preferred as a purchaser, leaving it to the creditors to claim the difference from the highest offerer. His Lordship also said that, in so important a question, it was proper to have a full discussion, and moved for additional papers, which were ordered, and the parties desired to examine the precedents. But the cause was compromised, and no papers were ever given in.

³ *Currie's Crs. v Hannay*, 1791, M. 3162. In the case above alluded to (*supra*, note 2), where the succeeding offerer was preferred, an action was raised by the creditors against the highest offerer for the difference between the highest and the second offer, which was no less than £290. Mr. Hannay, the highest offerer, argued chiefly upon the ground of this being a claim of damage or penalty, which is demandable only if an actual loss can be shown to have arisen; whereas the truth was that, by his interference, the price of the lands was very much advanced. To prove which, he printed an analysis of the offers, by which he showed that the sums at which the competition ceased with all but him were £20,940, whereas the amount of the offer which was resorted to on his failure was £23,210—making a difference, in consequence of his having offered, of £2270. But the answer to all this was, that this was a fair and proper contract, by which the exposers were to be assured of the highest price offered at the sale; the highest offerer being bound, upon failure, to pay at least the difference occasioned by that failure, so that the exposers should not suffer. The cause having been reported to the Court, they gave judgment for the difference.

Johnstone's Trs. v Johnstone, 1819, Fac. Coll. The damage was found to be the difference between the bidder's offer and the sum ultimately received, but so as never to exceed the penalty stipulated.

disburdened of the price only upon payment to the creditors, or upon consignment. But it is a fixed point, that a 'sale does not purge the estate of the debts and diligences affecting the same. They remain a burden upon the estate until the purchaser make payment of the price.'¹ If, therefore, the purchaser and his cautioner should fail, the creditors are entitled to sell the lands again.²

The creditors, or the cautioner, or even the purchaser himself, may wish to have the price consigned. It is declared by the Act of 1695, c. 6, to be lawful for purchasers, after a year from the decree of sale, to consign the price, with the annualrent due at the time of consignment, in the hand of the magistrates and town council of Edinburgh, and their treasurer for the time; but this is now changed to a consignment with the Royal Bank, the Bank of Scotland, or British Linen Company,³ the purchaser being freed from his obligation by intimating the consignment to the common agent. The creditors are entitled, at any term subsequent to the term of payment, to insist for consignment. It may [277] be added, that 'because purchasers of lands affected with liferents have retention of a share of the price, the purchaser is allowed to consign what remains in his hand after the decease of the liferenter,' in the same way with the rest of the price, 'he always making due intimation of the consignment to the creditors who got the rest of the price.'⁴

By 1695, c. 6, the purchaser paying the price to the creditors as ranked, or consigning it in terms of law, 'shall be for ever exonerated, and the security given for the price shall be delivered up to be cancelled, and the lands and others purchased and acquired, disburdened of all debts or deeds of the bankrupt, or his predecessors from whom he had right; and the bankrupt, or his heirs, or apparent heir or creditors, without exception of minority, not compearing, or conceiving themselves to be prejudged, shall only have access to pursue the receivers of the price, and their heirs, and reserving to the minor lessee his relief as accords.' For these purposes, a petition is given in to the Court, praying to have the bond delivered up, and the purchaser discharged of the price.

Two questions have arisen here: 1. Whether, although the lands be declared disburdened of the debts, the heritable securities can be kept up as real securities on the estate? The Court held that they cannot; that the judicial sale, and the title grounded on it, give the lands disburdened of the debt as a fund of credit to the purchaser, the conveyance to the debts and securities being merely in fortification of his title.⁵ 2. The other question is of some importance, namely, Whether it is necessary that the creditors, in order to give to the purchaser the benefit of this security arising from the warrandice in the assignation of their debts, are bound not only to enter their claims in the ranking, but to constitute these debts? The Court has held such constitution to be as necessary as if the creditor were a single adjudger; but this determination deserves well to be reconsidered.⁶

SUBSECTION IV.—OF THE PURCHASER'S TITLE; OF THE EFFECT OF STIPULATIONS IN THE ARTICLES OF ROUP; AND OF THE EXTENT OF THE RIGHT.

Questions of great difficulty and importance have occurred with respect both to the title and to the extent of right which is acquired by the purchaser at a judicial sale; and

¹ *Donator of Ward v Crs. of Bonhard*, 1739, M. 16453.

² *Murray, etc. v the Postponed Crs. of Rae*, 1793, M. 13344. The purchaser and his cautioner having both become bankrupt, the estate was again exposed by the creditors, but at a reduced price, which gave occasion to a question in the division, upon whom the defalcation should fall?—whether upon all the creditors proportionally, or only upon those postponed?—a question which will demand our attention afterwards in treating of the rules of distribution. It was observed from the bench, that 'the estate does not effectually belong to the purchaser till he

pay the price. Till then the securities of the creditors remain entire, and, of consequence, the subject continues pledged to the preferable creditors to the full amount of their debts.'

³ 54 Geo. III. c. 134, sec. 6. [Consignment may now be made in 'any joint-stock bank of issue in Scotland.' 19 and 20 Vict. c. 91, sec. 2.]

⁴ 1695, c. 6, and other statutes.

⁵ *Seton's Crs. v Scott*, 1788, M. 13371, Hailes 1054.

⁶ *Scott Moncreiff v Innes*, 1821, 1 S. 73, N. E. 74. See below, p. 261.

the common notions upon the subject are so dangerously erroneous, that it is proper to consider them very particularly.

1. QUESTIONS ON THE PURCHASER'S TITLE.

TITLE OF THE PURCHASER.—On this subject it is proper to observe—1. What is the effect and strength of the purchaser's title in the ordinary case, where no obvious defect in the bankrupt's right occurs. And, 2. How far the creditors can be protected against future responsibility or warrandice where there are defects in the bankrupt's title.

A decree of judicial sale, when properly completed as a feudal title, is regarded as the best and most eligible that a purchaser can receive; and yet many seem to talk of the goodness of such a title, without knowing precisely in what its virtue consists. The right acquired by judicial sale rests upon an irredeemable decree of adjudication; secured against all objection on the part of the debtor, and those deriving right from him, by its judicial nature as a decree, and by the declarations in the Acts of Parliament which establish it; [278] against all claims of creditors, by the extinction of the real securities, and by the decree of certification, which, to the effect of securing the purchaser, holds every debt not produced to be false and forged; and finally, against any claim of eviction from other quarters, by the warrandice of the conveyances to the amount of the debts of the creditors, and the consequent right of recalling from each the sum paid to him. This seems to comprehend all the circumstances of extraordinary security which the purchaser enjoys from this sort of title. Yet it was contended once, nay, actually decided by the Court, that a judicial sale is a title of a much stronger kind; that, being so public an act, so carefully and anxiously advertised, not only by citations, both special and edictal, to all who may be interested, but also by advertisements in the newspapers, and publications of every possible kind, a purchaser should not be exposed to the claims of strangers, in the character of proprietors, since they ought to have appeared before the sale; and that the only remedy for them should be, an action against those to whom the price had been paid.¹ But another view came to be taken of this question, when the true principles were better understood; and the right of a third person, not called as a party in the sale, was sustained against the purchaser.² It is no longer, then, to be questioned, that a judicial sale gives no protection against the claims of third parties whose right is not derived from the bankrupt, and who were not parties in the action of sale. And there seems to be as little doubt, that upon the emerging of any claim which undermines the right that was in the bankrupt, the purchaser would be entitled to suspend the payment of the price until he were relieved from it.

The effect of a decree of sale, then, being confined thus far in its operation, it is next to be seen in what its real strength consists.

Against the **BANKRUPT**, and all deriving right to the lands from him, the purchaser's right is protected by its judicial nature as a decree, by the peculiarity of the proceedings in the action upon which the decree proceeds, and by the declarations of the statutes establishing it.³

¹ *Cooper v Sir Andrew Myreton*, 1720, M. 13348 and 14171.

² *Urquhart of Meldrum v the Officers of State*, 1753, M. 9919. *Urquhart of Meldrum* purchased, at a judicial sale of Sir Kenneth M'Kenzie's estate, a right of patronage. A claim for this patronage was made on the part of the Crown, and the general question of the effect of a judicial sale against the right of a person not called as a party in the sale was debated. The Court found that the right of the Crown was not barred by the decree of sale.

This decision is highly approved of by Mr. Erskine; for 'though the purchaser acquires (says he) all right vested in or descendible to the bankrupt from his ancestors or authors,

it cannot hurt third parties who may have had a right preferable to that of the bankrupt, and who, not being called as defenders, had no access to know of the sale, and, upon that account, no opportunity of appearing for their interest.' B. ii. tit. 13, sec. 33.

³ *Dundas v L. Rollo*, 1739, Elth. Ranking and Sale, No. 5. None deriving right, either from the bankrupt or any of his predecessors, if called in the process of sale, can quarrel the sale. And, therefore, Thomas Wyllie having disposed some houses to his eldest son, Thomas, with reserved powers to alter, and in virtue thereof granted a second disposition to his second son, Henry, whereon he was infeft:—Thomas, the

1. It is of importance that all judgments should be secured against the arts or the undue neglect of those who, although parties to the cause, and having good objections to the proceedings, may omit to state them; or, having stated them, and taken the judgment of the Court upon them, may choose, after everything is settled by decree, to insist [279] for a reconsideration of the cause. In all actions, therefore, it is established as a rule, that claims which might have been brought forward by the parties, but were not, and pleas stated and judged of, are, under the names of 'competent and omitted' and 'proponed and repelled,' to be rejected as grounds of challenge.¹ These rules apply with peculiar force to judicial sales. No plea, 'competent and omitted,' or 'proponed and repelled,' will be allowed to shake the decree of sale, let it be ever so well founded.²

2. In common cases the above rule applies to no plea which arises from facts unknown at the time, *res noviter veniens ad notitiam*.³ Is the same exception admitted in a judicial sale? This question was debated, but not determined, in the case last cited. In considering such a question, the strong line of distinction between a common decree and a decree of sale deserves notice. A common decree is but a judgment of right between the parties, but in a judicial sale, a third party, otherwise unconcerned, risks his money upon the faith of a public sale. In the judicial sale, if the right of any one who appears in the action suffer, it is not the purchaser who gains, as in the common case, where the successful party has the benefit of a decree, for the purchaser pays a full price for the right which he receives. The creditors alone, who have received the price in payment of debts due by the bankrupt, gain by any error; and against them, therefore, the remedy and recourse should lie.

3. The same reasoning is applicable to the case of a decree of sale pronounced in absence of any person who holds a real burden upon the estate sold. In common cases, a decree in absence may be opened up upon paying the expense of the former proceedings; but, upon the principles already explained, it would be of dangerous consequence to allow to decrees of sale no stronger effect. All that can be done is, to ensure to all concerned the best possible chance of intimation that a sale is going on.⁴ With all the personal citations, and modes of intimation which have been thought compatible with economy, the law has given to a decree of sale this peculiar strength and security more than is indulged to common decrees: That although it be pronounced in absence of the debtor, and of those deriving right from him, and so having an interest to appear and object to the proceedings, it shall be secure against all challenge; 'the bankrupt, or his heirs, or apparent heirs or creditors, without exception of minority, not compearing, or conceiving themselves to be prejudged, only having access to pursue the receivers of the price, and their heirs; and reserving to the minor lesed his relief, as accords.' 1695, c. 6.

4. So far the law has given effect to those principles of expediency and justice which may be urged in favour of a *bona fide* purchaser at a judicial sale, and endeavoured to

eldest son, granted some infeftments upon these tenements, and after his and his father's death his brother Henry possessed them; and after his death, the creditors of Thomas, the son, brought the houses to a sale before the Lords, wherein John Wyllie, the son of Henry, was called as apparent heir to his uncle, anno 1726; and a creditor of Henry's now pursues a reduction of the sale as not belonging to Thomas, but to his debtor, from whose heir, John, he has adjudged them. But in respect that Henry's own right flowed from Thomas, the father and predecessor of Thomas the bankrupt, the Lords found that John, the son and heir of Henry, as well as heir of his uncle Thomas the bankrupt, having been called in the sale, neither John nor any of his father's creditors can quarrel the sale, which is agreeable to the words of the Act of Parliament. And on a reclaiming bill adhered.

¹ See regulations for the Session 1672, c. 16, sec. 19.

² Blackwood of Pitreavie's case, 1749, M. 11989. An objection having been moved to a decree of ranking and sale, founded upon the circumstance of the action having been inadvertently carried on in the name of one of the adjudgers who was dead, the Court, in respect that the creditor objecting had discovered a new document, opened up the decree of ranking, so far as to allow him to be heard, but 'found the reason of reduction noways to affect the decree of sale.'

³ Stair iv. 1. 44; Ersk. iv. 3. 3.

⁴ It is of much importance to have an established paper, under public authority, in which all advertisements and intimations of judicial sales should be published. But besides the publication in the Edinburgh Gazette, sales should be advertised in the provincial newspaper of the district, and in other papers of general circulation.

reconcile his security with the rights of those who may be interested to challenge the sale. The claim of relief has been directed against those who have received the benefit, and the purchaser has been in a considerable degree shielded from danger. But no law which encroaches on the rights of individuals can be entitled to a liberal or extended interpretation. [280] And although the statute has expressly provided that minority shall not entitle heirs or creditors to challenge the sale, it remains doubtful, whether, if a person having an interest to object to a sale had been prevented from doing so while the action was in dependence, by insanity or any other incapacity not expressly mentioned in the statute, he would be entitled to reduce the sale, leaving it to the purchaser to seek for relief under the warrandice contained in the conveyances from the creditors? The analogy of the rule as to minority is strong against the challenge in such cases; but where a common law right is to be destroyed, the words of the statute should be clearly applicable. Whatever might be the determination on this question, a purchaser should be exceedingly careful to insist upon searches being made with as much scrupulousness as if he were engaged in a voluntary purchase; while, on the other hand, it is materially the interest of the creditors to see that their common agent shall order such searches to be made as may leave them as little as possible exposed to danger, and which, by giving additional confidence to purchasers, may make the title to the lands more eligible and worthy of a higher price.

The peculiar strength with which the decree of sale is endowed, as it rests chiefly upon the accuracy of the intimations ordered in the statutes, must fail wherever any fundamental defect of that kind can be proved. It does not seem, therefore, to be sufficient (as was argued in the case of Sir Andrew Myreton), that a peculiar provision is made in the very forms of proceeding for a revisal of the whole, prior to the pronouncing of the decree of sale. The purchaser should see that the proceedings are at least *ex facie* regular and unobjectionable.

Against the CREDITORS of the bankrupt, the purchaser is protected by the decree of certification.¹ This decree has the double effect of protecting the purchaser against all latent claims from creditors, and of freeing the field of competition from all who have not appeared. The first of these effects only is to be at present considered. A decree of sale, indeed, even though guarded by a previous decree of certification, is not absolutely effectual and irrevocable, for instances have occurred of decrees of sale having been opened up. But at least there does not appear to be any case where this has been done, in which some peculiar circumstances of connivance or of interested conduct on the part of the purchaser were not established.²

As the purchaser, then, has no protection against claims of eviction from third parties whose rights are preferable to that of the bankrupt, as his right is nothing better than that of the bankrupt himself, and as the Legislature, by introducing a mode of selling the property of the bankrupt, had no design of creating a new estate for him, all that the purchaser has to trust to in this respect is, on the one hand, a strict search of the records, and a scrupulous examination of the title-deeds; and, on the other, the obligation of warrandice contained in the conveyances from the creditors.

WARRANTICE.—Where there is no particular stipulation, the purchaser has a right, upon discovering any defect in the titles of the estate, or any ground of eviction, to suspend the payment of the price. The only other ground of security is, warrandice by the creditors to the amount of their dividends.

The nature of the conveyances by the creditor to the purchaser, and the extent of the

¹ The terms for producing claims are assigned successively: the first in the same interlocutor which orders the proof of bankruptcy; the second, under the strongest declaration, immediately on the expiration of the first; and, after a further indulgence of ten days, the decree of certification is pronounced.

² As, for example, in the case of *Mortimer v Hay* of Mountblairy, Nov. 1757, where the pursuer of the sale was himself the purchaser, and contrived to induce the children of the bankrupt not to appear till the decree was extracted in his favour.

warrantice which they imply, are declared and regulated by Act of Sederunt, 31st March 1685.¹ It is the practice to require from a creditor claiming a share of the price of [281] lands sold by an apparent heir, a constitution of his debt, before drawing his dividend. In a single adjudication, a previous decree of constitution is necessary, if the debt be not liquid, but a ranking and sale is a general adjudication for every creditor whose claim shall be duly entered and sustained in the ranking;² and this is wisely ordered by the more recent laws and regulations, for the purpose of saving to the creditors and to the debtor the expense of separate proceedings. It seems, therefore, inconsistent with the spirit of these laws, and unnecessary according to their words, to constitute each creditor's debt separately. But in a late case the Court held this to be necessary.³

The warrantice is not like that of the seller of an estate,⁴ but merely that the purchaser shall be entitled for his indemnification to have back from the creditors what they shall have received of the price. And this, even without any conveyance from the creditors, or any public law declaring the warrantice, the purchaser would at common law be entitled to demand upon eviction. The true proprietor of the estate might, instead of claiming it from the purchaser, demand repayment from the creditors of what they had received of the price as truly paid from his funds; and when instead of this he claims the estate itself, he of course transfers to the purchaser his claims against the creditors.

TITLE TO DISCHARGE THE REVERSION.—Where there is a reversion of the price, it is of some consequence for the purchaser to know on what title the bankrupt or his heirs can effectually discharge it. The bankrupt himself, of course, is entitled to it on a simple discharge. Where the bankrupt has died, and an heir takes his right to the reversion, a distinction has been admitted: 1. If the sale is by creditors, the heir must make up his title as if to the real right of the lands, before he can draw the reversion;⁵ 2. Where the sale is on the Act 1695, by an apparent heir, no title is necessary.⁶

¹ It requires 'the creditors, who are preferred to the price of the lands, upon payment, to dispoise their rights and diligences, used at their instances, in favour of the purchaser, with warrantice *quoad* the sums received by them, so that, in case of eviction of the lands disposed, they shall be liable to refund those sums, in whole or in part, effeiring to the eviction, and the sums paid to them, with annualrents thereof from the time of the sentence; providing always intimation be made to the creditors of the process of eviction, before litiscontestation in the cause.'

² 54 Geo. III. c. 137, sec. 10.

³ *Scott Moncreiff v Innes*, *supra*, p. 257. In my former edition I expressed myself too strongly on this question, in saying that the practice of requiring a constitution 'is quite wrong, and I do not think would be sanctioned by the Court;' but I may be allowed, with the utmost deference, to suggest that this point well deserves to be reconsidered. The expense which the decision of the question as in *Scott Moncreiff's* case will occasion, and the advantage which is ready at all times to be taken of such licence, or encouragement, or requisition to proceed with expensive litigation, will require a legislative remedy, if it should be thought that judicially there are no grounds for an alteration.

⁴ *Lloyd v Paterson's Crs.*, 1782, Hailes 897.

⁵ Lord Elchies reports a case on this point thus: 'Such a sale being carried on by an apparent heir, and there being a free reversion after paying all the creditors, the question was, Whether a general service was sufficient, or what other title was necessary for the heir to carry that reversion? and the point being new, was remitted to the Ordinary. *Stirling v*

Cameron, 8 Dec. 1741. But I think about the of February 1742, a general service was found sufficient; that is, the purchaser's bond was ordered to be delivered up on paying the creditors, and the reversion to the heir so served; and some (Arniston) thought that no title at all was necessary.' *Elch. Ranking and Sale*, No. 7.

'The immediate above case of *Stirling and Cameron* was of an estate sold as bankrupt (not on the Act 1695), but the price rose so high at the roup as to leave a reversion to the heir; and upon report of Lord Haining, we found that the general service was no title. *2dly*, We found that to carry this reversion, a real right must be made up to the land, though the case might be different in sales on the Act 1695.' *Stirling v Cameron*, 21 July 1742, *Elch. Ranking and Sale*, No. 8.

⁶ The same learned judge reports the following case: 'Sale on the Act 1695. In the case of such a sale, there being a balance of the price over payment of the creditors, the question was reported by me, Whether the apparent heir must make up any title in his person to that balance, and what title is necessary? and observed to them the decision, *Stirling v Cameron*, 21 July 1742, where, in a sale on the 1681, the price having risen so high as that there was a balance over payment of the debts, the apparent heir was found obliged to make up a title to the lands. The Lords had this under consideration two different days, and found that no title was necessary to be made up; and the purchaser having already paid the balance to the apparent heir, they ordered his bond of cautionry to be delivered up. *Sir Hugh Hamilton*, purchaser of the estate of *Glenshaw*, supplicant, 1750.' *Elch. Ranking and Sale*, No. 20.

[282] **STIPULATION AS TO TITLE IN ARTICLES OF ROUP.**—The general rule is, that a purchaser has right to an unexceptionable title, unless he shall expressly and beyond doubt have waived that right.¹ But in the state of the bankrupt's titles there may be defects which cannot be supplied, and for the consequences of which the creditors will not consent to be responsible. Such cases lead frequently to special stipulations in the articles of roup, to the effect of which it is important to attend. And, 1. If the bargain is made in the articles of sale, that the purchaser shall accept of the titles as they stand, the warrandice agreed to in that case would seem to import that the purchaser will not be allowed to suspend the payment of the price until eviction.² But, 2. There is an obvious expediency that it should be held an effectual stipulation in the articles, that the creditors should not be bound at all in warrandice to the purchaser. Creditors will often take a smaller sum rather than be called on to refund what they have received; and it seems much more eligible to them that they should (by receiving a smaller price) pay the insurance of a defective title, than that they should remain in continual apprehension of a claim of eviction. The warrandice implied in the conveyances of the debts is no doubt a security at common law against the eviction of the estate; but, as an implied obligation, it is capable of being transacted as not inseparably connected with the nature of the sale or distribution of the price, provided the stipulation be clear. Accordingly this was sanctioned in a recent case.³

2. QUESTIONS ON THE EXTENT OF RIGHT CONVEYED.

Questions have often arisen respecting the extent of the subject acquired by the purchaser, as affected by the value, descriptions, etc. specified in the proven rental, or in the letters of publication, and in the advertisements. In all such cases, there seems to be room for a material distinction between the description of the subject itself and the statement of its value and advantages.

1. The purchaser is entitled to have warranted to him everything which is described in the judicial rental as part of the lands sold. On the contrary, he is not entitled to claim anything which is by that description excluded.

2. As he is entitled to have everything which is included in the description, so, when deprived of any part, he may claim a deduction proportioned to its value, if it be so distinct [283] that it may be separated.⁴ If the subjects have been valued and sold *in cumulo*, and no separate value put upon the subject which is evicted or lost to the purchaser, then he must either renounce the bargain altogether, or keep it without any abatement.⁵

¹ *Dick v Donald*, in the House of Lords, 1826, 2 Wils. and S. 522.

² *Hay v Panton*, 1783, M. 14183. A sale of this kind was made by a trustee for creditors, not indeed judicially; but that seems to make no difference on the principle. A provision was inserted in the articles of sale, that the creditors should assign their debts and rights, with the warrandice, to the extent of the price, and that the purchaser should accept of such titles as the creditors had to give, which were specified in an inventory. The purchaser finding, on more minute investigation, that there was no right vested in the common debtor, presented a suspension, in order to get quit of the sale. The Lord Ordinary (Alva) decided in his favour, 'finding him not barred by the articles of roup from objecting that no right whatever, in the person of the common debtor, is produced; or, though such title were produced, from objecting the nullity thereof, if such should appear.' But the Court altered this judgment, and found the sale binding. It was observed on the bench, that 'a purchaser is not, in the common case, obliged to pay before the seller has de-

livered to him a sufficient progress to the property of the subject sold. Here, however, it has been agreed, that eviction alone should entitle the purchaser to recourse against the sellers; and no reason occurs why this paction should not be effectual.' [*Bald v Scott*, 1841, 3 D. 564.]

³ *Carruthers v Stott*, 1825, 4 S. 34.

⁴ *Wilson v the Crs. of Sir James Campbell of Auchinbreck*, 1764, M. 13330. There the teinds having been included in the rental, and exposed and sold along with the lands, it was afterwards discovered that one-fourth of them did not belong to the seller. The Court found the purchasers entitled to deduction for a fourth part of the teinds.

See *Kersland's Crs.*, 1741, Elch. Ranking and Sale, No. 6.

⁵ *Lloyds v the Apparent Heir and Crs. of Paterson*, 1782, M. 13334, Hailes 897. Lord Braxfield said: 'There is no warrandice in a judicial sale. But if a person purchase through error or deceit, he may have a remedy by giving up the purchase. But he is not entitled to say, I will hold so much of the bargain, and have a deduction on account of the rest.'

3. The purchaser can claim nothing which is *excluded* by the description.¹ In a case which occurred some years before, the Court had decided in the same way against the purchaser, although the circumstances were much more favourable for him.²

4. In private sales it may sometimes be a question of nicety, what is to be held as a description of value or advantages implying warrandice. But in judicial sales the general rule is, that the purchaser is to trust to no statement that may be held out, of value, or of peculiar advantages.³ His business is to examine everything himself, and to proceed [284] only upon the information which he so acquires; for the measurements and values stated in the proven rental are not intended for the information of purchasers, or as grounds of warrandice, but for the purpose merely of serving as data to the Court, in deciding upon the question of bankruptcy and in fixing the upset price. Even when stated, as they generally are, in the newspaper advertisements, they are to be taken rather as hints to direct the inquiries of the purchaser, than as conclusive information and assurances upon which he is ultimately to rely in deciding upon the propriety of purchasing. Every judicial sale, therefore, is a slump bargain. In one case, the purchasers of part of the estate having discovered some material errors in stating the rental and upset price, they applied to have a rectifica-

¹ *Blair of Balthayock v Murrays*, 16 July 1790. The lands of Overdurdie, part of the estate of Balthayock, were originally held of the abbots of Scoon in feu for payment of certain quantities of bear, etc., amounting in value to about £20 a year of present money. The *dominium utile* belonged at the beginning of last century to Sir Robert Ayton. He obtained a signature from the Crown empowering him to purchase up from the Viscount of Stormont, the lord of erection, the feu-duty and superiority at the same rate which, by the decree-arbital concerning teinds, was declared optional to the Crown; but, in this charter, the power of redemption was still reserved to the Crown. Sir Robert accordingly purchased up the feu-duties and superiority, and received a conveyance of them from the Viscount of Stormont, under the condition of reversion in favour of His Majesty. This right contained a procuratory for resigning the lands to be holden of the Crown in blench; but with a condition that Sir Robert should, in case of the Crown choosing to redeem the feu-farms, resign the lands, and receive a renewal of the holding in feu for payment of the feu-farms, etc., as before. Sir Robert's charter was, however, taken out to be held, not blench, but in feu, for payment of the duties in the old investitures; and in narrating the right from Viscount Stormont, it was provided that Sir Robert and his heirs, etc. should have retention of the feu-duties, etc. until they should be redeemed by the Crown. In this form the titles continued, though by statute 1707, c. 11, the power of redemption by the Crown was renounced: 'that the feu-duties might remain with the lords of erection, and those having right from them, irredeemably and for ever.' When those lands of Overdurdie were exposed to judicial sale by the creditors of Mr. Blair, they were stated in the prepared state, etc. at a gross rent of £122, 9s. 7d.; but as holding feu of the Crown for payment of the feu-duties, as in the old titles, which, being converted at certain rates, amounted to £16, 3s. 1d., leaving, after other deductions, a free rental of £96, 1s. 5d. And in the act of roup it was found proved by charters, etc., 'that the said lands of Overdurdie do hold feu of the Crown for payment of the above duties,' etc. The purchaser of these lands claimed right to them unburdened with the feu-duties; and an action was brought against him by the heir of Balthayock,

to whom a clear reversion had arisen from the sale of his father's estates. Lord Eskgrove, Ordinary, having 'considered mutual memorials, found that the defender, Daniel Murray, being by the decree of sale declared to have as valid and effectual a right to the lands of Overdurdie, teinds and pertinents, as if they had been sold and disposed to him by the deceased John Blair of Balthayock, whose titles to the land included the right of retention of the ancient feu-duties thereof; and that the defender should hold them siklike and as freely, in all respects, as the said John Blair, or any of his predecessors or authors, held, or might have held the same, —the said defender is thereby entitled to the retention of the said feu-duties as a part of or accessory to his purchase: finds, that as the said lands and others have been sold judicially to the defender, as the highest bidder at the public roup where the same were exposed to sale, not conform to any rental, but at a slump or total upset price, he cannot now be obliged to pay a higher price than his last offer on account of any deductions erroneously made in the rental taken up by this Court before the said judicial sale; and assolvies the defender, and decerns; but in respect of the nature of the case, as meriting the most deliberate discussion, supersedes,' etc. When the question came before the Court, upon a petition and answers, the other judges took a different view of it. They held the case to come simply to this, that the right to the feu-duty, standing upon the right of retention and the statute, formed a separate estate, which was neither exposed to sale, nor intended to be purchased; and accordingly this judgment was pronounced: The Lords find that the defender must 'either give up the purchase of the lands of Overdurdie, or pay an additional price, corresponding to the value of the feu-duty in question, deducted from the rental; and remit to the Lord Ordinary to proceed accordingly, and in particular to ascertain the additional price to be paid in the event of the defender agreeing to hold the purchase.' [See *Gordon v Douglas's Trs.*, 1829, 7 S. 323; *Robertson v Rutherford*, 1841, 4 D. 121.]

² *Hepburn & Sommerville v Campbell of Blytheswood*, 1781, M. 14168.

³ [See observations on this dictum in *Traill v Dangerfield*, 1870, 8 Macph. 585, 589.]

tion and allowance; but it was refused, unless some material error could be shown *in calculo*, or in the application of the evidence.¹ Upon the same principle, deductions have been refused on account of decrease in the value of subjects, between the time of taking the proof and the date of the sale.²

5. A measurement which enters into the description of the lands, will, as in the case of Campbell of Blytheswood, be held a bounding description. But a measurement which is merely spoken of in the advertisements, or which appears upon a plan or survey of the estate, is to be considered only as intended to give information as to the probable extent of the estate, or as a mere relation of apparent advantages, which the purchaser is not entitled to consider as a condition, or as taking away the obligation upon him to satisfy himself by his own inquiries.³

6. If in the description the lands are stated as a forty shilling land of old extent, or as of £400 valued rent, or generally as sufficient to afford a freehold qualification, the purchaser would appear to have no right to insist on a warrandice to that extent. He must himself look to it, whether this advantage truly is attached to the purchase.

SECTION V.

OF THE RANKING OF THE CREDITORS AFTER JUDICIAL SALE.

The SALE is useful to the creditors, only as it converts the estate of the debtor into a distributable fund. To distribute it among them is the business of the RANKING. At present we are to consider merely the forms of the Ranking: the rules and principles of division will be explained hereafter.

The great objects of any judicial form of distribution are—1. To have the debts properly scrutinized, that no person may draw as a creditor who has no title to that character, and that none may acquire a preference to which he is not entitled; 2. To secure to those [285] who come forward safe payment of whatever may fall to them in the division; 3. To have the adequacy or deficiency of the funds clearly pointed out, and the distribution regulated accordingly; 4. To have all those proceedings carried on under the eye of a court, and subject to its review; and finally, To have them all accomplished in the shortest time, and at the least possible expense.

The RANKING, as a mode of distribution, may be considered as totally independent of the action of Sale. The course of it may thus be described: 1. For the accomplishment of the above purposes, a common agent is appointed to take measures for excluding all who do not within a certain time produce their claims, and to make up a state of the debts, containing the objections to which they are liable, and classing them according to those preferences which have been legally acquired. 2. The state so made up is ordered to be seen and answered by all concerned, so that they may have a full opportunity of correcting any errors or omissions of the common agent, or of removing any objections to their debts, which are capable of being removed. 3. The whole of those states, objections, answers, etc. are judged of and determined by the Court, and, as the result, the rights of the creditors are fixed. And, 4. A scheme of division is made up, containing a statement of the price of

¹ Hay of Drummelzier's case, 1697, M. 13328.

² Coutts v Crs. of Halgreen, 1725, M. 13328; Crs. of Cockpen, 1732, M. 13329; Wilson v Crs. of Sir James Campbell, 1764, M. 13336. In the Ranking of Skibo, 1788, Inglis v Dempster, M. 13335, the lands having been valued in 1780 and sold in 1786, the rents had, in the meanwhile, fallen about one-sixth, on account of which the purchaser claimed deduction, or leave to give up the bargain. 'The Court was unanimously of opinion, agreeably to many former determinations, that the

plea here urged for the purchaser was inadmissible, as the chief object of the judicial rental is to ascertain the bankruptcy, and in the interval which preceded the actual sale many alterations must necessarily happen. It is the business of intending purchasers to make a proper inquiry into the matter; and nothing but an undue concealment of the facts can annul a judicial sale otherwise unexceptionable.' The Court refused the claim of the purchaser.

³ Hannay v Crs. of Barclay, 1785, M. 13334.

the lands, rents, interests, etc., on the one hand; and striking the dividend payable to each creditor, according to the previously fixed order of ranking, on the other, and so giving effect to the decree of ranking in the division of the price.

But though the ranking may be considered, in one sense, as a process separate from the Sale, the law has varied considerably in regulating their relation to each other. When the action of sale was first introduced, it was merely an action of sale, not of ranking. The ranking was settled in a process of multiplepointing, after the sale was concluded.¹ This continued to be the practice after the action was in some particulars reformed by the statute of 1690, c. 20. But one great evil was found to spring from it. The purchaser contrived, by purchasing up debts, etc., to throw such difficulties in the way of the ranking, that often many years passed away before it was settled, while he retained the price in his own hands. To remedy this evil, it was enacted in the regulations for the Session 29th April 1695, art. 26: 'That in all actions of sale of bankrupts' lands, upon late Acts of Parliament, either depending or to be hereafter raised, the ranking of the creditors, and others concerned, shall proceed, and first be concluded by decree, at least to the avail of the price of the lands found and stated by the Lords of Session, before the said lands be exposed to roup and sale.' At the time that these regulations were introduced, there had not been any provision made for enabling apparent heirs to bring the estates of their ancestors to sale; and accordingly this regulation never has been understood to apply to actions of sale raised by apparent heirs, but, on the contrary, the sale has always in those cases preceded the ranking. The first alteration made upon the rule that the ranking should precede the sale, was by a private statute, empowering the Court of Session to depart from it in the very peculiar case of the York Buildings Company's bankruptcy. The ranking of the complicated claims against the estates of that company having depended for more than forty years, it was found necessary, in 1777, to apply to Parliament for authority to sell the estates, without waiting the issue of so tedious a process. It was not till 1783 that any alteration was made upon the rule, as applicable to common rankings and sales. The loss and inconvenience to creditors was found in many cases to be great. The estate, during the long period of the contest among the creditors, continued under sequestration, and a factor was paid for his management and care. There was a great risk, rather perhaps an absolute certainty, that during the short leases which a factor could give, the lands, instead of being improved, would suffer, both in cultivation and in value, to a purchaser; there was [286] danger that, during the dependence of the ranking, the best and most favourable opportunity for selling to advantage might be lost; there was even a possibility that the debtor himself, or his friends, flattering themselves with some favourable turn, might retard the ranking, by objecting to debts; and wherever the price exceeded twenty years' purchase, there would arise from a sale an annual advantage to the fund, by the excess of the interest of the price over the rents, even supposing it possible to levy rents without expense or deduction. These, with other reasons not perhaps so well founded, were stated by the proposers of the law of 1783, as the inductive causes of an alteration upon the old rule. It was proposed, and approved of by the Legislature, 'that all actions of sale of lands, or other heritable subjects, raised or to be raised, and pursued at the instance of creditors, before the Court of Session, upon any of the statutes in that behalf made, shall proceed, and be carried on to a conclusion, by actual sale, as soon as the necessary previous steps of a sale are taken, whether the ranking of the creditors is concluded or not; unless the Court, upon application of the creditors, or any of them, shall find sufficient cause to delay the sale, any law or practice to the contrary notwithstanding.' And to avoid the evil which led to the establishment of the old law, viz. the interested interference of the purchaser in picking up debts and delaying the ranking, the Court of Session was authorized, upon application of the creditors, to order

¹ See Sir George M'Kenzie's observations, 463.

consignation in the hands of a bank. This law was continued by the statute of 1793, and is also renewed by the statute of 54 Geo. III., in words more comprehensive than at first, and including both kinds of sale.¹

All the explanations which appear to be necessary concerning this action of ranking may be given under these heads: 1. The proof of debts; 2. The effect of the decree of certification in clearing away all claims not produced in due time; 3. The proceedings for ascertaining the interests of each claimant, and fixing the order of ranking; 4. The scheme of division; 5. The claim against the bankrupt and his personal funds, as affected by the payment of the creditors, and the conveyances which they are bound to give to the purchaser.

SUBSECTION I.—PROOF OF DEBTS.

The most important provision in such a system of regulations relates to the proof of debts. By the Act of Sederunt in 1711, a day was ordered to be appointed for producing claims, but there was no proper provision for making it known. By the subsequent Act in 1756 this was reformed, and it was ordered—1. That a term should be appointed, and publicly advertised in the newspapers for three successive weeks; 2. That a second term should be appointed and advertised in like manner; 3. That against those who did not come forward a decree of certification should be pronounced, holding them as having no claim against the estate, but reserving their rights against the bankrupt, and his reversion and other property; 4. That no creditor should be admitted till he had made oath to the truth of his debt; and, 5. That any objection which should occur to the several claims should be discussed in court. In this way there are sufficient precautions taken to ensure notice to all concerned, and a period sufficiently long is allowed for coming in to prove debts.

A creditor must enter his claim in an intelligible form, and produce in proof of it—1. An affidavit or oath of verity; and, 2. All the vouchers and grounds of debt on which it is founded. If not sufficiently proved, the Court will reject the claim, or allow such further proof as the claimant may offer. The claim is constituted by the decree of ranking (see below, p. 267). But it will be observed, that in one case the Court has held a separate [287] decree of constitution necessary.²

The effect of lodging a claim in a ranking is the same as if an action were raised against the debtor. It stops the running of prescription.³

SUBSECTION II.—OF THE EFFECT OF CERTIFICATION.

The effect of the decree of certification, as against creditors objecting to the sale, has already been considered. It has been seen that under this decree the purchaser is safe against any challenge by creditors. But there is obviously less danger or injustice in permitting the decree to be so far opened as to admit a creditor who has not appeared in due time, to claim his dividend of the fund. Notwithstanding the anxiety of the law to secure the best possible intimation to all the creditors, it is possible that a creditor may not have heard of the proceedings, and it would be unjust to exclude him absolutely when he may not be in fault. It was therefore provided by Act of Sederunt, that instead of paying a fine (which was the condition of being admitted to claim according to the old regulation of 1711), a creditor neglecting to produce his claim within the appointed term should 'be obliged to pay the whole expense occasioned by the delay, and by the production of a new interest, as

¹ 54 Geo. III. c. 137, sec. 6. [Re-enacted by 19 and 20 Vict. c. 91, sec. 2.]

² See above, vol. ii. p. 261.

³ Douglas, Heron, & Co. v Richardson, 1784, M. 11127.

See 54 Geo. III. c. 137, sec. 52, for effect of producing grounds of debt in a sequestration.

Stevenson v Campbell, Nov. 1804.

the same shall be ascertained by the Court or by the Lord Ordinary.¹¹ Under this clause, the general creditors have a good right to object to this expense if it should be charged in the accounts of the common agent, whose business it is to claim it from the creditor reponed. The effect of a decree of certification, then, is to make every claim not produced in due time be held as false and forged, unless, upon cause shown, and payment of the expense incurred, it shall be admitted by the Court.

SUBSECTION III.—STATE OF CLAIMS, AND ORDER OF RANKING.

The decree of certification operating as a bar to the production of other claims, the common agent may, without interruption, proceed to consider the documents and vouchers of debt, and propose his scheme of ranking, according to the just rights and preferences of the creditor. He is also required 'in these states to set forth whether there is any probability of a reversion to the common debtor, and in what view, or different views, there may be a prospect of such reversion.'¹²

The scrutiny to which a claim is subjected is very strict. 1. The common agent is bound by the duties of his office to investigate each claim accurately, and to state every possible objection to it which may either serve to strike it out of the division, and so benefit the common fund, or postpone it in the ranking, and so benefit particular creditors. 2. He is bound to state the particulars of each claim in a report, which is laid before all the other creditors for their inspection, so that any omission of the common agent may be corrected. And, 3. The claimant must swear to the truth of his claim before he can be admitted to draw a dividend upon it.

The creditor whose claim is objected to, has a full opportunity of being heard in answer. The common agent is bound to support the objection if for the common behoof, the individuals interested being left to maintain, at their own expense, such objections as may tend only to their advantage, as regulating their place in the ranking.³ The Lord Ordinary [288] was formerly directed to name days for lodging objections, answers, and replies, and then to order a pleading and pronounce judgment, unless he pleased to order the point to be argued to the whole Lords. This is altered by the Act of Sederunt of 1794, and either written or *viva voce* arguments declared to be sufficient, at the option of the Lord Ordinary. Much care is taken in these regulations to ensure despatch; and in the discussion of any question which arises, the rules of the Judicature Act and relative Acts of Sederunt will of course be applied. To prevent the splitting of the ranking into many parts, it is ordered that all the points upon which the judgment of the Inner House is sought, are to be decided at once; those which are brought under review from the judgment of the Lord Ordinary, and those which are taken to report by him, being ordered to be brought before the Court on the same day. This, however, is not strictly adhered to in practice.

SUBSECTION IV.—DECREE OF RANKING.

The whole objections being determined finally, the common agent draws up a decree, including all the particular judgments, and ranking and preferring those claims which are sustained as good, according to the preferences to which they are found entitled by the scheme of ranking as acquiesced in, or as settled by the judgments of the Court. This being transcribed by the clerk as an interlocutor of Court, is signed by the Lord Ordinary, and the decree of ranking is extracted.

The effect of an extracted decree of ranking, when considered with relation to those who have actually appeared in the action, is to settle their claims and preferences. But

¹ Act of Sederunt, 11th July 1794, sec. 12.

² *Ibid.* 11th July 1794, sec. 7.

³ *Ibid.* 11th July 1794, sec. 8.

still the judgment must of course be subject to appeal, and also liable to be set aside upon facts newly emerging, '*res noviter venientes ad notitiam*.'¹ Considered in relation to those who have not appeared in the action, the effect of the decree of ranking, as an exclusion, will be understood by remembering that those who under the express declaration of the law are prevented from disturbing the *purchaser*, are still entitled to have their relief against the *creditors*, even after the division of the fund; much more, consequently, must they be entitled to such relief before the fund is divided. And accordingly it is established, that creditors are, under the qualifications already explained,² entitled to appear, and claim a share in the division, without the necessity of reducing the decree of ranking.³

SUBSECTION V.—SCHEME OF DIVISION, INTERIM WARRANTS, AND FINAL DECREE.

The decree of ranking ascertains the claims of the creditors who are entitled to share the price; the scheme of division is, as it were, the point of union of the two actions of sale and ranking. The produce of the sale or fund to be divided is stated on the one hand, and the shares or dividends due to each creditor, according to the rights fixed by the decree of ranking, are struck upon the other.

When the scheme of division is made up, it is lodged with the clerk, to be examined by the creditors, and objected to if there be cause. It is then approved of by the Lord Ordinary, with such alterations as, on discussion before him, may be proper. A decree of division is then pronounced, containing a warrant upon the purchaser to pay the price. And upon this, as upon any other decree for payment, diligence may proceed.

[289] The common agent is bound to take the proper steps for recovering from the purchaser the price of the lands to be distributed. For this purpose all the diligence of the law is open to him. If the purchaser should become insolvent, the bond for the price is to be recorded, so that diligence may proceed against the cautioner; and if in no way the price can be recovered, the common agent must proceed to have the sale annulled, and the lands re-exposed.

A creditor who is unquestionably preferable, is not compelled to abide the final settlement of the ranking and division. But he cannot have his payment, either of principal or of interest, without a warrant from the Court.⁴ Such interim warrants are sometimes granted on the judicial factor, to make payment out of the funds which have accumulated in his hand of the interest due on preferable debts; or they are granted against the purchaser, or the bank with which the price shall have been consigned, to make payment of the principal, or part of it, from the price. And in this way loss of interest to a considerable amount is often saved. It is held as a rule respecting those interim warrants—1. That no creditor can thus draw his whole debt; 2. That he must show a clear case of preference, in order to entitle him thus to have precedence of the rest in the payment of his debt; 3. That sometimes a case is made out to authorize an interim scheme of division, where a whole class of preferable creditors is distinguishable; 4. That a creditor who receives by interim warrant a sum to account of his debt, is not entitled, in a question with the creditors interested in the general fund, to impute his payments periodically to the interest growing on his debt since the date of the warrant, but must turn them into a corresponding capital as at the time when the price began to bear interest;⁵ and, 5. That the creditor who receives payment on such interim warrants, is not entitled to charge the expense of those warrants against the common fund.⁶

¹ *Blackwood v Sir George Hamilton*, 1749, M. 11989.

² *Supra*, p. 266, subsec. 1.

³ *Crawford v Hunter*, 1759, M. 13351, where the doctrine of the text is stated as law.

⁴ [*Crombie v Napier*, 1824, 3 S. 380, N. E. 269.]

⁵ *Dickson v Crs. of Rae*, 1795, M. 13345.

⁶ *Dickson v Rae's Crs.*, *ut supra*, M. 13347; *Sir H. Inglis's Tr. v Goldie*, 1825, 3 S. 435, N. E. 305. [*Wood's Trs. v Ferrier*, 1835, 13 S. 645.]

When the creditors receive their dividends, they are bound to assign to the purchaser their debts and securities. But this is nothing more than an assignation of the real security, to the amount of the dividend received, so as to be a safeguard to the purchaser by extinction of the burden on the lands. Still the creditors are entitled to proceed in diligence against the person and moveables of the debtor, or against any heritable estate which he may since the sale have acquired, in order to recover the balance which may remain unpaid. The extract of the decree of division, and the payment of the dividends in consequence of it, operate not as an insuperable bar to any subsequent claim by a creditor who has not been included in the division. If the division should proceed, for example, during the period allowed for appealing to the House of Lords, the creditor aggrieved is not thereby precluded from his right of appealing. Again, if he shall have discovered new evidence sufficient to establish his claim, or if he shall be able to show that he was, by minority or other incapacity, prevented from attending to his interest in the ranking, he is not to be for ever deprived of his share in the fund by the mere circumstance of its having been distributed among the other creditors, however hard it may be for them to repay what they had *bona fide* received. Relief will be given to him in an action calling the other creditors for indemnification; and the Court will make a new remit to an accountant, to proportion the dividend upon the different creditors whose former draft it may affect.

CHAPTER II.

OF JUDICIAL SALE UNDER THE SEQUESTRATION LAW.

In the law for regulating the bankruptcy of mercantile persons, there is a provision [290] that, in case a majority of the creditors in value shall so determine, the heritable estate shall be sold by JUDICIAL SALE before the Court of Session.¹ As to the forms to be observed respecting this proceeding, it may be observed—1. That the Act empowers the trustee to bring the action, and to include in it only a part of the estate; 2. That he is to call the bankrupt, and his real creditors in possession, on a citation of fifteen days; and, 3. That there must be a ranking of the preferable claims, the trustee, as it would appear, being entitled to stand as the representative of all the personal creditors; and, after satisfying the preferable claimant, the balance comes to the trustee, to be distributed under the sequestration. The trustee's discharge is declared to disencumber the subject.²

It is also provided, that if the creditors shall not adopt this arrangement, the estate may be sold by PUBLIC VOLUNTARY SALE, with this most important provision, that the real burdens affecting the estate shall extend only to the amount of the price, and that on payment of the price the subjects shall be disencumbered.

CHAPTER III.

OF SALES BY CREDITORS UNDER POWERS CONTAINED IN THEIR SECURITIES.

THE extensive investment of capital on heritable securities in Scotland of late years, and the great facilities afforded by those securities to landed proprietors, as well as to merchants

¹ 54 Geo. III. c. 137, sec. 42.

² See below, Of Mercantile Sequestration.

and manufacturers, in the raising of money, have made it an object of great importance with conveyancers to improve as much as possible the machinery by which lenders may readily make their debt effectual.

One who lends money on the security of land may indeed procure repayment of it by the sale of his security; and in the common state of the money market, this, if the estate is sufficient, will readily attain his purpose. But when money is scarce, this transaction is not always to be depended on without a risk of loss; and to accomplish the object by means of personal diligence, compelling the debtor to dispose of his land and redeem the security, is a course very unpleasant to follow, and not always efficacious. But there is not under a common heritable security any direct remedy except by sequestration, if the debtor be a mercantile man and bankrupt; or by judicial sale, encumbered (as already explained) with many embarrassments.

About half a century ago conveyancers began to introduce into heritable securities a mandate, commission, or power to the creditor, giving him authority to sell by public auction the land over which the security extended, after certain notices to the debtor, and with the precaution of certain prescribed advertisements. But at first there was great disinclination to give encouragement to such clauses of power. They were assimilated to the *Pactum Legis Commissorie*, which has always been discountenanced in Scotland, and were held to [291] be of the nature of those oppressive conditions which creditors are apt to impose on necessitous borrowers, and to which, in the over confidence which arises from the removal of immediate and pressing difficulties, debtors are easily induced to agree. More recently, and in the natural progress of this augmenting branch of the commerce of money, these narrow views have yielded to other considerations; and powers of sale have not only been sanctioned judicially, but have now become in practice a part of every heritable security. When duly guarded against becoming instruments of oppression, they are beneficial both to the debtor and to the creditor; and it is of some consequence to mark precisely the nature and efficacy of those clauses of power, and of the proceedings which they are intended to authorize.

This subject may be viewed, 1. As in relation to the debtor or borrower, and his personal representatives; and, 2. As in relation to the holders of subsequent securities, or to creditors who have proceeded to sequestration, or raised an action of judicial sale.

I. As in a question with the DEBTOR himself, and his personal REPRESENTATIVES, the difficulties are not formidable.

A power is given to the creditor, by a special provision, to sell the lands for repayment of his debt. This is a mandate, procuratory, or commission.¹ In general it is held that such powers are sufficient to enable the creditor to proceed in selling the lands, and to grant a valid title to a purchaser, and that the exercise of this power is beyond the reach of interruption by the debtor or his representatives. The sale accomplished under such a power, while the granter of it having full right to the lands is still alive and not bankrupt,

¹ The form of the common heritable security, with a clause of sale, contains—1. A bond for the money. 2. For the lender's 'further security and more certain payment of the foresaid sums, and without hurt or prejudice to the said personal obligation, but in corroboration thereof, I sell, alienate, and dispone to the said B, and his heirs and assignees, heritably, but redeemably always, and under reversion in manner after mentioned, all and whole, etc., and that in real security, and for payment to the said B and his foresaids of the said sums of money,' etc. The precept and procuratory are in the same terms, 'to give sasine, etc., to the said B and his foresaids of all and whole, etc. in real security and for payment of the said principal sum, etc. But declaring always, that the said lands, etc. shall be redeemable

by me, etc. at the term,' etc. Then comes the power of sale: 'Declaring, that if I shall fail to make payment of the said sum within six months after a demand of payment is intimated, etc., in that case it shall be lawful to and in the power of the said B, etc., to sell and dispose of the foresaid lands, etc., on previous advertisement, etc., they being always bound, on payment of the price to be given therefor, to hold count and reckoning, etc., and with power to enter into articles of roup, grant dispositions containing procuratory of resignation, precept of sasine, etc., and a clause binding me in absolute warrandice of such dispositions, and obliging me to corroborate and confirm the same, and grant all deeds requisite,' etc.

is unquestionably good, and the title effectual, whether confirmed and corroborated by the granter or not. It may, besides, be fortified by adjudication in implement of the granter's obligation, if he should refuse to concur in a conveyance to the purchaser.

The law of mandate has been held to afford room for doubts of the efficacy of such clauses of power, and of the proceedings under them, on the death or bankruptcy of the granter. But although mandates in general are certainly revocable by death, or even by bankruptcy, such clauses of power are truly procuratories to the creditor *in rem suam*, and not proper mandates; and the revocable nature of the gratuitous contract of mandate does not seem to hold in such a case.¹ Still the necessity of a statute² in order to give effect after death to precepts of sasine and procuratories of resignation (which also are procuratories *in rem suam*), naturally leaves so much hesitation on the subject of these clauses of power, that it would be greatly beneficial to remove all such doubts by a legislative declaration. It has sometimes occurred to me, that a trust may be combined with an heritable bond, so as to leave less doubt of the efficacy of the power, either by constituting at the time of the loan a proper trust in the person of the creditor or of another, or [292] by creating a provisional trust to take effect on failure to pay upon notice. In this view it seems not incompetent for the borrower to give, grant, and dispense to the creditor (or to a neutral person), with a precept for infefting him (on failure to pay after notice), in trust, for the purpose of selling the lands by public roup, or so much as may be necessary for answering the debt, and for completing the titles of the purchaser; and this, accompanied either with power to receive and discharge the price, or only to receive, discharge, and disencumber the land of the debt in the heritable security, leaving the remainder of the price a burden on the lands, would, it is thought, effectually exclude every infeftment in security, or other burden, subsequent to the infeftment in trust, while it would entitle the creditors in such securities to make their demand as real creditors, and the other creditors of the truster as creditors on the reversion under the trust.

It has already been held judicially under the common clauses of sale³—

1. That it is not necessary, in order to exercise effectually the power of sale, to proceed by declarator, as if it were a penal irritancy.

2. That the sale under the mandate may proceed without interruption from the debtor, or from those in his right, provided he shall have given the stipulated, or (if none be stipulated) due notice of his intention, and that he shall have observed the precautions prescribed in the deed.⁴

3. That in all cases where the creditor holds a power to sell, his proceedings must be under the control of equity; and, on cause shown, the Court will interfere, and direct what may seem to be for the common interest of the parties. In conducting the sale, all the stipulated precautions as to advertisement, time of sale, place, upset price, etc., must be very strictly observed, and according to their true spirit, as the stipulated

¹ [Powers of sale are held not to be revocable by the death or bankruptcy of the granter. *Beveridge v Wilson*, 7 S. 292; *Simson v Grahame*, 10 S. 66; *Bell v Gordon*, 16 S. 65.]

² 1693, c. 35.

³ [The powers competent to heritable creditors are now entirely regulated by the Titles to Land Consolidation Act, 1868. See sec. 119 et seq. As to sales of estates under sequestration, see 19 and 20 Vict. c. 79.]

⁴ *Brown v Storie*, 1790, M. 14125.

In the case of *Perry Ogilvie v Crombie*, the debtor interfered to stop the sale, but as the creditor had made due requisition in terms of the bond, a bill of suspension and interdict was refused; and this judgment was affirmed by the Inner House, 18th February 1804. Session Papers of Mr. Baron Hume. [Hume 657.]

In *Robertson v Patons*, the creditor, after having in vain required payment from the debtor, though entitled by his security to sell, took the precaution of applying to the sheriff. That judge appointed a land surveyor to value the subject, and then ordered a sale by auction. The debtor applied to the Court of Session for redress. But Lord Gillies refused to interfere, and the Court affirmed his judgment with costs. Mr. Hume's note is: 'The Court were of opinion that the power of sale was a lawful stipulation; that it requires no declarator or judicial proceeding of any sort to give effect to it, but may be carried into execution extrajudicially; that the application to the sheriff in this case was competent, though unnecessary, and was not to be held as of the nature of a declarator.' 23d May 1815, Mr. Baron Hume's Session Papers and Notes. [Hume 58.]

guards against undue advantage.¹ Where none are stipulated, all reasonable precautions must be taken.²

The result is, that a sale under a trust or under a clause of power seems to be effectual and unexceptionable, so far as the debtor and his personal representatives are concerned.³

II. But the chief difficulties arise in relation to the rights of SUBSEQUENT CREDITORS, either where they hold postponed securities, or where a general process in bankruptcy has been instituted.

The chief difficulty here arises from the right of fee remaining in the debtor, burdened only by the real right in favour of the first security. In virtue of this right of fee, he may [293] grant securities that will be available to burden the lands to any extent; and of such burdens there are no means of directly and completely freeing the lands but by a sale, with consent of all the creditors holding such securities, or by judicial sale, or by sale under the Sequestration Law. A clause of power to sell, granted to the first heritable creditor, may, as already explained, be effectual to enable such creditor to give an unexceptionable feudal title to the purchaser; but still the land will be subject to the burdens constituted over it, and so will be exposed to actions of poinding of the ground, and maills and duties, there being no power by which the burdens can be limited to the amount of the price.⁴ The effect of this deserves consideration.

This difficulty seems capable of being overcome in one of two ways: 1. At common law it may be overcome, wherever the right of the debtor is reduced to a mere reversion, so as to limit his power of granting subsequent securities to the reversion only; or, 2. It might at once be removed by the Legislature interposing to limit the purchaser's responsibility to the amount of the price offered at a fair public sale after due advertisement.⁵ In absence of these, let us see the amount of the danger.

1. If the security be constituted by absolute disposition with a backbond. While the backbond remains unrecorded, and so merely personal, the debtor has nothing in him but the reversionary right; and so he can grant no subsequent security which can have any effect beyond that reversionary right, or which can affect the lands in the hands of a purchaser deriving his right from the creditor. The purchaser therefore will be safe.

If the backbond have been recorded, the right becomes from that moment a burden or right in security merely, the full right of fee being reinvested in the debtor. A conveyance or heritable security over his estate will therefore be effectual to transfer or to burden the estate, subject to the burden of the first security. And to whatever amount those securi-

¹ [As to the effect given to challenges of sales on the ground of informality, see *Glass v Stewart*, 8 S. 843; *Dickson v Mags. of Dumfries*, 9 S. 282; *Haggart v Robertson*, 13 S. 234; *Nisbet v Cairns*, 2 Macph. 863.]

² [*Ogilvy v Crombie*, Hume 657; *Robertson v Paton*, Hume 58; *Morrison v Millar*, Hume 720.]

³ Similar powers of sale in mortgages are effectual in England. 'It frequently happens,' says Mr. Sugden, 'that in deeds securing debts on real estate, the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named;' and he mentions a case before Lord Eldon, 'where the deed was in form a regular mortgage, with a power of sale, and the mortgager, in his answer, stated that he resisted the sale as having been made without his consent, and at an under value. But it was decided by Lord Eldon that the objection could not be sustained.' Sugden on Vendors and Purchasers of Estates, p. 314.

⁴ The late Mr. McDowall of Garthland granted securities with powers to sell, under which powers sales were made,

after other loans had been secured by infettment and Garthland had become insolvent. The purchaser doubted his safety in paying any part of the price without a discharge of all the real burdens, and the Court held him not bound to do so. The greatest lawyers then at the bar were consulted how a sale of the lands could effectually be accomplished, and they could devise no means but a sequestration. At last a private Act of Parliament was projected by Mr. Clerk (Lord Eldon) and Mr. Selkirk, accountant, which solved the difficulty.

In the case of *Marshall v Dunlop*, 19 Jan. 1821, it was held that a creditor by heritable bond of annuity, with a power to sell, was entitled to sell, although opposed by creditors having posterior heritable bonds with sasine, and although those creditors had actually brought into Court an action of judicial sale.

This case is by no means conclusive on the point. It was a just decision in the particular circumstances, but not such as can settle a general doctrine.

⁵ [This suggestion has been carried out. See the Titles to Land Consolidation Act, 1868, secs. 121-23.]

ties may have been constituted, they will affect the land in the hands of a purchaser; and the purchaser will stand in the situation to be immediately considered.

2. The bond and disposition in security, with a power to sell, is the most common form of security at present.¹ The creditor is said in this, as in the former case, to have the full feudal right vested in him, and to be able to give a perfect title to the purchaser.² But this doctrine cannot be held as settled to the full extent, a very clear distinction existing between the cases. The right of the debtor is not here, as in the other case, a mere personal right of reversion, but a fee *ex facie* of the deed. A second heritable security will be effectual to burden the property; and as proprietor of the land, the debtor may grant many securities, burdening the subject beyond what it may bring at a sale. Although, therefore, the sale may be effectual under the mandate, and even the feudal title unexceptionable to convey all the owner's right; yet the land must continue still subject to all securities which have already been validly constituted, and the heritable creditors will be entitled to poinding of the ground, and other diligence, for making their debts effectual. The purchaser cannot, against such diligence, plead payment of the price as a defence, further than to the amount of such securities as he may have acquired and had conveyed to him; for his responsibility is not limited to the amount of any price that may be brought at a sale. Nor is the land disencumbered of those securities which go beyond that price, but attach to the land itself; and it was to avoid that very danger that it was found necessary in the Sequestration Law to limit the purchaser's responsibility to the amount of the price.³

3. This leads to the question of the precise danger which the purchaser incurs. And it seems to be reducible to these points. 1. The purchaser is not safe to pay the price to the creditor holding the power to sell, nor to the proprietor himself, where there are burdens undischarged. 2. He would not, by paying even real burdens to the amount of the price, be discharged, or the lands disencumbered, even although he paid under a decree of multiplepoinding; for the creditors in real rights in security are entitled to look to the lands alone, and may at any time poind the ground. But, 3. The purchaser, by taking assignments to the real securities which he should pay off, would be entitled to oppose such poindings of the ground by counter poindings, or to take possession under decree of mails and duties, so as to counteract the effect and operation of the diligence of posterior creditors, and thus indirectly protect himself.

To save the purchaser from this necessity, and to ward off the danger of poindings of the ground, mails and duties, and other diligence at the instance of the holders of posterior securities, conveyancers have of late expressed their clauses of power in terms more absolute than that which has already been quoted. The proprietor or borrower is made to dispo, alienate, and convey, absolutely and irredeemably, to the lender, in the event of the debt not being paid after certain notices. This conveyance is only provisional, however; for it otherwise would truly be a penal forfeiture of the estate, and could not be effectual without declarator. The purpose is declared to be, that the creditor may sell the land, and pay off his debt, under an obligation to account for the reversion of the price. Still there is some doubt whether, without a declarator, such an absolute conveyance of the estate would be effectual. In attempting by private stipulation to attain the object, it seems more consistent with principle, and with the true intention of the transaction, to constitute a trust as already proposed; whereby either the creditor, or rather a neutral person having the confidence of both parties, may forthwith, or at any subsequent time, be infeft in the estate as trustee, with power to sell it, under certain precautions, for the purpose of paying off the

¹ See above, p. 270, note 1.

² In a case already referred to on another point (*Outram, Tr. for Evans' Crs., v Dryden*, 17 April 1816), the above point was taken for granted, but certainly without such discussion

as to entitle the case to be considered as a precedent settling the point.

³ 54 Geo. III. c. 137, sec. 42.

loan, and of discharging other debts and burdens, to the extent of the price, and with full power also to discharge the purchaser and disencumber the lands. That such a trust, completed by infestment at the time of the loan, will be effectual not only to confer a good title on the purchaser, but to disencumber the lands of all debts not existing as real securities previous to its completion, seems to be clear enough. But practically this can be of little use, for borrowers are not in general inclined to have themselves held out as under trust; and the creation of a trust, under a stipulation that no infestment shall be taken upon that trust till the expiration of a certain time, or until it shall appear that the debtor has granted subsequent securities to a certain amount, leaves the trust exposed to be defeated by the operations of the borrower. There seems, however, to be no reason to doubt that, from the moment of taking infestment on the trust-deed, the debtor would be deprived of all power of constituting securities to the effect of burdening the lands to the prejudice of a purchaser from the trustee.

The object proposed to be attained by an arrangement of this kind, is to confine posterior securities to the reversionary right of the debtor, and so to accomplish that object which has been attained under the Sequestration Law, by the limitation of the purchaser's obligation to the amount of the price fairly procured at a public sale. But without the aid of the Legislature this object cannot be effectually attained, or any other protection given to purchasers than that above explained. That such interposition might be safely and beneficially granted, seems to admit of little doubt. But, at the same time, some precautions might be necessary to prevent injustice. The lender holding a power to sell, and desirous to have his money, has no interest to consult but his own as lender; and if the land bring the amount of his debt he is satisfied, however greatly the debtor's interest suffers. But he may even be desirous, in a covert way, of taking advantage of the debtor's distress to acquire the property himself. To prevent these evils, a simple process of sale, by summary petition to the Court of Session or Lord Ordinary on the Bills, might be introduced: to which it should be requisite, as a title to pursue, that the creditor should produce his bond, with a clause of sale, accompanied by proofs of the stipulated notices; that he should call as parties the debtor and the holders of subsequent securities, as appearing from the records, or the trustee on the debtor's estate if sequestrated; and that he should pray leave, after certain advertisements, to expose the subject to sale at a certain upset price, subject to modification on cause shown by those interested, and that the reversion of the price, after discharging the real burdens, should be consigned, and distribution made judicially as in a multiplepoinding, or, by authority of the Court, be paid over to the trustee in sequestration. Such a process, accompanied by a limitation of the purchaser's liability to the amount of the price, would afford an economical and safe mode of sale, equally beneficial for all concerned. The direct advantages would be an unexceptionable title, the saving of the auction tax, the avoiding of those suspensions and interdicts which so frequently involve the parties in litigation, without affording the means of finally extricating the contest. The indirect but not less important benefits would be the facility of procuring money on a first security, the saving of the necessity of a sale, and the more ready settlement extrajudicially of the necessary arrangements for a sale.

But while no legislative measure of this kind exists, it is necessary to observe what has been fixed respecting the effect of the clause of sale, as now used, in respect to the right of subsequent creditors.¹ And,

1. Where there are subsequent securities, the purchaser is entitled, on the one hand, to see them purged before he can be bound to pay up the reversion of the price; and on

¹ [It would seem that where a postponed creditor has reason to apprehend that his interest will be sacrificed by a sale at the instance of the prior creditor, he may pay off the prior debt, and demand an assignation to the first security,

with its powers. *Cunninghame's Trs. v Hutton*, 1847, 10 D. 307. See the provisions of the Bankruptcy Act with reference to the claims of postponed creditors, 19 and 20 Vict. c. 79, secs. 113, 116, 117.]

the other hand, if he do pay up the reversion, he is liable to the creditors who hold securities, although there should be a clause declaring the purchaser to have no concern in the application of the price.¹

2. Where there are no subsequent securities, but personal creditors, by whom [296] the debtor is sequestrated, and the trustee has completed his title by a conveyance from the debtor, or by adjudication with infetment, there is a real right constituted in the trustee for the benefit of all the creditors who claim in the sequestration. And although this right seems to extend only to the reversion in the person of the bankrupt, at least to the effect of entitling the trustee to receive and divide among the creditors only the reversion of the price, after discharging the heritable debt, it may be doubted whether, in the case of the creditor and not the trustee selling the lands, it may not be competent for the trustee, as adjudger infet, to proceed with poinding of the ground without regard to the right of the purchaser, so as to compel the purchaser to have recourse to the indirect mode of defence already alluded to, by a counter action of poinding the ground, or by insisting for a preference as assignee to the first security.

These doubts have been found to disturb every attempt of creditors under powers of sale to dispose of the lands without the concurrence of the trustee in sequestration; and the termination of such disputes has generally been, that the trustee has been allowed to sell the lands, or to concur in the sale, so as to give to the purchaser the benefit of the limitation in the 42d section of the Sequestration Act.²

CHAPTER IV.

OF THE PROCESSES FOR DISTRIBUTING THE MOVEABLE OR PERSONAL ESTATE, WHERE THE DEBTOR IS NOT A TRADER.³

ALTHOUGH considerable progress has been made towards a system for equalizing diligence against moveables, there still exist great and manifest defects, where the debtor is not a person engaged in trade or manufactures.

¹ *Steven, Glen, & Curry v Fleming*, Brown, in April 1800, granted an heritable bond to Glen & Curry, 'with power to sell, without declarator or other process, to receive and discharge the price, to bind Brown in absolute warrandice, and to pay over the remainder of the price to him, his heirs or assignees; the purchaser to have no concern with the application, and the discharge of the expositors to be a sufficient exoneration.' These clauses were engrossed in the infetment. In May, Brown, with the knowledge of the prior creditors, granted an heritable bond to M'Dougal, containing a similar authority to sell, and the infetment was immediately recorded. In September 1800 Brown granted an heritable bond of annuity to M'Neil, on which infetment was regularly taken. The creditors under the two first of these bonds proceeded, in January 1802, long after the term of payment in their bonds, to sell the lands (with the knowledge of Fleming, trustee for Brown). Steven purchased at the sale, and paid the price to M'Dougal, holding the second security, with consent of Glen & Curry, who held the first. He received a joint disposition from them, was infet, and took possession. In 1803, M'Neil, holding the third security, raised an action of maills and duties. No intimation had been given to the

purchaser not to pay to M'Dougal, Glen, & Curry. The purchaser produced his titles in the maills and duties as exclusive. The sheriff found M'Neil entitled to the reversion of the subject, after deducting the two prior debts. The case was advocated, and Lord Robertson found 'that Brown had not been divested by the prior heritable bonds, and that consequently the posterior bond of annuity became a burden on the property, which could not be disappointed by the sale.' The purchaser reclaimed, but the Court adhered. 19 Feb. 1811, Fac. Coll.

N.B.—In the Faculty Collection this is reported as a case decided on the ground of *mala fides*, in the purchaser paying over the balance of the price to the debtor, while a posterior heritable creditor was unpaid. But the determination goes deeper, and seems to settle an important point of the doctrine under consideration.

² The benefit of selling without auction duties in sequestrations counterbalances the trustee's commission, so as to free the question from this miserable contest between the law agent for the heritable creditor and the trustee about their emolument.

³ [The reader will keep in view that the Bankruptcy Act, while extending the benefit of the process of sequestration to

It is unavoidable that proceedings for equalizing diligence should bear reference to the debtor's bankruptcy. But if it be inexpedient to provide that the bankruptcy itself shall have the effect of producing equality, at least some simpler process might perhaps be devised for establishing equality than the accumulation of arrestments and poindings at a great expense, and to the manifest danger of excluding some creditors altogether. It appears, indeed, that we have made a step retrograde in legislation on this matter. By the 23d of Geo. III. c. 18, sec. 2, it was provided, 'that where the effects of a debtor are arrested by any creditor within thirty days before bankruptcy, or within four months after it, and a process of forthcoming or multiplepoinding is brought in which such arrestment is founded on, it shall be competent for any other creditor producing his interest, and making his claim in the said process, at any time before the expiration of the said four months, to be ranked in the same manner as if he had used the form of arrestment.' Why this was altered, so as to require that all the competitors shall have used arrestment, does not appear. But it seems expedient to reform this matter by resuming the provision of the Act of the 23d of the late [297] king, and declaring, that where a debtor is rendered bankrupt, a process of multiplepoinding raised by the holder of a fund arrested, or by any creditor ready to proceed with arrestment or poinding, or by any trustee elected by the creditors at a general meeting, should have the effect of a process of competition and division, in which creditors producing their interests, and proving their debts, should be ranked in the same manner as if they had used arrestment or poinding.

As the law stands, there are three processes in which the moveable funds of a debtor, who is not a trader, may at common law be distributed among his creditors: 1. MULTIPLEPOINDING; 2. FORTHCOMING; and, 3. ACTION AGAINST POINDERS.

SECTION I.

OF THE ACTION OF MULTIPLEPOINDING.

The ACTION OF MULTIPLEPOINDING, or double distress, is a very old form of action in Scotland.¹ It proceeds, as its name intimates, upon the idea of double distress, either actually begun or threatened against a person holding the moveable property of another. It is of the nature of a suspension by the raiser of the multiplepoinding against all who are duly made parties to it, and in the older books is called the suspension of multiple, or double poinding. In consequence of its effect as a suspension against those who are parties to the action, the creditors may call on the pursuer to consign the money, or to give security, as in a suspension. But this action, although it has something of the character of suspension, will not be sufficient alone to suspend execution, nor will a debtor be safe to trust to it as sufficient to protect him against incarceration.

The summons bears, that the pursuer or raiser of the multiplepoinding has in his hands certain sums and funds belonging to A B (who is called the common debtor, *i.e.* common debtor to the persons respectively claiming the fund); that he is ready to condescend on the amount of the fund, and willing to pay it to the common debtor, or such of his creditors

the creditors of non-traders, does not abolish any process of distribution previously competent. A process of multiplepoinding may, however, be virtually superseded by a sequestration. See *Gordon v Millar*, 1842, 4 D. 352.]

¹ This is a form of action analogous to the English Chancery proceeding by bill of INTERPLEADER. A bill of interpleader is resorted to where a person claiming no right in the subject, not knowing to whom he ought of right to render a debt or duty, apprehends injury from claims made by two or

more, claiming in different or separate interests the same debt or the same duty. The bill states the situation of the plaintiff, the conflicting claims upon him, and prays that such claimants may interplead, so that the Court may adjudge to whom the debt, duty, or property belongs, and that the plaintiff may be thereby indemnified. The plaintiff should also, by his bill, offer to bring the money or property claimed into Court. 1 Maddock on Chancery 173.

or others as shall be found to have best right thereto; that he is harassed at the instance of the common debtor, and of sundry creditors, or pretended creditors of his, some of whom have used arrestments in his hands; and on the whole the conclusion is, that decree should be pronounced, finding the pursuer liable only in once and single payment of the sums in his hands, and that to the person having best right to it: for determining which, the said A B, as common debtor, for his interest, and all others pretending right thereto, ought to produce their respective grounds of debts and diligence; that the pursuer shall be found entitled to retain his expenses out of the fund; and that, on paying over the fund to the person found to have best right to it, or on consigning the same, the pursuer should be exonerated and discharged.

The action is of course directed against those who have intimated to the holder of the fund that they have received conveyances of it, or who have used legal measures for [298] attaching the fund for payment of the debt due to them by the common debtor. These creditors are cited as parties to debate their preferences, and to have it settled by a judgment to whom the fund is to be paid over; and this must, of course, be attended with the penalty, that if they do not appear, their claims shall be disregarded, and the fund distributed. One great object of the law in the institution of this action was to save the expense of all the various actions and counter actions that, in the common course of things, might be necessary for settling the rights of the creditors, and to combine them all in one process of competition of the rights or claims on an inadequate fund. It is therefore held to be a congeries of all the actions which may be necessary for extricating the competition—forthcoming, count and reckoning, reduction, declarator,¹ etc.

NATURE OF THE ACTION.—It is peculiar to this action, but useful in its application as an economical mode of settling competitions, that not only the holder of the fund, but any creditor interested, or even the common debtor himself, may bring the action. It must always proceed, however, in the name of him who holds the fund, and against whom the warrant for payment is ultimately to be issued. In maintaining his own right or claim, each creditor is entitled to demand a decree of declarator as preliminary to the petitory effect against the fund; and in such declarator (the title to demand which is the production of his grounds of debt) is included the rescissory declarator of reduction against all other claimants.

1. As the object of the action is to dispose finally of a disputed fund, it is necessary to call as parties to it every creditor who, by voluntary or judicial act, has any real right constituted in his person upon the fund. This is done by citation, as in any common action, but upon very short *induciae*. Where the action is brought by a claimant in the name of the holder of the fund, the other is truly a defender, and the summons must be intimated to him by leaving for him a copy before witnesses, and returning an execution of such intimation.² The effect of overlooking in the citation any creditor having a valid right in the fund, must of course be, to entitle him to claim back from the creditors who shall be preferred such part of the fund as he would have drawn in the competition, and to demand indemnification from the holder of the fund.

2. When all who have real rights over the funds are called, the decree of multiplepounding, which orders payment to those who are preferred, is, to the person who pays under such authority, a full defence against any future challenge by creditors who have not appeared. This decree is to be considered as a part of the creditor's diligence, or legal execution, similar in its effect to a decree of forthcoming. It must be obeyed, and, of consequence, must operate as a complete discharge to him who pays under his command.²

3. To the creditors preferred the decree of multiplepounding is no absolute assurance. By 1584, c. 3, one who can show a necessary cause of absence, or a minor who, at the date

¹ Act of Sederunt, 12 Nov. 1825, c. 58.

² Sir George M'Kenzie's Observ. 9 James v. c. 3; Ersk. iv. 2. 23.

of the proceedings, was without tutors or curators, is entitled, if he had a preferable right to the fund, to reduce the decree, and, although he may have been expressly called in the action, to claim from those preferred repayment of what he should have drawn. Those who were not summoned will be entitled to show that the decree was erroneous, and that the fund should still be paid to them. It is a matter of great importance to guard as completely as possible against the premature division of the funds before creditors have come forward, and therefore it is the practice to publish advertisements in the newspapers, intimating the dependence of the multiplepoinding, and requiring all having claims upon the fund to appear. These intimations, too, contain in general a declaration that those who do not [299] appear shall be excluded from any share in the division. But no such declaration can deprive a creditor of his legal right of preference should he afterwards challenge the decree of multiplepoinding, and be able to establish such preference.

4. In all competitions it is a rule, that while the fund is still *in medio*, undisposed of, any creditor interested may appear and claim. And so, in the multiplepoinding, any creditor of the common debtor may appear, though not called; and on producing his grounds of debt, may enter into competition, object to the claims of other creditors, maintain the superiority of his own, and contend for a place in the division, as if he had been an original party to the action.

5. The pursuer of the action has little further interest than to see that such citations have been given as may secure the efficacy of the decree, considered as a discharge to him; to abide the orders of the Court respecting the intermediate disposal of the fund, and the ultimate payment of it; and to get the necessary expenses of the common action allowed as a deduction from his debt. By the first interlocutor in a multiplepoinding, accordingly, the raiser of the action is declared liable only in single payment, and entitled to the expense of raising the action if well founded. The subsequent proceedings concern the amount of the fund, and the competition of the creditors, and settlement of their rights; and in settling the amount of the fund, the pursuer is entitled to discuss any claim of retention or of compensation which may be competent to him. The whole is closed by a decree, settling the order of division, decerning for payment to the claimants who shall be preferred, and discharging and exonerating the pursuer.

EFFECT UPON CREDITORS.—The action being thus of a nature to infer a judicial discharge to the holder of the fund, while it is a congeries of all the actions necessary for settling the disputed preferences among the creditors, the effect of it upon the diligence of individuals requires to be taken notice of.

1. No individual who has appeared in the action can proceed with personal diligence against the holder of the fund. His claim is properly, as already observed, under suspension as to that fund; and he will expose himself to an action of damages, by using diligence against the holder of it.¹ But it would not seem to be sufficient as a suspension to interrupt diligence, that a creditor were merely cited in a multiplepoinding, without having made appearance. Should any creditors, not called in the multiplepoinding, proceed with diligence against the holder of the fund, the multiplepoinding, although not itself a suspension of the diligence, will afford a complete ground of suspension.

2. The multiplepoinding makes the fund litigious, to the effect of preventing the common debtor, to whom that fund originally belonged, from granting any voluntary conveyances of it while the action is in dependence.

3. An action of multiplepoinding does not seem either to supersede the necessity of proceeding with diligence, in order to attach the fund, or to prevent creditors from going on with their diligences, in order to acquire preferences.² It is an action devised for the benefit chiefly of the person holding the fund, and having only incidentally the operation of

¹ *White v Brown*, 1772, M. 9133.

² [*Smith's Trs. v Grant*, 1862, 24 D. 1142.]

an action of competition for settling preferences. But the measures which the raiser of the multiplepoinding may think necessary for his safety, cannot prevent the creditors from using legal diligence for acquiring preferences over the funds of their debtor. It is only by the interference of the Legislature, on the principles of bankrupt law, that this right of creditors at common law can be restrained; but there is no such restraint in any of the subsisting statutes. Therefore, 1. If a creditor have arrested, and the arrestee have raised a multiplepoinding, a creditor who is no party to that action may proceed with every diligence that can operate against the fund: he may, for example, carry it off by [300] poinding, if the subject be poindable, just as effectually as if the action in dependence were a forthcoming. 2. If an arrestment have been used, and the debtor be rendered bankrupt, the other creditors must, notwithstanding a multiplepoinding, arrest within the four months, in order to have the benefit of the *pari passu* preference. But it does not appear to be sufficient for this purpose to produce a claim in a multiplepoinding raised by the arrestee. In the statute 23 Geo. III. sec. 2, it was provided that this should be sufficient; but no such provision is made in the subsisting statute. Even where the person proceeding with diligence is a party to the action, it would seem that he may go on to arrest, or do other diligence, to the effect of acquiring a preference. An action of ranking and sale has no effect in stopping diligence independently of the recent statute; but an action of multiplepoinding is in no shape entitled to the same strong effects with a ranking and sale. It is not a general diligence of attachment for behoof of all the creditors, proceeding on the principles of bankrupt law; it is only a process for distributing what is in the hands of the pursuer, among those who can show the best right to it; and as it does not supersede the necessity of using diligence to attach the fund, it cannot have the effect of stopping it.¹ 3. If the fund have been poinded, another creditor ready to poind may establish his *pari passu* preference by raising a multiplepoinding within the appointed term, or by appearing within that term in a multiplepoinding already raised.²

Although the creditors who by this action are brought together to dispute and settle their preferences are not formed into a deliberative body, as in the sequestration, they may (and where there is a common fund to be managed, or many contending interests to be adjusted, they generally do) apply to the judge for the appointment of a factor to manage the common property, or a common agent to attend to the general interest of the creditors.

1. In the ordinary case there is little occasion for a FACTOR. Where the fund is money, the general course is to order it to be consigned in a bank, upon a promissory note payable to the order of the Court. Where the fund consists of goods that require to be disposed of, the Court gives, of course, such orders respecting the sale as may ensure the best price and greatest advantage to all concerned. But where rents are arrested, or goods unsold, and requiring to be brought to market, it is beneficial for all parties to have the sale conducted by, or the levying and consigning of the rents entrusted to such a person. The majority of the claimants in value rules the election; and when the factor receives the authority of the Lord Ordinary, he finds caution for his intromissions and for the faithful discharge of his office, as under the Acts of Sederunt relative to judicial factors.³

2. It is only in competitions which are much involved that a COMMON AGENT is appointed. The clerk of the process is, in general, the person who makes up the state of the interests and order of ranking. But where a common agent is thought necessary, the analogy of the proceedings under a ranking and sale is closely followed.⁴ The duty of the common agent does not materially differ from that of the common agent in the ranking and sale. In making up the state of debts for division, 1. The funds are stated as ascertained; 2. The claims are arranged into classes, and detailed with the proper objections; and, 3. A

¹ [Where the debtor has been rendered 'notour bankrupt,' separate diligence is no longer necessary. See 19 and 20 Vict. c. 79, sec. 12.]

² 54 Geo. III. c. 137, secs. 2 and 5. See above, vol. ii. p. 74.

³ 22 Nov. 1711 and 13 Feb. 1730.

⁴ See above, p. 247.

scheme of the order of ranking is subjoined. This state is allowed to be seen and objected to, and the discussion proceeds among such of the creditors as find themselves engaged. The great use of the appointment of a common agent is to prevent these individual discussions from putting the action out of its proper shape, and to keep the parties from unduly delaying the division of the fund.

[301] When the preference is settled by a final interlocutor of ranking, effect is given to it in a scheme of division; which, after being seen by all concerned, and either acquiesced in or corrected and approved of, is the foundation of the final decree settling the distribution of the fund, and finally discharging the raiser of the multiplepointing.

SECTION II.

OF THE PROCESS OF FORTHCOMING, CONSIDERED AS A PROCESS OF DISTRIBUTION.

When several creditors concur in arresting, and have raised forthcomings, it is unnecessary to multiply proceedings by raising an action of multiplepointing, should there be no other creditors in the field. The separate actions of forthcoming are conjoined into one, and the competition determined as if it were a multiplepointing.

In such combined action, the Court will give the necessary orders for preserving the common fund, and will make the proper remits to the clerk, or to an accountant, after the points of preference are determined, to make up a scheme of division. Simple as in the abstract a competition of arrestments may seem to be, it often becomes (especially in the arrestment of the rents of an extensive estate by many creditors) a matter of very great difficulty to bring out an intelligible view of the effect of the different arrestments, and of the ranks in which they should be preferred in the division of the fund.

It seems to be quite unnecessary, after what has already been said upon multiplepointing, to add anything further respecting the combined action of forthcoming, as a process of distribution.

SECTION III.

OF THE PROCESS OF DISTRIBUTION OF THE PRICE OF POINDED GOODS.

The statutes passed in the 23d and 33d years of King George III., in introducing the *pari passu* preference amongst poinders, required that creditors who wish to take the benefit shall 'summon' the poinder within four months from the bankruptcy.¹ It could not be the intention of the Legislature absolutely and precisely to require an action at the instance of every creditor wishing to take the benefit of the statute. It was accordingly found competent for other creditors, instead of raising each of them an action, to appear in the action raised by any one creditor against the poinder, and produce their interests there;² and by the late Act of 54 Geo. III. it is declared, that the judicial production of a decree or liquid ground of debt in any relative process shall be sufficient to entitle a creditor to a share proportioned to his debt.³ A multiplepointing is such a process; and the person intending to claim as a poinder may raise such an action, or appear in one already raised, to the effect of preserving his right to a *pari passu* preference.

¹ See *Bisset v Robertson*, 2 June 1812, Fac. Coll.

² *Finlay v Bertram, Gardner, & Co.*, 1788, M. 1250.

³ 54 Geo. III. c. 137, sec. 5. [19 and 20 Vict. c. 79, sec. 12.]

CHAPTER V.

OF SEQUESTRATION OF THE ESTATES OF BANKRUPTS.¹

SECTION I.

PROCESS OF SEQUESTRATION.

1. HISTORY OF THE LAW OF SEQUESTRATION.

INDEPENDENTLY of the peculiar rules of the Law of Bankruptcy, creditors are insulated individuals, connected by no common interest, and not bound to co-operate in execution, or to take joint proceedings for the general benefit. The mischances incident to trade necessarily lead to bankruptcies; and with the extension of commerce, and the prevalence of the system of credit, the effect produced by them is extended over a country: '*Non enim possunt, una in civitate, multi rem atque fortunas ammittere, ut non plureis secum in eandem calamitatem trahunt.*' It is amidst those frequent insolvencies that the great principles of the law of bankruptcy are elicited; that men feel by experience the absurdity and unjust consequences of the old maxim, that priority of execution should regulate the preference among rival creditors; that they come to take a more enlarged view of the effects of insolvency upon the common interests of all, and acquire a just sense of the benefit to be derived from unanimity and from common proceedings. Under the law of bankruptcy the creditors are formed into a community; the inadequacy of the fund from which they are to be paid suggests the wisdom of mutual forbearance; a stop is put to the accumulation of expensive and separate proceedings; and a general plan, following the reasonable wish of the whole, or, resulting from the equity of contending interests, is established for recovering and distributing the estate at the common expense. The proceedings against the person of the debtor suffer also a change; the right of imprisonment is restrained by liberal views; and although the debtor who is guilty of fraud is exposed to harsh constraints, and regulations highly penal, he whose insolvency has arisen from innocent misfortune is relieved from prison or discharged of his debts. The circumstances of Scotland, and the spirit of her common law, have been favourable to the formation of such regulations as might safely be applied to all ranks of men. As already explained, there are two fundamental principles on which these regulations ought to rest: *first*, That from the moment of the debtor's insolvency, the inadequate fund becomes the common property of his creditors; and *second*, That where the debtor has made a full and fair surrender, he should be entitled to freedom from his debts.

The first attempt to apply these principles practically was made in 1751. A bill was introduced into the House of Commons by the merchants, but was lost in the Upper House. The Court of Session in 1754 made an Act of Sederunt, establishing an equality of ranking among all arrestors and poinders within a certain period of bankruptcy. But this was a mere experiment; and upon the expiration of the Act, which was in force only for four years, it was not renewed. The law fell back into its old state of imperfection: priority gave preference; and on the slightest alarm, creditors poured in with diligence against the unhappy debtor, and the most unjust preferences took place among the creditors. In this position the law continued till 1772, when the first Sequestration Act, 12 Geo. III. c. 72, was passed. It enacted that, on a debtor's bankruptcy, and upon a petition to the Court of Session by any creditor, a sequestration of his personal estate should be awarded, which

¹ [In consequence of the numerous changes in sequestration procedure introduced by the legislation of the present reign, the editor has thought it expedient in this instance to substi-

tute the chapter on Sequestration as appearing in Mr. Shaw's edition, for that of the author. The new matter is distinguished by brackets.]

should have the effect of equalizing all arrestments and poindings used within thirty days of the date of the petition; that the estate should be vested in a factor proposed by the creditors, and be distributed by him according to the directions of the Court; or, if it should seem more eligible to the creditors, extrajudicially by a trustee elected by them, as under a private trust-deed. When, in 1783, this statute came to be renewed, the alarm occasioned by the novelty of the arrangements had given way to a conviction that bankruptcies were much more beneficially administered under the new system, imperfect as it was, than under the common law; and that the alternative of judicial proceedings might be dropped, leaving the plan of trusteeship to stand alone. This was accomplished by the statute 23 Geo. III. c. 18. The chief alterations introduced were these:—Sequestration was restricted to the estates of merchants and manufacturers; was extended to the whole property, both heritable and moveable, an option being reserved to the creditors of selling the former by the process of judicial sale; regulations were introduced for equalizing arrestments and poindings within a certain period of bankruptcy; and the administration was confined to a system of private trust under the immediate control of the Court of Session. The sequestration was to be a universal diligence for attaching the whole estate, and enabling the creditors to pursue a systematic plan for calling the rest together in order to constitute the trust in some person: the trust was to be rendered effectual by a proper conveyance of the estate to the trustee, by whom the estate was to be managed and disposed of, the competition of the creditors settled, and the dividends struck; while the Court was to try, in a summary manner, every objection which the parties concerned had to state against the decisions of the trustee, and interfere upon all proper occasions by means of its controlling power. This statute was revived in 1793 by the Act 33 Geo. III. c. 74; and several useful regulations were introduced by an Act of Sederunt passed in 1805 under the authority of the statute.

In 1814 another renewal was made by the Act 54 Geo. III. c. 137, which continued in operation till 1839. In the meantime, much inquiry and discussion had taken place, both among lawyers and mercantile men, as to the means of effecting still greater improvements in this department of the law. It is not surprising that, among the multitude of suggestions which were offered, many projects should have been brought forward which were rash and hazardous; and, in particular, that certain new arrangements of bankruptcy which had been made in England should have had considerable influence in leading to a proposal to relinquish our own system for the adoption of one bearing a closer analogy to that of England. But the good sense and practical views of those who took the lead in these discussions finally prevailed in a resolution to adhere to the principles of our own, rather than to enter upon the experiment of any new system. The result was a resolution to frame a new bill that should embrace certain recommendations of the Law Commissioners, and unite and reconcile the various opinions of those interested in the measure.¹ This was passed into a law, and is the statute 2 and 3 Vict. c. 41.²

Never, perhaps, has any statute undergone, previously to its coming before the Legislature, a more ample discussion; and if, in the course of that discussion (as is almost unavoidable), all that could have been desired has not been accomplished, but some points

¹ [The preparation of the new statute was confided to the author, who framed a bill embracing and consolidating the whole law of bankruptcy. Eventually, however, it was resolved that the bill should be confined to the subject of sequestration; and in consequence of the author's time being fully occupied by the duties imposed on him as Chairman of the Law Commission, of Professor of Law, and Principal Clerk of Session, the preparation of the bill was devolved on Mr. Shaw, the editor of the sixth edition of this work, as part of the general law of bankruptcy, on which he was then engaged in framing various bills. Of these there were passed

the statutes as to Personal Diligence, Cessio Bonorum, Arrestments, and Poindings. Others relating to the Acts 1621, c. 18, 1696, c. 5, Judicial Sales, Inhibitions, Adjudications, and Competitions, were also prepared; but amidst the official changes consequent on political conflicts, they were not carried through Parliament.]

² [Although the Act is entitled 'An Act to consolidate and amend the Laws relating to Bankruptcy,' it is chiefly confined to the branch relative to sequestration of the estates of bankrupts.]

left, amidst the differences of opinion relative to its practical operation, for still further experience, there seems to be nothing at least vicious in the great principles of the system—nothing which may not be supplied by a short statute at any time introduced. [The course suggested by the author was adopted in 1853, when a short Act (16 and 17 Vict. c. 53) was passed, by which it was provided that, in place of an interim factor being elected by the creditors, he should be appointed by the Lord Ordinary who awarded sequestration; that the factor should take immediate possession of the estate; that a deliverance by the sheriff declaring the election of trustee should be final; and that the time of payment of dividends should be accelerated. There were also other changes introduced of a less important character. In 1856 an Act was passed which to a large extent is a renewal of the Act of 1839, and embodies the changes made by the short Act. The new matter consists chiefly of two provisions: 1st, That sequestration shall not be confined to the estates of merchants, but be extended to those of all persons, as in the original statute of 1772; and 2d, That sequestration may be awarded by the Sheriff Courts as well as by the Court of Session. This is the statute 19 and 20 Vict. c. 79, which came into operation on the 1st of November 1856. . At the same time another statute was passed re-enacting verbatim certain provisions in the Act of 54 Geo. III. c. 137, relative to arrestments, poindings, judicial sales, adjudications, and securities for cash credits. This is the statute 19 and 20 Vict. c. 91, which took effect from the time when it was passed, July 29, 1856.¹]

2. NATURE AND OBJECT OF SEQUESTRATION.

Sequestration may be said to be a judicial process for attaching and rendering litigious the whole estate, heritable and moveable, real and personal, of the bankrupt, wherever situated, in order that it may be vested in a trustee elected by the creditors, to be recovered, managed, sold, and divided by him, according to certain rules of distribution.

For all the acts in which judicial interposition is required, the sequestration may be considered as a depending action, to the effect of authorizing at all times summary application to the Court. But the peculiarity of the contrivance is, that except in those steps of proceeding in which the aid or the superintendence of a court is absolutely necessary, the whole operations are extrajudicial. Thus, for the management, sale, and distribution of the estate, the creditors are formed into a united body of the nature of a corporation, acting on some occasions in general meetings, in others by functionaries—a factor, trustee, and commissioners—elected with certain precautions, and under the incessant superintendence of a court of law.

3. FORUM.

[Sequestration² may be awarded either by the Court of Session,³ or by the sheriff of any county in which the debtor within the year⁴ preceding the date of the petition resided

¹ [These statutes were framed and passed somewhat hastily; and very soon after coming into operation defects and mistakes became apparent, which led to the necessity of passing an amending Act in the next session of Parliament—the 20 and 21 Vict. c. 19.]

² As the process for distributing the estates of bankrupts differs so essentially from the sequestration of the common law, in the case of a competition of rights (*ante*, p. 244), it is unfortunate that the term 'sequestration' has been adopted. It suggests a false analogy, and the erroneous notions thence arising are frequently visible in practice.

³ [Hereafter, unless otherwise mentioned, reference is made to the Lord Ordinary on the Bills, in whom the practical jurisdiction is vested. See p. 285, sec. 5. Sequestrations under the old Act may be carried on under it; but where the application has been before the date of the new Act, and the

procedure is not till after that date, sequestration may be awarded under it (sec. 3; *Drummond*, 1856, 19 D. 42). Jurisdiction cannot be founded by arrestment for the purpose of awarding sequestration. *Croil*, 1863, 1 Macph. 509.]

⁴ [The variety of expression as to dates in this and other instances should be kept in view. Here it is 'within the year preceding the date of the petition,' which may import any time within the year, although the meaning probably intended is a full year; in regard to the case of a deceased debtor, the words are, 'for the year preceding his death,' which clearly means the definite and entire period of the year preceding death. And in the provision (sec. 13) as to liability to sequestration, the terms are, that the party who is notour bankrupt must have resided, etc., in Scotland 'within a year' prior to the presentation of the petition, which would seem to import that residence at any time would bring him under the

[or carried on business; but no sequestration shall be awarded by any court after production of evidence that a sequestration has already been awarded in another court, and is still undischarged (sec. 18).¹

In the case of a deceased debtor, sequestration may also be awarded by the Court of Session or by the sheriff of the county in which the debtor for the year preceding his death had resided or carried on business (sec. 2 of Bankruptcy Act 1857).

But where sequestration has been awarded against a debtor by the sheriffs of two or more counties, the later sequestration (on production of a certificate by the sheriff-clerk of the county in which the sequestration first in date was awarded, setting forth the date of such sequestration) is to be remitted to the sheriff of such county. Where all the sequestrations are of the same date, any one may be brought by appeal at any time before the Court of Session or Lord Ordinary on the Bills, who shall remit the sequestration to such Sheriff Court as in the whole circumstances shall be deemed expedient; and the same course is to be followed where a sequestration has been awarded by the Court of Session alone, or by the Court of Session and also by one or more Sheriff Courts; and a notice of the remit is to be inserted by the clerk of the Bill Chamber in the Gazette within four days after the remit shall have been made.² It is also provided, that where a sheriff has refused to sequester, it shall be competent to present a petition for sequestration to the Court of Session (sec. 19).³

In sequestrations awarded in the Court of Session and remitted to the sheriff,⁴ the process is held to be in the Bill Chamber. The clerks of the Bill Chamber are clerks to such sequestrations, and the sheriff-clerk of any county is clerk to the sequestrations awarded by the sheriff of that county (sec. 43).⁵

4. WHOSE ESTATES MAY BE SEQUESTERED.

Sequestration may be awarded of the estates of any living debtor, subject to the jurisdiction of the Supreme Courts.⁶ This may be done, *1st*, on his own petition, with the concurrence of a creditor or creditors, qualified as after mentioned; or, *2d*, on the petition of a creditor or creditors duly qualified, provided the debtor be notour bankrupt, and have within a year before the date of the presentation of the petition resided, or had a dwelling-house or place of business, in Scotland;⁷ or, *3d*, in the case of a company being notour bankrupt, if it have within such time carried on business in Scotland, and any partner have so resided or had a dwelling-house, or if the company have had a place of business, in Scotland. Sequestration may also be awarded of the estates of a deceased debtor who at the date of his death was subject to the jurisdiction of the Supreme Courts. This may be done (1) on the petition of a mandatory to whom he had granted a mandate to apply for sequestration, or (2) on the petition of a creditor or creditors duly qualified (sec. 13).

enactment, although probably a full year would be required. By sec. 5, 'periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run.'

¹ [The references are to the sections of the Act 1856, unless otherwise stated. See, as to the effect of the existence of an English Commission of Bankruptcy, *Mein v Turner*, 1855, 17 D. 435.]

² [By sec. 3 of the Bankruptcy Act, 1857, if sequestration has been awarded by the sheriffs of two or more counties, and the later sequestration or sequestrations have been remitted by the sheriff or sheriffs awarding them to the sequestration first in date, a notice of the remit in this case shall also be inserted in the Gazette four days after a copy of the deliverance of such remit could be received in course of post in Edinburgh.]

³ [No sequestration, either in the Court of Session or Sheriff Court, shall fall asleep (sec. 43).]

⁴ [On a remit of a sequestration awarded in the Court of Session to the sheriff, a copy of the petition and of the first deliverance, and also (where it is different) of the deliverance awarding sequestration, certified by one of the clerks of the Bill Chamber or sheriff-clerk, shall, with the productions, be transmitted by the petitioner to the sheriff-clerk of the county to the sheriff of which the sequestration is remitted (sec. 43).]

⁵ [In all sequestrations the sheriff-clerk and messengers-at-arms and officers of the Sheriff Court have power to act in their respective offices under the Act (sec. 43).]

⁶ [Sequestration of estates of a royal burgh held competent. *Wotherspoon v Mags. of Linlithgow*, 1863, 2 Macph. 348.]

⁷ [See *Plock v Wallace*, 1841, 4 D. 271, where the circumstance of having retired to the sanctuary was held not sufficient without the other requisites.]

5. APPLICATION FOR AND AWARDING OF SEQUESTRATION.

[Petitions for sequestration in the Court of Session shall be made to the Lord Ordinary, and be signed by the petitioner or his counsel or agent, and the Division of the Court to which the sequestration is appropriated shall be marked thereon. In the Sheriff Court it shall be signed by the petitioner or his agent. And in either court, in petitions at the instance of the debtor, but not signed by him, there shall be produced therewith a mandate authorizing the same, signed by him;¹ or, in the case of a company, signed by a party entitled to act for the company. In all cases the petitioning or concurring creditor shall produce with the petition an oath to the effect after specified,² and also the account and vouchers of the debt, as after explained,³ failing which production the petition shall be dismissed (sec. 21).⁴]

1. WHERE THE DEBTOR APPLIES OR CONCURS.—The necessity of a concurrence by a creditor or creditors to the extent prescribed is not superseded;⁵ but it renders the service of the petition unnecessary, and entitles the Court instantly to award sequestration. The cases in which the debtor's concurrence is necessary are: Where he is not notour bankrupt; or where, at the time of the application, he does not reside in Scotland, and has no dwelling-house or house of business there, or at least has had no such residence, or dwelling-house, or house of business within a year previous to the application. In these cases sequestration may be awarded if the debtor be subject to the jurisdiction of the Supreme Court;⁶ and if he shall make a joint application with qualified creditors, or if he shall, by himself or those acting for him (he not being in Scotland), concur in the application by these creditors. [Accordingly, it is enacted by sec. 29, that in these cases the Lord Ordinary or the sheriff shall forthwith issue a deliverance, by which he shall award sequestration of the estates which then belong, or shall thereafter belong, to the debtor before the date of the discharge, and declare the estates to belong to the creditors for the purposes of the Act. And, by sec. 34, if a creditor who has petitioned for sequestration, or concurred in the petition, withdraw, or become bankrupt, or die, any other creditor may be sisted in his place; and if the debtor die after the petition is presented, the proceedings shall notwithstanding be followed out in terms of this Act so far as circumstances shall permit. The former rule applies also in the case of opposition to a petition or application for a recall of the sequestration. And by sec. 41 it is provided that the petitioning or concurring creditor shall be entitled to payment by the trustee, when he shall be appointed, out of the first of the funds which shall come into his hands, of the expenses incurred in obtaining the sequestration, and doing the other acts hereby required prior to the election of the trustee, as the same shall be taxed.]

¹ The debtor may write so ambiguously to his man of business as to leave it doubtful whether his letter amounts to a mandate to apply for sequestration; and it must become a matter of construction whether the powers be sufficient. See *Cole v Flammare*, 1772, M. 1605. The Court would in such a case probably supersede consideration of the petition till an explicit authority were produced; and the effect of sequestration would attach from the date of the first deliverance, although it merely superseded the petition. A question occurred on the effect of a mandate for sequestration in very critical circumstances: the debtor sent a mandate to apply for sequestration, but died before it was produced. The judges were satisfied that the debtor's death had extinguished the mandate, and that no proceedings could therefore be grounded upon it. *Mann*, in sequestration of *Stewart*, 28 Nov. 1811, n. r.

² [See p. 291.]

³ [See below, p. 292.]

⁴ [See as to whether, if the vouchers be objectionable,

further evidence can be permitted, *Aitken v Stock*, 1846, 8 D. 509; *Dyce v Paterson*, 1846, 9 D. 310; *M'Rostie v Halley*, 1849, 12 D. 124, and 1850, 12 D. 816. The presenting of or concurring in a petition for sequestration, or the lodging a claim in the hands of the trustee, or the sheriff, or preses at any meeting of creditors, interrupts prescription of the debt of the creditor so petitioning, concurring, or claiming, and bars the effect of any statute of limitations in England or Ireland, or Her Majesty's dominions; and although this sequestration shall be recalled, such interruption or bar shall notwithstanding be effectual (sec. 109).]

⁵ [See p. 288.]

⁶ [See *Blair*, 1846, 8 D. 807, where the debtor was in Australia.]

⁷ [See *Cook v Jeffrey*, 1831, 9 S. 667; *Taylor v Hunter*, 1840, 2 D. 512, as to the meaning of 'first of the funds'; and *Bell v Mudie*, 1854, 16 D. 915, as to the claim by a country agent against the trustee.]

2. WHERE CREDITORS ALONE APPLY, the debtor must be proved a bankrupt.¹ There is one distinction, however, between the description of bankruptcy required for authorizing a sequestration and that which will set aside a deed of preference under the Act 1696, c. 5. In the former, insolvency is presumed; in the latter, it must be shown. And in general it may be laid down, that where the requisites of the statute concur, it is no sufficient ground for refusing sequestration that the debtor offers in the face of this presumption to prove his solvency.² The only proof of solvency which is admissible is payment of the petitioner's debt, and of the debt whereupon the diligence proceeded; together with the debts of those who may have concurred in the application. There is, however, a discretionary power in the Court to judge of any reasonable cause why further proceedings should not be held; and in very extraordinary cases the Court may supersede the awarding of sequestration for a short time, to give an opportunity of showing solvency, and of paying off the debts before notice of the bankruptcy is sent to the Gazette.³ There is usually little danger from a short delay, since the effect of the sequestration is drawn back to the date of the first deliverance.

3. APPLICATION AFTER THE DEBTOR'S DEATH.—Prior to the statute 2 and 3 Vict. c. 41 there was no means of sequestrating the estate of a debtor dying insolvent; nay, it had been held, as we have seen, that a mandate granted by a debtor for applying for sequestration was rendered unavailing by his death before the sequestration was awarded. The effect of this was, that in cases of insolvency of deceased debtors the creditors were compelled to adopt very tedious and expensive proceedings against the estate and effects of the debtor. The only obstacle to the authorizing of sequestration in such cases lay in the possible interest of representatives, and their right to see that no advantage was taken of the rapid proceedings which the process of sequestration admitted. But after much discussion the matter has been settled on a footing which seems fairly to reconcile the interests of creditors with those of the surviving relations of the debtor.⁴ [By sec. 15, petitions for sequestration of the estates of a deceased debtor, at the instance of a creditor, may be presented at any time after the debtor's death; but no sequestration can be awarded until the expiration of six months from the debtor's death,⁵ unless he was at the time of his death notour bankrupt, or unless his successors⁶ concur in the petition or renounce his succession, in which cases sequestration shall forthwith be awarded; and by sec. 29 a deliverance to that effect is to be issued, and ordaining any successor who has made up a title to or is in possession of any part of his property to convey the same to the trustee to be appointed.]

4. APPLICATION BY OR AGAINST COMPANIES.—By sec. 27 sequestration may be awarded either on the application of the company itself,⁷ or on the application of a creditor or

¹ [In this class of cases it is provided by sec. 15, that sequestration shall be competent only within four months of the date of the debtor's notour bankruptcy. In *Balfour v Pedie*, 1841, 3 D. 612, it was held to be no objection to an application for sequestration without consent of the debtor, following upon an act rendering him notour bankrupt, that he had been previously rendered notour bankrupt more than four months prior to the presenting of the petition for sequestration, and had continued in a state of bankruptcy during the intervening time.]

² [See below, p. 293, sec. 8, as to opposition to awarding sequestration.]

³ [*Speid v Stirton*, 1850, 12 D. 985.]

⁴ [See *L. Melville v Paterson*, 1842, 4 D. 1311, to the effect that, so far as practicable, the provisions of the Act apply equally to the estates of a deceased as of a living debtor.]

⁵ [In *Taylor & Kirkland v Esplin*, 1849, 11 D. 1016, it was

held that the enactment in the 4th section of 2 and 3 Vict. c. 41, that no sequestration of the estates of a deceased debtor shall be awarded until six months after his death (except in certain specified cases), includes not merely the award of sequestration, but any application for it within that period. The above enactment supersedes this decision.]

⁶ [It has been held by the Lord Ordinary in the Bill Chamber, 1st, That an executor nominate not confirmed is not a successor (*Kinnear's Sup. 11*); and, 2d, That where one of two executors was a married woman, her concurrence without that of her husband, although he had deserted her, was inept (*Kinnear's Sup. 11*).]

⁷ [Taking this enactment by itself, it would appear that the concurrence of a creditor is not necessary; but as by sec. 4 it is enacted that the words 'debtor, bankrupt, and creditor,' shall apply to companies as well as individuals, it is thought that the provisions as to the latter are to be read as applicable to companies.]

[creditors to the required amount, without the consent of the company, of the estates of the company and partners jointly, or of their respective estates separately.]

If no diligence has been done, it ought to be strictly observed whether there be due authority for presenting a petition for sequestration in name of the company. The expression of the Act is very general—'signed by a party entitled to act for the company.' But who is entitled to act for a company in a matter so extraordinary?¹ A mandate signed by all the partners will be good to authorize the application under the above provision. But a mandate signed by the firm is questionable, as necessarily it must be written by the hand of a single partner; and being an act of the most extraordinary administration, extinguishing the very life of the company, it can have no support from the presumed *præpositura*. But where it is the act of the whole company legitimately assembled, or the result of a signed minute expressive of their resolution to terminate their career, the desire of the petition will on proper evidence be granted.² If one of the partners be abroad, the rest have no power, without express delegation, to apply for sequestration. In such a case, the sequestration should proceed on the petition of a creditor, and regular diligence. Should a sudden emergency render it eligible to have sequestration instantly awarded, in order to prevent preferences, which the delay of proceeding by diligence might establish beyond recall, both methods may be followed, and the sequestrations conjoined.

Where a power is given, by the express mandate of an absent partner, to the rest to take the entire management, it will be effectual to authorize a petition.³ Sequestration is competent only if the company carry on its business in Scotland;⁴ and it will be sufficient that it has a domicile and establishment here, although it may also have a domicile and establishment in England or elsewhere.⁵ Nor does it seem that attention will be paid to superiority in one branch over another, or that sequestration would be refused on pretence that the chief establishment of the company is abroad.⁶ The creditor who petitions or concurs must be a proper creditor of the partnership. It will not, in general, occasion much difficulty to settle this character; the doubtful cases, indeed, being only those in which the transaction has been with a partner, and where it is left uncertain whether he acted for himself or for the company. Thus, money lent to an individual who is a partner of a company, and which afterwards is by him applied to the uses of the company, will not make a debt by the company to the lender:⁷ the company will be debtor to the partner, and the partner will be debtor to the lender. But if the company, while solvent, has recognised the loan as a company debt, the lender will be a direct creditor of the company. A partner who has advanced money to the company beyond his stock is a creditor of the company. But his debt will not support a petition for sequestration; for no partner can be considered as a creditor on funds which are appropriated to creditors whom he is bound to see paid. The petition for sequestration generally includes the partners as individuals as well as the company. Where this is done, the sequestration may be considered as joint; or, as consisting of distinct sequestrations, comprehending interests inconsistent and ad-

¹ [In *Campbell*, 1830, 8 S. 625, a surviving partner of a company was held entitled to apply for sequestration. See also *Buchanan*, 1849, 11 D. 510, where sequestration of the estates of a company was awarded on the petition of one of the partners, the other partner having fled the country to avoid apprehension on a criminal charge.]

² [See below, book vii. chap. ii. sec. 3.]

³ [*M'Lean & Son*, 1824, 122 N. E., 3 S. 82.]

⁴ [In the Bankruptcy Act there is no express provision as to this in the case of an application by the company other than that which applies to 'a living debtor,' who must be subject to the Supreme Courts of Scotland; but if the application be against the company, it must be notour bankrupt, and have within a year before the date of the presentation of

the petition carried on business in Scotland, and any partner have so resided or had a dwelling-house, or the company have had a place of business in Scotland (sec. 3).]

⁵ *Royal Bank v Stein & Co.*, 20 Jan. 1813, F. C., 1 Rose's Ca. 462.

⁶ [Where the existence of a partnership is denied, see *M'Gavin v Ogilvie*, 1854, 16 D. 546, as to the competency of allowing proof of the fact in this proceeding.]

⁷ *Wheatly ex parte*, 1 July 1797, Cook's B. L. 550. Erskine (iii. 3. 20) seems to lay down a different doctrine on the authority of the Pandects (*Pro Socio*, lib. 17, tit. 2, l. 82). But I would take, in preference to his authority as a commentator on the civil law, that of Pothier. See *Tr. du Cont. de Société*, p. 570, No. 101.

verse.¹ The common case is of a joint sequestration, where the partners have had no other trade, and properly no other creditors, but those of the company; and in such cases there is the same course of administration in both sequestrations. Where the partners, however, have separate estates and separate creditors, the distinct interests to be administered, which frequently lead to contest and dissension, may require different trustees, and an entire separation in the management.

[By sec. 94, if any latent partner of a company whose estates have been sequestrated shall not, by intimation to the trustee, acknowledge that he is a partner, on or before the day appointed for the examination of the known partners, it is enacted that he shall not be entitled to the benefits or privileges of the Act, unless in an application for the same he shall satisfy the Lord Ordinary or the sheriff that the omission proceeded from innocent mistake or ignorance of the proceedings, or reasonable misconception as to his liability as a partner, and unless he shall then follow out all necessary steps for remedying as far as possible the loss and inconvenience thence arising.]

A partnership creditor may apply for sequestration against the individual partners; but it is necessary, in regard to his title, to attend to the operation of two rules,—one of which excludes contingent creditors from petitioning; and the other gives to a partnership creditor a right to claim against the separate estate, in competition with the separate creditors, only for the balance unpaid by the company. It would seem that such creditor would be bound to value and deduct, and would be admitted as a petitioning or concurring creditor against the separate estate of the individual only for the balance.²

6. QUALIFICATION OF CREDITORS.

[Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than fifty pounds; or of any two creditors whose debts together amount to not less than seventy pounds; or any three or more creditors whose debts together amount to not less than one hundred pounds,—whether such debts are liquid or illiquid, provided they are not contingent (sec. 14).]

1. NATURE OF THE DEBT.—Debts, as formerly explained, are of three kinds—pure, future, and contingent.³ A Pure Debt is one arising on an obligation or engagement of which the term of payment has arrived, and of which, consequently, payment may immediately be enforced. This sort of debt forms the proper subject of sequestration. It is not necessary that the debt shall be constituted by a decree, or even proved by written document: a debt by open account will serve as an effectual ground of a petition, provided it be proved as required by the Act. But a debt may have been incurred, and may be actually due, while the amount may not be ascertained, or capable of being so stated as to be precisely demandable, without the aid of a court of justice. Such are certain claims of damages;⁴ a distinction being marked between damages for breach of contract, and damages arising from delict and *quasi delict*. Where a claim of damages arises by breach of contract or convention, the amount may sometimes be brought to a certain test or criterion; and in such cases it may be doubted whether the person entitled to such damage may not swear to its amount as a debt, to the effect of sustaining a petition for sequestration, as it is not a debt of which either the existence or amount depend on a contingency still unascer-

¹ [Sequestration may be awarded either on the application of the company itself, or on the application of a qualified creditor, without the consent of the company; of the estates of the company and partners jointly, or of their respective estates separately (sec. 27). But an affidavit of a debt against the company will not authorize the sequestration of the estates of a partner (*Bellis v M'Gregor*, 1831, 10 S. 96); and a sequestration of a person as a partner will apply only

to the partnership, not to private debts. *Lindsay v Clelland*, 1844, 6 D. 412.]

² [This, it is thought, does not apply to the case of petitioning for sequestration, but to claiming to vote, or for a dividend.]

³ *Ante*, vol. i. p. 332 et seq.

⁴ See *ante*, vol. i. p. 698.

tained. Thus, the loss sustained by non-delivery of a cargo of corn according to agreement, forms a claim of debt ascertainable at once by an event already past, viz. the market price of grain, or by the amount of the sum actually paid for a like quantity rendered necessary for fulfilling the creditor's collateral contracts. So the damage occasioned by failure to build a house may be the sum which has actually been paid to another to supply the place of the contractor.¹ But claims of damage arising from injury by delict or *quasi delict* are of a nature too uncertain to be the ground of a petition. There are, in such cases, no data for fixing, as an absolute debt, the sum of damage; and it remains with a jury to say whether any damage is due, and whether, if due, it may not be within the amount required by law for the qualification of a petitioning creditor. In this a claim of damage for injury differs from a common debt, which, if it be due at all, is due to a certain ascertained amount, and of which the ground of debt cannot be true, and the debt itself fallacious. A claim for expenses or costs of suit is a good debt to support, in whole or in part, a petition for sequestration; but the party himself is not entitled to apply on this ground, where the decree for expense has been issued in the name of his agent, and the party has not satisfied the agent.² The person who petitions must be creditor in a debt on which he might have brought an action in his own name.³ A debt due to two jointly does not appear to be good to support a petition by one of the creditors. If the debt be divisible, one of the creditors may petition, or an application may proceed on his single affidavit, provided his share be sufficient to satisfy the act in respect of the amount of debt.⁴ But it is not necessary that the petitioner shall be a creditor in his own right. One who holds a debt as trustee may petition for sequestration, provided his character as trustee is specified.⁵ If the creditor be under legal disability (as under a sentence of fugitation), it would seem that the Court would give time to him to be reponed; and that the reversal of the outlawry will have a retrospective effect to validate proceedings which have been taken without objection.⁶

Although, by common law, neither future nor contingent debts are excluded in the distribution of an insolvent debtor's estate, yet it is a different question whether such debts may be the ground of a petition for sequestration. It has long been settled that a future debt may support a petition for sequestration. But no person whose claim is merely contingent, or depending upon an uncertain condition, is entitled to apply or join in the petition for sequestration.⁷

2. AMOUNT OF DEBT.—It has been held fit by the Legislature to limit the remedy of a sequestration to the more considerable bankruptcies. As it is impossible at first to know what the ultimate amount either of the debts or of the funds may be, till the creditors have produced their claims, and the extent of the funds has been investigated, the petitioner's debt has been taken as the test of the probable importance of the bankruptcy.⁸ As part of the debt, he may include interest to the date of the petition, where the debt bears interest either by law or contract. Expenses already incurred, with exchange and re-exchange, if the debt arise upon a foreign bill of exchange, may also be included, provided the expense is precisely ascertained, so that the creditor can swear to it. If the debt be a future debt,

¹ See below, p. 305, note 2.

² *Black v Kennedy*, 1825, 4 S. N. E. 125.

³ [See, as to the effect on the sequestration of the rejection of a debt, on which the petition was founded, in a competition for the trusteeship, *Lockhart v Mitchell*, 1849, 11 D. 1341.]

⁴ See *Greenhill v Cumine*, 1824, 2 S. 531. [A bill granted by a partner of a company under the name of the firm, after dissolution, is not a good voucher of debt due by the company. *Snodgrass v Hair*, 1846, 8 D. 390.]

⁵ *Fulton v Forbes*, 9 July 1816, F. C.; *Peddie v Berry*, 1816, in *Sequestration of the Patent Cooperage Co.*, n. r.

⁶ *Black v Kennedy*, note 2.

⁷ *Morrison v Turnbull*, 1832, 10 S. 259. [But though not admitted to petition, a contingent creditor is allowed to prove his debt, to the effect of having his dividends consigned. See below, p. 308 (5).]

⁸ [Several debts may be accumulated into one sum (*Allan & Co. v Thomson*, 1846, 3 D. 152; *Smith v Borthwick*, 1849, 11 D. 517); and the same creditor may make separate affidavits to separate debts (*Wilson v Drummond*, 1844, 7 D. 249, overruling *Black v Dixon*, 1843, 5 D. 1077).]

the amount of interest between the date of the application and the day of payment must be discounted; the petitioner being a creditor for the balance only. Where he has paid a less consideration for the debt than its true amount, it seems necessary to distinguish: If the debt, as originally constituted against the bankrupt, and as between him and the original creditor, is a fair debt to the full amount, it does not seem to ground an objection to the petitioner's title that the consideration which he gave for it was less; as where he has purchased the debt for 10s. in the pound.¹ If the debt, as originally constituted, was without consideration (as an accommodation bill), the holder is a creditor to the full amount of what he has paid for it. It has been determined in England, that if he has bought it for less than its amount, as for 10s. in the pound, or if he has advanced cash upon it as a deposit, but not to the full amount,² the holder may prove the whole amount—and if he may prove, his debt will support the commission—to the effect of being paid by dividends the consideration which he has given. To this doctrine there seems to be no good exception as applicable to the law of Scotland.³ The money having been advanced, or forbearance given by the holder, on a security of a certain value, the holder ought not to be deprived of the legal means of enforcing this security, otherwise than by payment of his debt. Neither does it seem to be a good objection to the effect of restricting the debt, that the petitioner had agreed to take an extrajudicial composition, payable by instalments, which have not been paid. For where a creditor agrees to take less than his debt, so that it be paid precisely at the day, the debtor, if he fail in payment, cannot in equity be relieved from payment of the full debt.⁴ But the rule is different where a composition has been settled under the Sequestration Act. In that case the bankrupt who compounds is 'discharged, *except* as to the payment of the composition.' This has been settled to import, that a creditor under a first sequestration, terminated by a discharge on a composition, can claim in a second sequestration only as creditor for the composition.⁵

DEDUCTION must be made of all partial payments;⁶ and unless the debt shall then amount to the sum specified in the statute, sequestration cannot be awarded. But questions may arise of some nicety. If, in payment of the whole debt, or of such part of it as would reduce the sum below the legal standard, the petitioner has got endorsed to him a bill, and it has been dishonoured, while he has not, as he might have done, enforced payment by due negotiation, the debtor, or any creditor having an interest to oppose the sequestration, will be entitled to insist that this bill shall form a deduction from the petitioner's debt.⁷ But if the partial payment be such as the general body of creditors are entitled to challenge and set aside, it cannot be held to diminish the debt of the petitioning creditor in this question, provided the creditor is willing to hold it as part of the divisible fund: as, where one who is a prior creditor receives, within sixty days of the debtor's bankruptcy, an endorsement to a bill in part payment of his debt; or receives from the bankrupt, within that period, delivery of goods in liquidation of part of his claim,—these are preferences subject to reduction.⁸ Where the debtor, although he has made no payment to account of the debt, has counter claims against the petitioning creditor, there seems to be little doubt that these counter claims would be held to diminish the debt, if instantly verified by the debtor objecting to the sequestration, or if admitted by the petitioner. But where unliquidated,

¹ *Lee ex parte*, 1 P. Wms. 782. [*Robb v Forrest*, 1830, 8 S. 839; aff. 5 W. S. 740.]

² *King ex parte*, Cooke's B. L. 157; *Crossby ex parte*, 3 Br. 237; *Bloxburn ex parte*, 6 Ves. 449, and also 6 Ves. 600, reversing a former order (reported 5 Ves. 448), about which there seems to have been some mistake.

³ See below, p. 305 (2).

⁴ See *Bennet*, 2 Atkins 528; *Kay v Fleming*, 4 Feb. 1807, n. r. [*Paul v Black*, 19 Dec. 1820, F. C.; *Horsfall v Virtue & Co.*, 1826, 5 S. N. E. 33; *Blinco's Tr. v Allan & Co.*,

1828, 7 S. 124, aff. 7 W. S. 26. See *Graham v Cuthbertson*, 1828, 7 S. 152.]

⁵ *Saunders v Renfrewshire Banking Co.*, 1827, 5 S. N. E. 531.

⁶ See below, p. 305 (2), as to voting and dividend.

⁷ See *Bickersdike v Bolman*, 1 T. R. 405.

⁸ *Mann, Assignee of Stevens, v Shepherd*, 6 T. R. 680. [Payment of a part after the application is made for sequestration is of no relevancy. *Allan & Co. v Thomson*, p. 289, note 8.]

they could not have this effect, as compensation is no extinction of a debt *ipso jure*. Prescription may be regarded as a legal discharge of the debt, proceeding in the shorter prescriptions on the presumption of payment; in the long negative prescription, on the ground of abandonment. It has not been determined that a creditor, in a debt which is prescribed, has been allowed to petition for sequestration; and it appears that he ought not,¹ for sequestration is not an action for constituting a debt, but is a process of execution; and although it is open to persons whose debts are not constituted either by document or decree (the affidavit of the creditor, with the bankruptcy, and the citation to answer, being held sufficiently to guard against all danger), yet it appears to be both against the presumption of the law as to the existence of a prescribed debt, and not necessary to a creditor who has been so negligent, that his title should be sustained. He ought to constitute his debt anew before being allowed to petition.²

3. OATH OF CREDITOR.³—[The rules as to the oath to be taken by the concurring or petitioning creditor are contained in secs. 22, 23, 24, and 25. It is enacted, that in the case of a creditor residing within the United Kingdom, the oath shall be taken by him before a judge ordinary, magistrate, or justice of the peace (sec. 22).⁴ In the case of a creditor who is out of the United Kingdom, the oath is to be taken before a magistrate or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary-public) (sec. 23). In both cases he must make oath to the verity of the debt claimed by him;⁵ and there state what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof; and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified;⁶ and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect (sec. 22). If the creditor be furth of the United Kingdom, his known agent or mandatory within the kingdom may make an oath of credulity in the above manner and to the above effect (sec. 23). When the creditor is a corporation, an oath of verity made by the secretary, manager, cashier, clerk, or other principal officer of the corporation, is sufficient, although the person making the same be not a member of it; or in case of other companies, an oath by a partner shall be sufficient.⁷ And where any creditor is under age

¹ [Lockhart v Mitchell, p. 289, note 3; Wink v Mortimer, 1849, 11 D. 995; Low v Baxter, 1851, 13 D. 1349; Nisbet v Nicoll, 1856, 18 D. 1042.] See below, p. 311, text, and compare.

² In England, a debt, notwithstanding the Statute of Limitations, was formerly held to support a commission; but Lord Chancellor Eldon decided that such a debt may be objected to both by the bankrupt and the creditors, and that a debt barred by the Statute of Limitations will not support a commission. See Swayne v Wallinger, 2 Strange 746; Quantock v England, 5 Bur. 2628, 2 Blackst. Rep. 703; Lord Eldon's decision in *ex parte Dewdney*, 15 Ves. 479; confirmed by his Lordship, *ex parte Roffey*, in matter of Dewdney for rehearing. 2 Rose's Cases 245.

³ See below, p. 304, as to the oath in the case of voting.

⁴ The oath may be taken before any justice of peace, although not at the time within the limits of his county. Turnbull v Smellie, 1826, 6 S. 676. [Or it may be taken before a Scotch justice in England. Kerr v M. of Ailsa, 1852, 14 D. 864; aff. 1 Macq. 736.] Solicitors or procurators before inferior courts cannot be justices of peace. 6 Geo. IV. c. 48, sec. 27.

⁵ [A marginal note on the oath unsigned is no part of it.

M'Kersey v Guthrie, 1829, 7 S. 556; Miller v Lambert, 1848, 10 D. 1419. See, to the same effect, as to an erasure, White v Girdwood, 1846, 9 D. 283; Dyce v Paterson, 1846, 9 D. 310; Jardine v Harvie, 1848. But the signature of the magistrate to an alteration or erasure affords evidence of its authenticity. Dyce, *supra*; Perryman v M'Clymont, 1852, 14 D. 508. See, as to the effect of errors, Taylor v Manford, 1848, 10 D. 967; and Foulds v Meldrum, 1851, 13 D. 1357, compared with Anderson v Monteith, 1847, 9 D. 1432.]

⁶ [Although it is required that the obligants and securities be specified, it is not necessary at this stage to value and deduct them. See, as to specifying obligants and securities, Imrie v Commercial Bank, 1842, 4 D. 1532; Wright v Corrie, 1842, 5 D. 164; Learmonth v Patton, 1845, 7 D. 1094; Taylor v Drummond, 1848, 10 D. 335; Taylor v Manford, note 5; Glen v Borthwick, 1849, 11 D. 387; Wixon and Deans v Nicol & Co., 1849, 11 D. 1188; Elder v Elder and Thomson, 1850, 12 D. 994; Forbes v Manson, 1851, 13 D. 1272; Gordon v Paul, 1855, 17 D. 779 (L. O.'s note). See p. 306 (3), as to what are securities.]

⁷ [In Brown v M'Callum, 1845, 7 Jur. 296, the holder of a bill, blank endorsed, which had come into his hands as agent of an unincorporated banking company, was held entitled to

[or incapable to make oath, an oath of credulity by his authorized agent, factor, guardian, or manager, is sufficient (sec. 25).¹ When the petition is presented during the life of the debtor, without the consent of the debtor, the petitioning creditor must in his oath, in the event of the debtor's bankruptcy being founded on his retiring within the sanctuary, swear that he believes the debtor to have so retired (sec. 24). When a petition is presented for sequestration of the estates of a deceased debtor, the petitioning creditor must in his oath (or in a separate oath) specify the place where the debtor resided or had a dwelling-house, or carried on business in Scotland at the time of his death,² and whether he was then owner of estates in Scotland (sec. 24).]

4. **VOUCHERS OF THE DEBT.**³—The grounds of debt must be produced, or a certified copy of the account, where the demand is founded on an account, it being competent to apply, whether the debt be liquidated by formal voucher or stand on open account. If the claim be on an open account, a full copy of the account from its beginning, or at least from the last docketed balance, must be produced, stating the items with the dates, the whole being accompanied by the vouchers necessary to the legal proof of the debt.⁴ For it will be remembered that this is not merely a claim for investigation, but such proof of a debt as will entitle the creditor to proceed in the immediate prosecution of the most severe and fatal diligence of the law. And as the application is now accompanied by a personal protection, it is of importance to prevent the collusion so easily practised by the aid of friends.⁵

Questions of some importance have arisen relative to the effect of the stamp laws on the evidence of the debt. Where a stamp is required for a bond or other document on which the proof of the debt depends, and either the stamp has been omitted or a wrong stamp used, it was questioned whether the supplying of the proper stamp, on payment of the penalty when allowed by the Stamp Acts, was sufficient to render valid the sequestration issued on the creditor's application. In *Rob v Forest*⁶ it was held too late to make the objection after the sequestration had been awarded, and the stamp supplied.⁷ But under the Stamp Acts, a bill cannot, after it has been used, have the right stamp adjoined; and so, if the sequestration proceeded on a debt proved by a bill alone, the objection is fatal.⁸ But where the debt may be proved independently of the bill, the sequestration will be good if there have been an affidavit to the debt.⁹

make affidavit to the debt, and present an application in his name, as agent for the bank, for the sequestration of the estates of the acceptor. But it was questioned whether the partner of an incorporated bank can, as such, make affidavit to a debt of the bank. See also *Bonnar v Liddle*, 1841, 3 D. 830. In *Campbell v Myles*, 1853, 15 D. 685, it was held that the bank agent of the British Linen Bank, who was not one of the principal officers, could not make the affidavit.]

¹ A person under age seems to mean a person under the age for swearing a lawful oath—namely, fourteen years. *Miller v Aitken*, 1840, 2 D. 1112. A person deranged, or ill of a fever or other incapacitating disease, will be deemed a person incapable to give an oath.

² [In *Brown v McCallum*, (p. 291, note 7), an objection to an affidavit, that while it stated that the debtor carried on business as a shipowner, etc., it did not state that he carried on such business within Scotland, was repelled.]

³ See below, as to Vouchers in questions of Voting and Dividends, p. 309, subsec. 15.

⁴ *Hunter, Rainy, & Co.*, 14 Jan. 1812, F. C.; *Lizars*, 1835, 13 S. 963. See p. 285, note 4.

⁵ *Murray v Donnelly*, 1856, 19 D. 44.

⁶ 3 Oct. 1851, 5 W. S. 740.

⁷ See *Davidson v Gibb*, and *Wood v Kerr*, 1838, 1 D. 10, 14. In *Rogers v James*, 7 Taunt. 147, it was held that a probate, after an additional stamp was affixed, made the commission of bankruptcy which had proceeded on the executor's application with a probate on a wrong stamp, perfect by relation backwards.

⁸ [See *Scott v Scott*, 1847, 9 D. 1347. *Lockhart v Mitchell*, p. 289, note 3.]

⁹ *Geddes v Mowat*, 4 June 1824, 2 Sh. App. Ca. 230. [In *Elder v Thomson & Elder*, 1850, 12 D. 994, the petitioning creditor in a sequestration produced as his ground of debt an account-current containing entries for cash advances, and as vouchers of these advances unstamped drafts upon him by the debtor in the following form: 'Debit my account with £20.' It was held that the debt was sufficiently vouched to warrant a sequestration. In *M'Rostie v Halley*, 1849, 12 D. 124, the petitioning creditor founded in his affidavit on a bill of which the date was written on an erasure. The Court at first allowed a proof before answer that the bill was granted of the date it bore, but thereafter held that the proof was in such a proceeding irrelevant. 1850, 12 D. 816.] See below, as to the want of stamp on vouchers in questions of voting, p. 311 (2), *in fin.*

7. CITATION OF DEBTOR.

[When a petition for sequestration is presented without the consent of the debtor, or for the sequestration of the estate of a debtor who is dead, without the consent of the successor, the Lord Ordinary or sheriff to whom it is presented shall grant warrant to cite the debtor, or if dead, his successor, to appear within a specified period, if he be within Scotland, by delivering to him personally, or by leaving at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him,¹ a copy of the petition and warrant; and if the debtor or his successor be furth of Scotland, to cite him to appear within a specified period, by leaving such copy at the Office of Edictal Citations, at the dwelling-house or place of business last occupied by him;² and if the debtor be dead, also at the dwelling-house or place of business occupied by him at his death, to show cause why sequestration should not be awarded (sec. 26). And by sec. 27, when the debtor is a company it shall be a sufficient citation that a copy of the petition and warrant be left at the place where the business of the company is or was last carried on, provided a partner or a clerk or a servant of the company be there, and failing thereof at the dwelling-house of any of the acting partners; and if the house of such partner cannot be found, by leaving a copy at the Office of Edictal Citations.³ The *induciae* of citation, when made personally or at a dwelling-house or place of business, are not less than six nor more than fourteen days, and when made edictally are twenty-one days; and the Lord Ordinary or the sheriff at the same time shall direct intimation of the warrant, and of the diet of appearance on such *induciae*, to be made in the Gazette (sec. 28).

8. AWARDING SEQUESTRATION AFTER CITATION.

After the petition for sequestration has been served—which is only in the case where it is not by or is without the concurrence of the debtor (or if dead, his successor)—and the *induciae* have expired, if he do not appear at the diet of appearance, and show cause why sequestration cannot be awarded, or, if so appearing, do not instantly pay the debt or debts in respect of which he was made bankrupt, or produce written evidence of the same being paid or satisfied, and also pay or satisfy, or produce written evidence of the payment or satisfaction of the debt or debts due to the petitioner or to any other creditor appearing and concurring in the petition, the Lord Ordinary or sheriff, on production of evidence of the citation, and of the requisites for sequestration, shall award sequestration (sec. 30). The deliverance awarding sequestration is not subject to review (sec. 31).]

The awarding of sequestration may be opposed either by the debtor or the creditors. The debtor has a clear interest to oppose a proceeding which will involve his whole affairs, place his estate under expensive management, deprive him of the capacities which belong to a solvent man, and proclaim him as a bankrupt to the whole world.⁴ And creditors may have a strong interest to oppose such a measure, either if they have reason to dread the effects of a stop in their debtor's trade, or if they have the prospect of acquiring preferences which the sequestration will destroy.⁵ Where a good objection is established to the

¹ [In *Brown v M'Callum*, 1845, 7 D. 423, it was held that a debtor was well cited under the Bankruptcy Act by leaving a copy of the petition and deliverance (as the messenger's execution bore) 'within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea.']

² [As this is not an action, it is not necessary to have letters from the Court of Session in supplement of the sheriff's warrant.]

³ [Service or citation may be made by a competent officer without witnesses (sec. 175).]

⁴ [See *ante*, p. 286 (2), as to grounds of opposition.]

⁵ In *Thomson & Sons v Broom*, 1827, 5 S. 441, the Court refused to listen to an objection to a sequestration applied for by the bankrupt, with due concurrence, on the ground of a trust-deed having been granted, and instalments paid under it, whatever effect this might have as a ground for recalling the sequestration. [In *Macdonald v Auld*, 1840, 2 D. 1104, sequestration was awarded under the statute 2 and 3 Vict. c. 41, of the estate of a deceased debtor, although it had been previously under the management of an executor-creditor confirmed, and the debtor died before the date of the Act, reserving the rights of the executor-creditor under his con-

description of the debtor, the debt of the petitioner, or the bankruptcy, sequestration will not be awarded.

[As already mentioned (p. 285), if the creditor withdraw, die, or become bankrupt, another may be sisted in his place (sec. 34).

9. RECALL OF SEQUESTRATION.

1. RECALL ON THE MERITS.—By sec. 31, any debtor whose estate has been sequestrated without his consent, or the successors of any deceased debtor whose estate has been sequestrated without their consent (unless on the application of a mandatory authorized by the deceased debtor), or any creditor, whether the sequestration has been awarded by the Lord Ordinary or by the sheriff, may, within forty days after the date of the deliverance, present a petition to the Lord Ordinary, setting forth the grounds for recall, and praying for recall; and when sequestration has been awarded of the estate of a deceased debtor, when his successor was edictally cited, his successor, or any person having interest, may apply by petition at any time before the publication of the advertisement for payment of the first dividend. The Lord Ordinary shall thereupon order a copy of the petition and of his deliverance to be served on the parties who petitioned or concurred in the petition for sequestration (or on their respective known agents, and on the trustee, if appointed), and require them to answer within a specified short time, and order a notice of the presentation of the petition to be published in the Gazette, and on the expiration of the time so fixed he shall proceed to pronounce judgment.¹ By sec. 32 it is provided that nine-tenths in number and value of the creditors ranked on the estate may at any time apply for recall by petition to the Lord Ordinary, who shall order notice of his deliverance to be published in the Gazette, requiring all concerned to appear within fourteen days from the date of publication, to show cause why the sequestration should not be recalled; and on expiration of the time he shall proceed to pronounce judgment. By sec. 33 it is declared, that pending any petition for recall, and until the sequestration be finally recalled, the proceedings in the sequestration shall go on as if no petition had been presented.²]

The grounds on which the petitioner may pray for a recall are such as, for example, that the petitioner's debt is not duly proved, or not of the legal amount, or not of a nature to support the proceedings;³ that there is no sufficient mandate; or that the concurrence of the bankrupt or of the petitioning creditor is without due authority, or has been forged;⁴

firmation. See also *Newall's Trs. v Aitchison*, 1840, 2 D. 1108, where the estate had been previously under the management of a judicial factor, and part was under the jurisdiction of the Court of Chancery, and the debtor had died before the date of the Act. In *Semple v Weddell*, 1841, 3 D. 411, sequestration was awarded of the estate of a deceased debtor, although the petition did not aver the insolvency of the deceased, and the deceased's representatives alleged that the estate was solvent. See *Weir & Gardner v Scott*, 1848, 10 D. 1361. In *Milne & Co. v Milne*, 1850, 12 D. 1007, it was held not imperative to grant sequestration of the estates of a deceased debtor, although all the requisites provided by the statute had been complied with, it being held that it was within the discretion of the Court to refuse it if they saw cause; and accordingly they refused to sequester, the insolvency of the debtor not being alleged. In *Rodger v Gellatly's Trs.*, 10 June 1850, 12 D. 985, consignation of the petitioning creditor's debt was held a good ground for refusing an application for sequestration of the estates of a deceased debtor. See also *Alexander v Barclay*, 1845, 7 D. 264; *Steele v M'Ewan* 1852, 14 D. 348.]

¹ [In *Elder v Thomson & Elder*, 1850, 12 D. 994, it was held

competent for a party who had unsuccessfully opposed the granting of a petition for sequestration to apply for recall of the sequestration on the same grounds which had been repelled by the interlocutor of the Lord Ordinary granting sequestration.]

² By sec. 31 it is enacted, 'that if a sequestration be recalled, the recall shall be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions.'

³ In *Beadie v Heggie*, 1787, M. 1248, the Court held it competent to entertain a petition grounded on an objection to the amount of the petitioner's debt. It is good ground for recall of sequestration if it have proceeded on a contingent debt, and other creditors do not appear to support it. See, under the statute 54 Geo. III., *Morrison v Turnbull*, 1832, 10 S. 259.

⁴ [In *M'Nab v Hunter*, 1851, 14 D. 182, the Court refused to recall a sequestration on a petition by a single creditor, founded on the ground that the concurring creditor, who was elected interim factor and trustee, was an undischarged bankrupt; but directed him to call a general meeting of the creditors to consider the matter. And see, as to the com-

or that there are valid objections to the diligence.¹ As this is not a mere superseding of future proceedings, but a recall of the sequestration *ab initio*, the effect of the judgment may be to give validity to preferences which, had the sequestration stood, would have been reduced. It may therefore be of importance to the general interests of the creditors to sustain the sequestration; and where the objection does not rest on any radical defect, this may sometimes be possible. Thus, if the objection is to the diligence founded on, another creditor producing unobjectionable diligence subsisting against the bankrupt at the date of the sequestration will save the sequestration from recall. But where the objection is to the debt of the petitioning creditor, it will not be enough that another creditor is willing to concur after the objection is raised.² If, however, a creditor sufficiently qualified should suspect foul play, he may concur in the sequestration; and such concurrence will, as from the date of that concurrence, support the sequestration against any objection to the debt of the petitioning creditor.³

It is not a sufficient ground of recall that the debtor is, on a balance of his books, solvent, although exposed to temporary embarrassment; nor does it appear sufficient that he is ready to pay the petitioning creditor's debt, and to find caution for payment of any other debt.⁴ For the sequestration, once awarded and advertised, may have the effect of inducing other creditors to abstain from proceedings on the faith of it; and, at all events, it would seem to be inexpedient to recall the sequestration on such a ground till after the examination of the bankrupt. It certainly was not the intention of the Legislature to place a discretionary power in the hands of the Court, and it accordingly refuses to proceed on such grounds, and requires, in order to justify recall, either, on the one hand, a legal ground of interruption of the proceedings, or, on the other, the statutory consent of all the creditors.⁵

In one case the Court yielded to a petition without evidence of consent by the creditors, on the ground of such an accession of fortune to the bankrupt as, it was said, restored him to solvency, and at the distance of six months after sequestration recalled it.⁶ But the consequence of this judgment showed the inexpediency of any relaxation of the statutory rule. For the creditors did not receive their payment; and on the application of some creditors who had not formerly appeared, the sequestration was revived.⁷ Under the statute 54 Geo. III. the Court authorized the recall of a sequestration on an application by all who appeared from the bankrupt's books to be creditors; intimation for fourteen days having first been made on the walls, in the Minute-book, and in the London and Edinburgh Gazettes.⁸ But such a decision would not now be given.

It is no sufficient ground for recalling a sequestration, that, in point of expediency, the affairs might be better managed under a private trust-deed, and that a majority of the creditors concur in this opinion. Neither is it enough that the debtor has granted a trust-deed, and so is barred *personalis exceptione* from petitioning for sequestration. The law holds him justified if there be not such a concurrence as will make the trust fully effectual.⁹ It is no answer to the application for sequestration, nor is it a ground of recall, that the estate has

petency of sisting another creditor, if necessary, *Lockhart v Mitchell*, 1849, 11 D. 1341.]

¹ It was doubted in *Beadie v Heggie*, p. 294, note 3, whether a manifest nullity in the proceedings might not be founded on to defeat the sequestration at any time after the expiration of the term limited for recall. But this question is now settled by the Act, where the consent of nine-tenths is required to any application for recall after the expiration of the forty days.

² [If the objection be to the affidavit, and be good, the sequestration must be recalled, although the other creditors approve of it. *Campbell v Myles*, 1853, 15 D. 685.]

³ 54 Geo. III. c. 137, sec. 68. [See sec. 34 of 19 and 20 Vict. c. 79.]

⁴ [*Knowles v Crooks*, 1865, 3 Macph. 457.]

⁵ [The apparent want of any available estate held not a legal ground for recalling or refusing sequestration. *Gardner v Woodside*, 1862, 24 D. 1133.]

⁶ *Douglas*, 2 Dec. 1811, n. r. [*Anderson*, 1866, 4 Macph. 577.]

⁷ *Carrick, Brown, & Co.*, 15 Feb. 1812, n. r.

⁸ *Lothian*, 1839, 1 D. 401.

⁹ *E. of Kellie v Crawford*, 1821, 1 S. N. E. 126. [*Jopp v Sir A. Leith*, 1844, 7 D. 260. The existence of an English adjudication of bankruptcy held a ground of recall in *Young v Buckel*, 1864, 2 Macph. 1077.]

been for years managed under trustees feudally vested, or of allowing the private trustees to exclude the administration of the factor or trustee under the sequestration.¹ The effect of the recall would be to restore, against the effects of the bankruptcy thereby established, all preferences, voluntary or judicial, which might otherwise have been challengeable.²

Against those who have appeared and opposed the petition, the judgment of recall (unless overturned at the instance of some other person) will be effectual as *res judicata*. But to those who have not appeared, the recall is open to objection.³ And there seems to be room for a distinction, to which the above-mentioned case appears to give some sanction. Although all the creditors must be held to be present as parties to ordinary proceedings and judgments in the usual course of the sequestration (otherwise utter confusion would arise), yet where any application is made, or judgment pronounced, out of the common course, it seems to be challengeable as a decree in absence by any one interested, and not actually a party to the proceeding.⁴

[2. RECALL BY DEED OF ARRANGEMENT.—By sec. 35, at the meeting for the election of the trustee (or at any subsequent meeting to be called for the purpose), a majority in number and four-fifths in value of the creditors present or represented at the meeting may resolve that the estate ought to be wound up under a deed of arrangement, and an application presented to the Lord Ordinary or the sheriff to sist procedure for a period not exceeding two months; and on such resolution being carried, it is not necessary to elect a trustee. The bankrupt, or any person appointed by the meeting, may report the resolution to the Lord Ordinary or the sheriff within four days of the date of the resolution, and apply for a sist; and the Lord Ordinary or the sheriff may hear any party having interest; and if he shall find that the resolution was duly carried, and that the application is reasonable, he may grant the same (sec. 36). And in that event, he may, on the application of any creditor, make such arrangement for the interim management of the estate as he shall think reasonable, if any shall appear to be necessary (sec. 37). If the sequestration be sisted, the creditors may, at any time within the period of the sist, produce to the Lord Ordinary or the sheriff a deed of arrangement, subscribed by or by authority of four-fifths in number and value of the creditors; and if the Lord Ordinary or the sheriff, after making such intimation as he may think proper, and hearing parties having interest, be satisfied that the deed has been duly entered into and executed, and is reasonable, he shall approve thereof, and declare the sequestration at an end;⁵ and the deed shall thereafter be as binding on all the

¹ In *Broughton v Dickson, etc.*, 2 July 1812, F. C., the Court ordered the trustees to cede and deliver up to the interim factor possession of the lands, etc., reserving all claims of preference or security under the trust-deed.

² Care must be taken, in the event of a recall, that the interest of third parties be saved, as where sales of any of the property have taken place under the sequestration, or where any transaction has been settled under the legitimate authority of the factor, or any debt has been received by him and discharged. In such cases the recall can justly have no effect in exposing the transference, payment, etc., to challenge. But the danger of such a consequence ought to be avoided; although in the common case there is little occasion, perhaps, for the precaution, as in general the recall is very early, and before any important step is taken.

³ So it was found in *Carrick, Brown, & Co.*, p. 295, note 7.

⁴ One important point may arise in consequence of the recall of the sequestration, as to the lodging of claims in the sequestration, which has the effect of interrupting prescription. The Court seems to have held that, provided the claim shall be duly entered, the benefit of the interruption shall not be lost

by the subsequent recall of the sequestration. *Crawford's Trs. v Haig*, 1827, 5 S. N. E. 658.

[By 23 and 24 Vict. c. 33 it is enacted (sec. 2), that 'if in any case where sequestration has been or shall be awarded in Scotland, it shall appear to the Court of Session or to the Lord Ordinary, upon a summary petition by the accountant in bankruptcy, or any creditor or other person having interest, presented to either Division of the said Court or to the Lord Ordinary, at any time within three months after the date of the sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and that from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent laws of England or Ireland, the said Court, in either Division thereof, or the Lord Ordinary, after such inquiry as to them shall seem fit, may recall the sequestration.' See *Smith Brothers v Rostrom*, 1860, 23 D. 140; *Brandon v Stephens*, 1862, 24 D. 263; *Haines v Shaw*, 1862, 24 D. 383; *Moses v Gifford*, 1866, 4 Macph. 1056.]

⁵ [If the sequestration be declared at an end, the judgment

[creditors as if they had all acceded to it. But the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate (sec. 38). If the resolution shall not be duly reported, or if a sist be refused, or if the deed of arrangement shall be not produced, or not approved of, the sequestration shall proceed (sec. 39).¹

10. PUBLICATION AND RECORDING OF SEQUESTRATION.

1. PUBLICATION.—The applicant must, within four days from the date of the deliverance awarding the sequestration (if awarded in the Court of Session), or if by the sheriff, within four days after a copy of the deliverance could be received in course of post in Edinburgh, insert a notice in the subjoined form in the Gazette,² and also one notice in the same terms within six days from the same date in the London Gazette (sec. 48 *in fin.*).³

2. RECORDING.—One important effect of sequestration is, to operate as an inhibition from the date of the first deliverance. It is therefore necessary to secure, by every safe precaution, the publication of the sequestration as an inhibition. And whether the debtor concur or not, the petition of sequestration, with the first deliverance, is required in all cases to be recorded in the Register of Inhibitions. [Accordingly, by sec. 48, it is enacted that the party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance, if given by the Lord Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the sheriff, an abbreviate of the petition and deliverance, signed by him or his agent, in the form subjoined,⁴ to the Keeper of the Register of Inhibitions at Edinburgh. The keeper must forthwith record the abbreviate,⁵ and write and subscribe a certificate thereof on the petition, in the subjoined form;⁶ and on the request of the party transmitting the abbreviate, and on payment of fees and postage, retransmit the petition by post to the party.⁷ The recorded abbreviate has the effect of an inhibition from the date of the deliverance, and also of a citation in an adjudication of the estate of the debtor at the instance of the creditors afterwards ranked; and it is not competent to stop that effect, or the effect of the sequestration after it is awarded, by paying the debts in respect of which it was applied for or awarded. If the abbreviate be not recorded, it has no effect as an inhibition or citation.] The duty of recording is incumbent on the party who applies for sequestration, and the omission of it will expose him to a claim of damages for any loss or injury arising from the neglect. Under the statute 33 Geo. III. the omission to record the sequestration as an inhibition had the effect of annulling the whole sequestration at whatever time the omission was discovered, and whether the bankrupt had any heritable property or not, and it was necessary to begin *de novo*. But now the effect of the omission is only to deprive the sequestration of

declaring the same is to be recorded in the same manner as if the sequestration had been recalled (sec. 40).]

¹ [In that case the period of time subsequent to the resolution is not to be reckoned in calculating periods of time prescribed in the Act (sec. 39).]

² 'The estates of *A B* [*name and designation*] were sequestrated on [*date, month, and year*] by the [Court of Session or sheriff of].

'The first deliverance is dated the [*date*].

'The meeting to elect the trustee and commissioners is to be held at [*hour*] o'clock on the [*day of the week*] the [*date, month, and year*], within [*specify particular place*] in [*town*]. A composition may be offered at this latter meeting; and to entitle creditors to the first dividend, their oaths and grounds of debt must be lodged on or before the [*insert date*].

'All future advertisements relating to this sequestration will be published in the Edinburgh Gazette alone.

(Signed) *P Q*, agent [*specify place of business.*']

³ [An error in the Gazette notice does not invalidate the sequestration, and may be amended. *Gray v Cockburn*, 1844, 6 D. 659. See *Fife*, 1844, 6 D. 686; *Garden*, 1848, 10 D. 159; *Ross*, 1852, 14 D. 546; *Tolmie*, 1853, 16 D. 105.]

⁴ 'Petition for sequestration of *A B* [*name and designation*]. Date of first deliverance day of
(Signed) *C. D* [*if an agent, state so.*']

⁵ [After the lapse of the statutory time this cannot be done. *Tolmie*, 26 Nov. 1853, 16 D. 105.]

⁶ 'This petition was presented by [*or received by post from*] [*name and design the presenter or party transmitting by post*] and recorded on [*date*] in the Register of Inhibitions at Edinburgh.

(Signed) *E F*, Keeper.'

⁷ [By sec. 157, a register of sequestrations is to be kept by the accountant, in which certain particulars as to every sequestration are to be entered.]

its efficacy as an inhibition or inchoated adjudication. And although this may, and generally will, be attended with danger of preferences becoming effectual (for the injury arising from which the party will be responsible), the sequestration, to all other intents, proceeds without interruption.

11. PROTECTION AND LIBERATION OF THE DEBTOR.

It has been formerly explained, that creditors have a right to prosecute their diligence at one and the same time against the estate and against the person of their debtor. But as the only legitimate object of imprisonment is to force the debtor to apply his funds towards payment of his debts, so, where the diligence against the estate is universal, where all is given up for the common benefit, and where a creditor must come in under the sequestration, or relinquish his hope of payment from the existing funds of the debtor, the right to a personal protection seems naturally to follow. It is only where there is fraud, or suspicion of embezzlement, that a protection should be denied; and the imprisonment ought to be not at the will of an individual, to whom it is a fraud to make payment, while other creditors receive only a dividend. The grounds on which a bankrupt whose estates are under sequestration is entitled to personal protection are, justice to a debtor who has given up all to his creditors, combined with the advantage to the creditors to be expected from his exertions in the recovery and management of the estate.

[1. PROTECTION.—Accordingly, on these principles, it is enacted by sec. 44, that the Lord Ordinary or sheriff, when awarding sequestration, may grant to the debtor, or partners of the company against whom it is awarded, a protection against arrest or imprisonment for civil debt until the meeting of the creditors for the election of trustee; or he may refuse to grant it.¹ But if the protection be not advertised in the London and Edinburgh Gazettes within one week after the date of the sequestration, the protection shall be ineffectual.² If the Lord Ordinary or sheriff have refused to grant protection, it is competent to the creditors at the meeting to elect a trustee, or at the meeting after the examination of the bankrupt, or at any subsequent meeting, to resolve that protection ought to be granted for such time as they may think fit; and the trustee is thereupon to apply to the sheriff, who shall grant the protection. And by sec. 77 it is declared, that at either of these meetings, or at any meeting called for the purpose, the majority in number and value of the creditors present may resolve that the personal protection of the bankrupt ought to be renewed for such time as they may think fit; and in such case the trustee shall apply to the sheriff, who shall renew the protection; and the deliverance by him renewing the same, or an extract thereof signed by the sheriff-clerk, shall have the same effect as the original warrant of protection.³

2. LIBERATION.—By sec. 45, the Lord Ordinary or the sheriff by whom sequestration was awarded may, on application made either in the petition for sequestration, or by a separate petition by the debtor, grant warrant for liberating him if in prison, after such intimation to the incarcerating creditor or his known agent as he may deem just, and after hearing any objection to the granting of such warrant.⁴ And if the application be refused, it shall be competent for the debtor to make a new application for liberation, with consent of the trustee and commissioners; and on intimation and hearing objections, the Lord Ordinary or the sheriff may grant warrant to liberate.⁵ In any case, the Lord Ordinary or the sheriff may annex such conditions of caution or otherwise to such warrant as he may judge proper.

¹ [The bankrupt may reclaim without concurrence of the trustee. *Murray v Donnelly*, 1856, 19 D. 44.]

² [Tolmie, 1853, 16 D. 105.]

³ [If the proper majority resolve to renew the protection, the sheriff must grant it. *Hodge v M'Lure*, 1855, 18 D. 135. But he must satisfy himself that there is a real majority. *Millar v Dodd*, 1862, 1 Macph. 67.]

⁴ [If the trustee do not concur, a petition for liberation is incompetent. *Ritchie v Paterson*, 1856, 18 D. 1310; *Summers v Marianski*, 1862, 1 Macph. 214.]

⁵ [See, as to an English debtor in an English prison whose estate was sequestrated, *Henderson v De Salvi*, 1857, 19 D. 996.]

[By sec. 46, it is declared that the judgment of the sheriff granting or refusing liberation shall be subject to review by a note of appeal to either Division of the Court of Session, or during vacation to the Lord Ordinary; which appeal shall be held summarily, and the judgment pronounced thereon shall be final. And by sec. 47 it is enacted, that the warrant granting protection or liberation, or a copy thereof, certified by one of the Bill Chamber clerks if it is granted by the Lord Ordinary, or by the sheriff-clerk if it is granted by the sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debts contracted previous to the date of sequestration. All courts of justice and judges, and all officers and jailors, are bound to give effect to such warrant; but neither a warrant of protection nor liberation is of any effect against the execution of a warrant of apprehension or imprisonment *in meditatione fugæ*, or *ad factum præstandum*, or for any criminal act.]

Under the statute 33 Geo. III. it was held that the Court could not recall a protection once granted. But this seems to deserve consideration. There is at common law no power in the Court to grant protections against diligence, and it is solely in exercise of that given by statute that protection in this case of sequestration is granted. But if, in exercising this power, the Court has *re incognita* granted a protection to one who does not deserve it, and in circumstances which, if fully known at the time, would have led to a refusal of the protection, it seems to be implied that the Court may review its sentence, and recall the protection. Nay, even where the bankrupt, taking advantage of his liberty, has contrived to get part of the funds into his hands, with which he designs to escape, there seems to be sufficient ground for regarding his whole proceeding as one plan of embezzlement, which should entitle the Court to recall the protection.¹ It will not be competent for the debtor, after having obtained, for the sole use of the creditors, his personal protection or liberation, to take advantage of it by going into the sanctuary. As this cannot be done under a protection *in cessio*, neither does it seem competent in sequestration. The personal protection and liberation which is authorized to be granted to individuals is competent to each of the partners on the bankruptcy of a company. The question as to each partner must proceed in a distinct and separate course of discussion. And although there has been no petition for a separate sequestration against the partners as individuals, they may severally apply for protection against the diligence competent to the company creditors against their persons.

12. INTERIM PRESERVATION OF THE ESTATE.

[By sec. 16 it is competent for the Court to which a petition for sequestration is presented (whether sequestration can forthwith be awarded or not), on special application by a creditor, either in the petition, or by a separate petition, with or without citation, as the Court may deem necessary, or without special application, if the Court think proper to take immediate measures for the preservation of the estate, either by the appointment of a judicial factor² (who shall find such caution as may be deemed necessary) with the powers necessary for preservation, including the power to recover debts, or by such other proceedings as may be requisite.³ Such interm appointments or proceedings are to be carried into immediate effect; but if they have been made or ordered by the sheriff, they may be recalled by the Court of Session on appeal. The sheriff has also power, upon cause shown by any creditor, or without any application, if he shall think fit, at any time after the sequestration, and before the election of a trustee, to cause to be sealed up and put under safe custody the books and papers of the bankrupt, and to lock up his shop, warehouse, or other repositories, and to keep the keys thereof till a trustee is elected and confirmed (sec. 17). And where the sequestration is under appeal to the Court of Session, it is competent for the sheriff to take

¹ *Aitken v Rennie*, 6 June 1809, F. C.

² See below, subsec. 44, as to the appointment of a judicial factor on the estate of a deceased debtor.

³ [Although the judicial factor reside beyond the territory of the sheriff, he is subject to his jurisdiction (sec. 86).]

[such measures in the meantime as may be necessary for preserving the debtor's estate and effects within his jurisdiction (sec. 20). Formerly the interim possession of the estate was confided to an interim factor elected by the creditors; but it is now entrusted, as we have seen, to a judicial factor appointed by the Court. It may therefore be proper to state the former rules as to interim factors, which seem equally applicable to the judicial factor.]

Generally stated, the duties and powers of the factor are those of a mere manager, the object of whose appointment is to preserve the estate until a fit person shall be elected trustee. He has no right to make any division of the funds; and the Court has no power to authorize him to divide.¹ Without any warrant but his act of appointment, he may demand delivery of goods consigned to the bankrupt; stop *in transitu*; require payment of bills when due; receive the money, and grant a valid discharge.² He may raise such actions or use such steps of diligence as may be requisite for avoiding prescription, or for providing against immediate danger of loss, or securing a share of the funds, in case of the debtor's failure, seeing that he is bound to follow, in the preservation and recovery of the estate, the ordinary steps of legal diligence. But he has no power of discretionary acting; as of entering into submissions, agreeing to compositions, compromising claims, etc. He has power to draw the rents of the estate, to remove tenants, and do other acts of necessary administration. He is entitled to take possession of all the bills, notes, vouchers, title-deeds, and instructions of the bankrupt's estate, and of his books and papers. Goods in the possession of creditors under pledge cannot be recovered by the factor, but must remain in pledge, and ships under mortgage and possession must be allowed to continue with the mortgagee. But it would seem that rights resulting from accidental possession (as goods in the hands of a factor or manufacturer under a general lien, or writings in the hands of a law agent) should be demandable by the factor, the preference of the holder being reserved to him entire over the proceeds of those goods or over the writings.³ He is entitled to pay all expenses necessary in carrying through the acts of administration, and to make all those necessary payments without which he cannot get possession of the estate: to pay, for example, freight, carriage, etc. of goods, which are sent to the bankrupt from a distance; the expense of manufacturing commodities, which the bankrupt had put into the hands of workmen, and for which, as the counterpart of the contract, they are entitled to retain the commodities; and the expense of such repairs of heritable subjects as the bankrupt was bound to pay. But he is not entitled to make any other payments without an express warrant of Court. Nor is he empowered to judge of claims of compensation and of general retention not arising out of the obligation itself for implement of which he is insisting. It may be necessary for a factor, in the course of his management, to appear in the meetings of the creditors of those who are indebted to the funds; and his vote will be good in all questions respecting the administration of such estate on which the creditors are called to decide. But, as already stated, he cannot accede to any compromise, nor agree to any submission; nor can he do any act of extraordinary or discretionary power, without express authority. He may sometimes be obliged to dispose of such parts of the estate as it may be dangerous to retain; as commodities which are likely to perish or be deteriorated, or of which the market is declining.⁴ The principle which should regulate the factor in selling is, that his duty is to preserve. And thus he has power to sell only where preservation is the object. But although it is not necessary to have a warrant to make sales in such circumstances, this measure is frequently adopted, to give opportunity to all concerned to object. The Court cannot refuse such an application as unnecessary.⁵

¹ *Campbell v Buchanan*, 20 Feb. 1816, F. C.

² [Under the Bankruptcy Act, it would appear that the factor has no power to apply to the sheriff to open the letters of the bankrupt. This seems to be confided to the sheriff-clerk or trustee. See sec. 179.]

³ *Interim Factor on Bertram, Gardner, & Co.'s Estate v Thomson*, 16 Jan. 1794, n. r.

⁴ *Crawford v Corsan*, 1827, 6 S. 127. [*Malcolm*, 1828, 6 S. 1025.]

⁵ *Carmichael*, 16 Jan. 1810, n. r. There is a manifest dis-

There may occur questions in which recourse to the Court to give directions relative to the preservation of the estate may be proper in the first instance, both on account of the magnitude of the property, and of the expedition with which it may be necessary to decide. Thus, where a great manufacturer becomes bankrupt, with the hands of his workmen full of work, things may be utterly spoiled by stopping their operations; where, as in an iron-work, the dismissal of the men may reduce the property to nothing, while, if they be continued, their employment may be attended with no loss. The question of preservation in such cases comes to be complicated with something of speculative advantage or loss, which makes the resolution to be formed a matter of great difficulty. And although the Court will exercise with extreme reluctance such discretionary powers, it is obviously necessary that there should be somewhere authority to control the proceedings of individual creditors, in consideration of the interest of others who have had no opportunity of appearing. In the same way, where measures must be adopted, either by way of action or otherwise, for preserving important rights to the estate, or for recovering property abroad, the Court will interfere to do what may be necessary, and will order the bankrupt to sign such deeds or powers of attorney as may be requisite. It may happen, for example, that a bankrupt has sold his property, but the titles of the purchaser are not yet completed, and it may be necessary to obtain an adjudication in implement for the purpose. If the Court can, in awarding sequestration, give decree of adjudication in favour of the factor, the equality, which is the great object of the bankrupt laws, may be preserved; and this does not seem to be a remedy beyond the power of the Court.¹ As the statutes of bankruptcy do not operate against the Crown, and as the effect of the adjudication by relation back to the date of the first deliverance will not avail the creditors against the extent of the Crown, therefore, where proceedings by writ of extent are dreaded, the Court ought, on application to that effect, to pronounce an adjudication in favour of the factor, with an order on the bankrupt to assign the effects to him. Such adjudication or conveyance, completed by possession, would probably be effectual to disappoint the Crown's right.²

The factor is entitled to reimbursement of all sums expended for which he had no supplies out of the fund under his care, to relief or indemnity against all the engagements necessarily or legally undertaken by him on account of the estate, and to remuneration for his labour and care bestowed in the management.³ On the other hand, as the office of factor is not gratuitously undertaken, but is so on the footing of *locatio operarum*, in which he is entitled to a commission for trouble, and exclusive of others, he will be liable, as a mercantile factor or agent is, for the consequences of such neglect as no prudent man commits in the management of his own affairs.

tinction between the object of such an application and that of applications by tutors and factors *loco tutoris*. In the latter there is necessarily an *ex parte* case, for the person interested is incapable of checking the proceeding. But in bankruptcy the creditors require only to be called in an authoritative way to enable the Court to judge as *in foro contentioso*, or as on the footing of holding as admitted the circumstances stated. If the Court therefore interfere in the former cases, it is to diminish responsibility *ex parte*: in bankruptcy the creditors are called upon to attend to their interests. In matters of importance the fit proceeding would be also to call a meeting of the creditors; but the factor does not seem to have power to call such a meeting.

¹ In the sequestration of *M'Dougall*, 31 July 1820, n. r., the Lord Ordinary on the Bills during vacation pronounced decree of adjudication under 54 Geo. III. in favour of the sheriff-clerk, reserving all objections *contra executionem*.

² The adjudication is a judicial conveyance requiring nothing more to complete the transference of moveables; and the bankrupt's assignment under the order of the Court would not seem to be liable to objection on the Act 1696, c. 5. No legal objection could be taken on account of the professed object to disappoint the Crown's diligence, since it was for that very purpose that the provisional assignment was invented in England; and the Lord Chancellor considers himself bound, as Keeper of the Great Seal, not to withhold it from a commission whose avowed object is to enable the creditors to disappoint the Crown's diligence. (See *ante*, pp. 51, 52.)

³ [This must be awarded by the creditors (*Dunlop v Jeffrey*, 1823, 2 S. N. E. 387); and he is entitled to this out of the funds of the estate, preferably even to the trustee for expenses incurred by him (*Anderson v M'Intosh*, 1845, 7 D. 947).]

SECTION II.

CONSTITUTION OF THE TRUST.

13. THE TRUSTEE, AND WHO MAY BE ELECTED.

[1. ORDER TO ELECT A TRUSTEE.—The Lord Ordinary or the sheriff, by the deliverance which awards the sequestration, is to appoint a meeting of the creditors, to be held at a specified hour on a specified day—being not earlier than six nor later than twelve days from the date of the Gazette notice of sequestration having been awarded¹—at a convenient place within the county of the sheriff awarding sequestration, or to whom the sequestration is remitted, to elect a trustee or trustees in succession (sec. 67).]

The meeting is fixed by the statute to be 'at a convenient place;' and this provision seems to give some latitude in determining between the place of the bankrupt's residence and the place of his trade. The residence of the greater number of his creditors will avail much in this question.² But the Court seems not to be authorized to follow that convenience to the entire neglect both of the bankrupt's residence and of his place of trade.

[2. PARTIES DISQUALIFIED.—By sec. 68 it is declared, that it shall not be lawful to elect as trustee the bankrupt, or any person conjunct or confident with him, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session.]

It is a matter of great consequence that the trustee, who is to judge between the creditors in the first instance, should be perfectly impartial, and therefore neither the bankrupt, nor a conjunct or confident with him, can be trustee.³ In the ordinary case, a creditor may be trustee; but where he has a distinct and material interest adverse to that of the other creditors (not an interest trifling and inconsiderable, but such as may reasonably be suspected to sway his conduct), he is ineligible.⁴ The brother-in-law of a creditor, whose interests in a question of some intricacy stood opposed to those of the creditors, was found ineligible as a trustee;⁵ so a person who was the mere cover or creature of another who was objectionable was held to be ineligible.⁶ And where there is any inconsistency between the duties to be performed by the trustee on the estate, and the duties of an office or character already held by the trustee elect, as where the candidate is already trustee on an estate, between which and the estate in question there are either subsisting disputes, or accounts unsettled and questionable, the Court will not confirm the election.⁷ It has been doubted whether it is a sufficient answer to an objection of incompatibility of duties, that the trustee elect has resigned one of his offices.⁸ On the principle of the law, it seems sufficient; but the question has not yet been determined. On occasion of the bankruptcy of a company, and of the individuals, there frequently arise disputes of a very intricate kind

¹ [Edinburgh Gazette. Sec. 4.]

² *Stuart*, 1822, 1 S. 291. Here the Court authorized a meeting for electing a trustee to be held at Edinburgh, where most of the creditors of a bankrupt lived, who had been a merchant in the Isle of Skye, and had afterwards gone to Van Diemen's Land.

³ See, as to Conjunct and Confident, *ante*, p. 175.

⁴ See Lord Chancellor Eldon's remarks in *Campbell v M'Nair*, 11 July 1809, 5 Pat. 48. And see *Robison v Stuart*, 1827, 6 S. 104. [*M'Tavish v Matheson*, 1824, 3 S. N. E. 196; *Bisset v Nicholson*, 1841, 3 D. 1238; *Clark v Mitchell*, 1847, 9 D. 399; *M'Farlane v Grieve*, 1848, 10 D. 551; *Colville v Ledingham*, 1850, 13 D. 415.]

⁵ *Cross & Co.'s Sequestration*, 10 March 1807, n. r. [See *Laidlaw & Son v Wilson*, 1844, 6 D. 530.]

⁶ *M'Tavish v Matheson*, note 4. [*Corsan v Crawford*, 1827, 6 S. 125.]

⁷ In *Paterson's Sequestration*, 15 Jan. 1812, n. r., intricate questions were impending between the estate of a father and that of a son; and in *Garden & Sons' Sequestration*, 8 March 1816, n. r., M'Kellar, trustee on the estate of Garden Brothers & Co., having been chosen, his rival objected a long unsettled account between the houses to the amount of many thousand pounds. The Court in both cases refused to confirm. [See *Scott v Stevenson*, 1836, 14 S. 552; *M'Farlane v Grieve*, note 4, compared with *Allan v Morrison*, 1841, 3 D. 646.]

⁸ *Garden & Sons*, note 7.

between the company and the separate creditors; and where this is the case, the rule applies as in other cases of inconsistent duties. But, in general, it is rather of advantage to both classes of creditors that one trustee should have the management of both estates; and the Court requires a clear case of collusion of interests in order to support the objection to such an election.¹

It is for the creditors alone to judge of the preferable qualifications of the candidates for the duties of that office, from knowledge, profession, etc.; and the Court refused to interfere where, a writer having been elected trustee, it was maintained by the opposing creditors that the other candidate, a merchant, was more fit to manage a mercantile estate.²

It has been stated as an objection, that the trustee lived at a distance from the seat of the bankrupt's trade. At first the Court did not listen to this objection, as resolving into a matter of expediency, of which the creditors can best judge.³ And this seemed to be confirmed by the statute requiring merely that he should reside in Scotland. But afterwards the objection was sustained.⁴ Whether a person resident in a distant part of the country, and beyond the jurisdiction of the sheriff to whom the sequestration is remitted, is fit to be elected, is left to be determined on grounds of expediency applicable to the circumstances.

A personal objection to the trustee, arising after his election, forms a good ground for refusing to confirm the election.⁵

The Court disapproves of partnerships in the business of a trustee. But it does not appear that a personal objection to the election of one so connected could be maintained on the possibility of a divided responsibility.⁶ This was strongly confirmed in a case where not only was the person proposed in partnership with another accountant, but his partner was trustee on an estate with which it was said there were accounts to be settled, and the person proposed was cautioner for his partner.⁷

Where the person who prevails in the contest has obtained the votes and interest of creditors by any fraudulent means, or promises of undue preference or favour, or in collusion with the bankrupt or his near relations, the election is annulled.⁸ Thus, an election procured by promising to communicate to certain creditors a share of the commission as trustee was held corrupt, illegal, and void, and the Court ordered a new election of a person different from the person corruptly chosen.⁹ So, a promise to rank on the estate bills challenged as forgeries was found to disqualify.¹⁰ And an engagement on the part of the brother-in-law of a bankrupt to bear all the expense of a competition for election, was held to disqualify the person to whom that engagement had been made.¹¹

Although a creditor may without blame strive by legal diligence to obtain a preference,

¹ Robison v Stuart, p. 302, note 4.

² Robb's Sequestration, Winter Session, 1806-7. See also M'Tavish v Matheson, p. 302, note 4. [In Clark v Wink, 1847, 10 D. 117, a sheriff-clerk depute was held ineligible.]

³ In M'Taggart's Sequestration, 1 Feb. 1809, n. r., the proposed trustee resided in Glasgow, while Greenock was the seat of trade. The election, however, was annulled on another ground. The election of M'Kellar of Glasgow, as trustee on an estate in Leith, was sustained (see note 6). The objection was disregarded in the sequestration of the Patent Cooperage Company, where a person resident in Edinburgh was elected, while the seat of trade was at Glasgow. 13 April 1816.

⁴ Spence v Eadie, 1826, 5 S. N. E. 72. The estate was in Glasgow, and the proposed trustee was an accountant in Edinburgh. [See *contra*, Cheyne v Guthrie, 1828, 6 S. 1050; Forrester v M'Kenzie, 1831, 6 S. 465; Kerr, 1828, 7 S. 19; Reid v Berry, 1836, 14 S. 809.]

⁵ Cross & Co.'s Sequestration, p. 302, note 5.

⁶ This was objected in F. Garden & Sons' Sequestration, to

Mr. Buchanan, accountant in Glasgow; but the Court paid no attention to it. 8 March 1816.

⁷ The Court has taken occasion, however, to express their opinion that, in case of such an election, everything done by the trustee's partner would be disregarded, as every discouragement should be imposed on such collusive proceedings. Spence v Eadie, note 4.

⁸ [Corsan v Crawford, 1827, 6 S. 125; Lowe v Fleming, 1835, 13 S. 465; Railton v M'Laren, 1835, 13 S. 1076; A B v Berry, 1837, 15 S. 1107; Mann v Dickson, 1857, 19 D. 1942.]

⁹ M'Gown, in Sequestration of Strong's estate, 13 Dec. 1808, n. r. The Court further found, that in accounting for the estate while under his management, the trustee was not to take credit for any profits to himself, nor for any outlays which he could not show to have been expended profitably for the creditors; and found him liable for all the damage that could be shown to arise from his election and management.

¹⁰ Robison v Stuart, p. 302, note 4.

¹¹ Corsan v Crawford, note 8.

any attempt to obtain a fraudulent preference by collusion or concealment will bar his election as trustee.¹

It does not appear to be an absolute disqualification that the person proposed is himself a bankrupt; though, in expediency, it forms an extremely good ground of objection, to be stated for the consideration of the Court, that a bankrupt is not his own master; that his personal freedom, and power of attending to the duties of his place, are not at his own command; that all the books and papers in his possession are subject to seizure; and that there is danger of confusion at least, and litigation concerning moneys coming into his hands.²

14. CREDITOR'S OATH TO VOTE AND CLAIM.

[1. THE OATH, AND WHO TO TAKE IT.—It has been already seen,³ that to authorize a creditor either to concur with the bankrupt in applying, or to apply for sequestration of the estates of the latter, he must produce an oath (sec. 22), which, if he reside in the United Kingdom, must be taken before a judge ordinary, magistrate, or justice of the peace, to the verity of the debt claimed by him; and in which he must state what other persons (if any) are, besides the bankrupt, liable for the debt or any part thereof; specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he must depone to that effect.⁴ With a view to vote, or claim participation in the dividend, he must also, as shall be immediately seen, put a value on securities and his claim against obligants, deduct the same, and specify the balance.⁵]

An assignee or an endorsee in trust will be held as the creditor, for the debt is constituted in his person, and so may take and claim on his own oath of verity. A trustee in a sequestration is unquestionably entitled to claim on another sequestrated estate;⁶ and, indeed, he is the only person entitled to swear the oath.⁷ It would seem that even an interim factor is entitled to swear the oath, and vote in meetings, otherwise the debt may be lost by prescription, or measures hurtful to the estate adopted.⁸ Where there are more trustees than one, it seems to have been usual to admit one of them to swear the oath of verity.⁹ The practice appears to be, that neither the whole body of trustees, where they are named jointly, nor the quorum where a quorum is appointed, swear the oath or authorize the claim. The acting trustee generally swears the oath, and it is held enough. Were the matter questioned, however, there seems to be ground for rejecting the oath or claim by one of several co-trustees as insufficient, at least unless accompanied by a mandate from the rest. There must be an authority sufficient to bind the trust-estate for the expense or consequence of the proceedings which are authorized by the vote, or sanctioned by the silence of the claimant; and without the quorum or majority of the trustees, such authority does not seem to be competently interposed.¹⁰ It has been doubted whether an oath may not be taken by the agent or rider of a manufacturer or merchant, or of a trading or manufacturing company, for his principal; as

¹ *Corsan v Crawford*, p. 303, note 8.

² In England nothing seems to be said in the books expressly on this point; but it seems rather to be implied that bankruptcy is no objection. See *ex parte Jackson*, 2 Rose 22. It is, indeed, set down in an order by Lord Loughborough, 8 March 1794, that if an assignee become bankrupt he shall be removed; and this appears to have been in conformity with the prior decisions. 1 Atk. 97. But this does not settle the point of competency to elect a bankrupt. In Scotland the trustee finds security; and there is less possibility of mingling his own affairs with those of the bankrupt estate after his own bankruptcy than before it.

³ See *ante*, p. 291.

⁴ [By sec. 58, in no case shall oaths of verity or credulity supersede production of legal evidence, when required, in any

discussion before the Court of Session, the Lord Ordinary, the sheriff, or the trustee.]

⁵ See below, p. 307.

⁶ *M'Kellar v Templeton*, 22 June 1803, M. App. Bankt. No. 23.

⁷ *Berry v White*, 1825, 3 S. 336.

⁸ Perhaps the bankrupt ought also to swear in this case; and the same objection does not strike against his oath, as where the estate is actually transferred to and vested in a trustee.

⁹ In England one of several assignees may sue out a commission of bankruptcy. *Ex parte Blakey*, 1 Glyn and Jamieson 197, Eden's B. L. 39.

¹⁰ [See *Dods v Ireland*, 1847, 9 D. 1419; *Watson v Morrison*, 1848, 10 D. 1414.]

he alone, it is said, being the person who received and executed the order, can properly swear to the debt. But this case forms no exception to the rule. The principal may in such case safely swear to the debt, if satisfied that it has been incurred.¹ At all events, the words of the law are quite clear; and the principle is, that, by admitting such looseness, the responsibility to which the law anxiously looks as a guard against fraud would be shifted from the true claimant to some nameless man whom the law does not acknowledge. It has also been doubted whether a commissioner, acting for his constituent, can effectually take the oath. A commissioner is one who holds a power from his constituent to manage his affairs, either generally or in a particular department, with full authority to act as he himself might do if present. Land estates are generally placed under this sort of administration, where they are of great extent; and the proprietor himself frequently knows nothing of the subsistence of any particular debt. But the words of the law are imperative; and as the commissioner is a mere factor, the oath must be sworn by the constituent.

Where the debt is claimed by one in his own right as the original creditor, he pledges himself to actual and personal knowledge of the fact.² But where he claims as assignee, trustee, etc., he cannot be held thus to pledge himself: he does only negatively—that to his conviction the debt is just; that he knows nothing to the contrary; and that the grounds of the claim fairly entitle him to insist upon it as a just and legal demand.³ The debt must be clearly described in the oath, and the extent of the claim distinctly specified. But it is sufficient to describe it by reference to an accompanying account or voucher. And either in the oath, or by reference to the accompanying document or account, the date of the transaction or course of dealing out of which the claim arises should be specified.⁴ Without such specification, it cannot be known whether the claimant is entitled to be admitted; for no debt can be admitted to a share in the distribution which did not exist prior to the date of the first deliverance; and an objection may lie against the debt on prescription.⁵

2. DEDUCTION OF PAYMENTS.—It has been doubted whether an oath of verity can be sworn to the full amount of the debt, as appearing on the face of a bill or other document, where the claimant has bought the debt at less than that amount.⁶ But there seems to be

¹ It is not enough that the person who claims is the usual agent of the creditor.

² See *Gibson v Lockhart*, 1825, 4 S. 133. [But he may be so situated as to be able to swear only an oath of credulity, and this has been held sufficient. *Paul v Gibson*, 1834, 12 S. 431, aff. 7 W. S. 462. If the party be unable to write, it is sufficient that the oath be signed by the magistrate. Same case. In *Anderson v Monteath*, 1847, 9 D. 1432, a party was not allowed to claim for a penalty of £200 in a contract on his oath alone; and see *Wink v Mortimer*, 1849, 11 D. 995. See above, p. 289.]

³ This oath is in such a case not the same with an oath of verity or reference: it seems to be more analogous to the oath of calumny, which pledges the party to the truth of his assertion, in so far as depends on his personal knowledge and conviction.

⁴ See below, p. 309, note 3.

⁵ [See *Lawrie v Harvie*, 1848, 10 D. 1236, as to a bill returned on the claimant after the first deliverance; and *Hay v Durham*, 1850, 12 D. 676, as to a cautioner.]

⁶ See *ante*, p. 290. [In *Walker v Walker*, 1835, 13 S. 428, it was held, that if a creditor on a sequestrated estate sell his claim for a composition on its amount, the purchaser may vote to the same extent for which the seller was ranked; and he does not require to make a new claim and affidavit, but merely to intimate the assignation to the trustee.] In England it is settled, that where such claim is to be made on the

estate of another than the person from whom the bill was received, it may be entered to the full extent, provided the bill is not a mere accommodation, and that the claimant does not take dividends to a greater amount on the whole than 20s. in the pound of the consideration which he gave. *Cooke*, 7th ed. 156 et seq.; *Whitmarsh* 185; *Montagu* 195, C; *Eden* 147. Against the person from whom the bill was received, the claim can be only to the extent of the consideration; and where the bill is merely for accommodation, and a claim is made to a greater extent than the advance paid for it, the judicial determinations in England have sustained the claim to the full extent, but limited the drawing to the amount of the consideration. See 2 *Christian on B. L.* 629, and the cases there criticised. It has also been settled, that although the holder of a bill, bond, or other obligation, in which several are bound, is entitled to claim the whole sum from every person bound, to the effect of receiving full payment; yet if he have drawn dividends from any co-obligant before claiming in bankruptcy, what he so draws must be deducted. For it is said that he cannot swear truly that the whole is due, when he has already received a part; and that this has been settled on grounds not peculiar to the English system of jurisprudence, but on general principles universally applicable. *Cooper v Pepys*, 1 Atk. 106; *ex parte Wildman*, 1 Atk. 109, *Cooke's B. L.* 151, *Whitmarsh* 179. Nay, it seems to be sufficient if the dividend is declared before prov-

no reason to doubt that a creditor who shall receive a bill, or other ground of debt, in security of a debt due to him, will be entitled to claim for the whole sum of the debt so pledged, provided he either draw no more than his own debt, or hold the reversion in trust for the original creditor. But it is an important question, whether one who purchases a debt should be allowed to exercise the functions of a creditor beyond the interest which properly belongs to the sum paid by him for the claim; for it is often a part of a fraudulent device on the part of the bankrupt or his friends, and not unfrequently a speculation by those who intrigue for the office of trustee, to purchase up at a low rate debts which, ranked at their full amount, shall give to the holders the command of the resolutions of the creditors. If a payment has been received from the bankrupt himself, or out of his estate, before swearing the oath of verity, the claim must be limited to the balance. But one who holds several bound to him is entitled to demand the whole from each, to the effect of being paid his debt, and no more; or if the co-obligants are bankrupt, he is entitled to a dividend from each estate, corresponding to the whole, but so as not to derive more than payment of the debt from the amount of the several dividends; and a payment of a part from any one will, *pro tanto*, extinguish the claim against that estate only, leaving the security available to its full extent against the others. The date of the sequestration is the point of time at which each creditor holding joint securities is entitled to estimate the amount of debt to be claimed, the sequestration operating as an assignment in security, and for payment to all the creditors. Conformably to these rules, it is held not inconsistent with the truth to swear to the full amount of the debt against any estate, although from another estate a part has been received.¹

[3. VALUATION AND DEDUCTION OF SECURITIES.—By sec. 59, if a creditor hold a security over any part of the estate of the bankrupt, he must, before voting, make an oath in which he shall put a specified value on the security, and deduct that value from his debt, and specify the balance; and if the estate over which the security extends be sold, he must specify the free proceeds which he has received, or be entitled to receive, and the balance due after deduction thereof; and he shall be entitled in any case to vote in respect of that balance, and no more, without prejudice to the amount of his debt in other respects. But in questions as to the disposal or management of the estate subject to his security, he is entitled to vote as a creditor for the full amount of his debt, without making any such deduction. By sec. 60, when he has an obligant bound with but liable in relief to the bankrupt, or holds any security from an obligant liable in relief to the bankrupt, or any security from which the bankrupt has a right of relief; he must, before voting, make an oath in which he shall put a specified value on the obligation of the obligant, and on the security to the extent to which the bankrupt is entitled to relief, and deduct that value from his debt, and specify the balance, and he shall be entitled to vote in respect of such balance, and no more, without prejudice to the amount of his debt in other respects. By sec. 61, a creditor on the estate of a company is not bound, for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners; but if he claim on the estate of a partner, he must, before voting, put a specified value in his oath on his claim against the estate of the company, and also against the other partners, in so far as they are liable to relieve that partner, and deduct such value from his debt, and specify the balance, and he shall be entitled to vote as a creditor for the balance, and no more, without prejudice to the amount of his debt in other respects.² By sec. 62, it is competent to the trustee, with consent of the commis-

ing. *Ex parte Leers*, 6 Vesey 644; *ex parte Tod*, in Watson's bankruptcy, 1815, 2 Rose 202. And the rule was applied by Lord Chancellor Eldon, in the case of the Royal Bank of Scotland claiming under the commission against Scott, Smith, Stein, & Co. 2 Rose 197.

¹ *Robertson v Bank of Scotland*, 1823, 2 S. N. E. 403. See also *Mein v Sanders*, 1824, 2 S. N. E. 645.

² [*Cormack v Campbell*, 1838, 11 S. 72; *M'Cubbin v Turnbull*, 1850, 12 D. 1123; *M'Lellan v Bank of Scotland*, 1857, 19 D. 574; and compare *Dunlop v Speirs*, 1776, M. Apx.

[sioners, within two months after an oath specifying the value of a security, or obligation, or claim in the several cases before mentioned, has been made use of in voting at any meeting, or in assenting to or dissenting from the bankrupt's composition or discharge, and to the majority of the creditors (excluding the creditor making such oath) assembled at any meeting, and during such meeting, to require from that creditor a conveyance or assignation in favour of the trustee, of the security, obligation, or claim, on payment of the specified value, with twenty per centum in addition to the value; and the creditor shall be bound to grant such conveyance or assignation at the expense of the estate. But where a creditor has put a value on such security or obligation, he may, at any time before he has been required to convey and assign, correct that valuation by a new oath, and deduct such new value from his debt.]

The oath must distinctly enumerate the securities which the claimant holds, whether on the estate of the bankrupt on which the claim is made,¹ or on the estate of other obligants, or by the personal engagements of others as sureties, and that he holds no other security than is mentioned in his oath. Thus, where the claimant has a security or lien over any part of the bankrupt's estate (as a creditor by heritable bond, a factor who holds property subject to a lien, a banker who has bills deposited with him in security), he must set forth these securities.²

Nor will the oath be sufficient to enable the creditor to vote in the election of trustee, or in any question at a meeting of creditors, unless it affirmatively state the value of any preferable security or lien held over the bankrupt's property, or of any collateral obligation by others, where the bankrupt is not bound to relieve those collateral obligants.³ And this value must be expressly deducted from the amount of the debt, and the balance must be specified. Both these are precisely necessary by the words of the statute. If these injunctions be neglected, the claim will not support the vote; and although, where the oath substantially complies with the law, by furnishing data for ascertaining the claim, the intention of the Legislature may be thought to be complied with, yet the words are so imperative that a judge does not seem entitled, in a matter of statutory regulation, to admit a creditor to vote, unless in the oath the value shall be deducted, and the balance specified and affirmed to as the debt.⁴ And this has been held on the expedient principle, that at a meeting of creditors the amount of each man's interest and vote should clearly appear, without the necessity of any arithmetical process to ascertain it; and so the rule is rigidly adhered to where the claim is simple, depending on a single article of debt, diminished by the valuation of the security.⁵ Where the oath contains several articles composing one claim, from some of which articles deductions are to be made, not only has the vote been held exceptionable, so far as it rests on articles as to which the deduction and specification of the balance have

Society, No. 2, aff. 2 Pat. 437, with *Johnston v Losh*, 1844, 6 D. 626. See sec. 66 of the statute, and subsec. 39 of this chapter, as to claiming dividend.]

¹ [A promissory note by the bankrupt is not a security. *Bow v Spankie*, 1 June 1811, F. C.]

² [The security must also be specified, although the claimant considers it of no value (*M'Ewan v Cleugh*, 1842, 5 D. 273), or be merely of a nominal value (*Hay v Durham*, 1850, 12 D. 676). See also *Woodside v Esplin*, 1847, 9 D. 1486.]

³ [In *Smith v Borthwick*, 1849, 11 D. 517, where the estates of the institute in possession of an entailed estate were sequestered, an objection to the votes of parties claiming as creditors of his father, the entailor, was sustained, on the ground that the preference which they held over the fee of the estate was a security over the estate of the bankrupt which they had not valued and deducted. But the preference of a medical man on a claim for deathbed expenses is not a security to be

deducted. *Low v Baxter*, 1851, 13 D. 1349. In *Dyce v Paterson*, 1847, 9 D. 993, where a third party accepted a bill drawn on him by the bankrupt, who endorsed it to a bank, and the manager in his affidavit stated that the bill had been accepted for the bankrupt's accommodation, and that the acceptor was not liable to relieve the bankrupt, it was held by the whole Court, that although he did not value and deduct the security of the acceptor, nor produce evidence that the bill was accepted without value, the vote was unobjectionable. See also *Aitken v Callender*, 1848, 10 D. 1269; *Ferrers v Borthwick*, 1848, 11 D. 308.]

⁴ [See *Watson v Cowan*, 1848, 10 D. 754; *Smith v Borthwick*, 1849, 11 D. 517; *Low v Baxter*, 1851, 13 D. 1349; contrasted with *Wilson v Drummond*, 1844, 7 D. 249. The sheriff may allow the oath to be corrected. See below p. 309.]

⁵ *Jeffrey v Crichton*, 20 Jan. 1821, n. r.

been neglected; but it has also been held, that in order to vote at all, there must be a distinct specification of the whole balance of debt on which the vote is claimed.¹

Where there are collateral obligants, and the bankrupt is himself the proper debtor, and liable to relieve the others, the claimant is not bound to deduct anything in voting, although *ex facie* of the document of debt this should not appear.²

Where the bankrupt is one of several who are jointly liable, the creditor will be entitled to vote without making any valuation and deduction for that share which the bankrupt is liable to pay without relief.

So, where the joint obligation arises *ex delicto* (*ex. gr.* where the owners of a ship sink her fraudulently, and so are jointly bound for the damage), the claim would seem to fall under this rule, for it is applicable to all cases where more than one is bound for the debt; and the object is to make the nearest approximation possible, by anticipation, to the value of the interest which the claimant has in the bankrupt's estate, without relief against others. Although, therefore, in criminal law, *culpa tenet suos auctores*, and a claim for a fine would not be so ruled, the claim of damages which arises *ex delicto*, as a civil debt due jointly by the parties, seems to fall under the rule.

[4. INTEREST AND DISCOUNT.—By sec. 52, a creditor who has a claim, or a debt due, shall be entitled to vote and rank for the accumulated sum of principal and interest to the date of the sequestration, but not for any interest accruing after the date of the sequestration. And if the debt is not payable till after the date of the sequestration, he shall be entitled to vote and rank for it only after deduction of the interest from that date.³ He shall also be liable to deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it;⁴ but he shall not be bound to specify separately in his oath or claim for his debt the amount of any interest due thereon, or of any interest or discount deducted therefrom, or to specify therein any accumulated sum of principal and interest. If there be any residue of the estate after discharging the debts ranked, he is entitled to claim out of such residue the full amount of the interest on his debt in terms of law.

5. CONTINGENT DEBT AND ANNUITY.—By sec. 53, when the claim of a creditor depends upon a contingency, which is unascertained at the date of lodging his claim,⁵ he shall not be entitled to vote nor to draw a dividend in respect of such contingent debt; but he may apply to the sheriff (if the trustee has not been elected), or, if elected, to the trustee, to put a value on the debt. And the sheriff or trustee shall put a value on it as at the date of the valuation; and on the value being fixed, the creditor shall be entitled to vote and draw dividends in respect of the value, and no more.⁶ But if the contingency have taken place before the debt has been valued, the creditor may vote and draw dividends in respect of the amount of the debt (but the same shall not disturb any former dividends allotted to other creditors); and when such application is made to the sheriff or trustee, notice shall be given to the bankrupt and petitioning or concurring creditor. The judgment of the sheriff or trustee is subject to review, and any creditor who has claimed on the estate may appeal, or appear and be heard on any appeal. By sec. 54, no creditor in respect of an annuity granted by the bankrupt is entitled to vote and draw a dividend until the annuity shall be valued; but he may (if the trustee has not been elected) apply to the sheriff, or, if elected, to the trustee, to put a value on the annuity. And the sheriff or trustee shall put a value on the annuity, regard being had to the original price given for the annuity, deducting therefrom such

¹ *Murray v Phillips*, 1821, 1 S. N. E. 84. [See cases in p. 307, note 4.]

² *Buchanan v Dunlop*, 1827, 5 S. N. E. 441.

³ [See *Johnstone v Baird*, 1840, 2 D. 1463; *Cullen v M'Farlane*, 1842, 4 D. 1522; *Love v Anderson*, 1846, 8 D. 1016; *Paterson v Lumsden*, 1846, 19 Jurist 144; *Low v Baxter*, 1851, 13 D. 1349.]

⁴ [See, as to exchange, *Paul v Gibson*, 1834, 12 S. 431–2, 7 W. S. 462.]

⁵ [A claim against the drawer and endorsee of a bill which is not due is a contingent debt. *Gordon v M'Cubbin*, 1851, 13 D. 1154.]

⁶ [After being valued, the debt is not considered to be contingent. *Gemmel v North British Bank*, 1853, 16 D. 264.]

[diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the sequestration; and the creditor shall be entitled to vote and draw dividends in respect of that value, and no more. When such application is made to the sheriff, notice shall be given to the bankrupt, and the petitioning or concurring creditor; and the judgment of the sheriff or trustee is subject to review, and any creditor who has claimed on the estate may appeal, or appear and be heard on any appeal.¹

6. RECTIFICATION OF OATH.—By sec. 51, when it appears to the sheriff or to the trustee that the oath or claim of any person produced with a view to voting, or ranking and drawing a dividend in the sequestration, is not framed in the manner required by the Act, the sheriff or trustee shall call upon such person, or his agent or mandatory, to rectify his oath and claim, pointing out to him wherein it is defective; and unless he or his agent or mandatory shall thereupon make such alteration as may be necessary in order to rectify the same, the sheriff or trustee shall disallow or reject the oath and claim. But when the failure to comply with the provisions of the Act appears to have been made for some improper or fraudulent purposes, or where injury can be qualified by the other creditors or any of them in respect thereof, it is not incumbent upon the sheriff or trustee to give such person an opportunity to rectify his oath and claim.²

15. ACCOUNTS, VOUCHERS, AND TITLE.

To entitle a creditor to vote or draw a dividend, he must by sec. 49 produce at the meeting, or in the hands of the trustee, an oath to the effect, and taken in the manner appointed in the case of creditors petitioning for sequestration, and the account and vouchers necessary to prove the debt referred to in the oath.³ If he be not in possession of them previously to the period for lodging claims with a view to a share in any dividend, he must by sec. 50 state in his oath the cause of their not being produced,⁴ and in whose hands to the best of his knowledge they are, which shall entitle him to have a dividend set apart till a reasonable time be afforded for production of them, or otherwise establishing his debt; but he shall not be entitled to act or vote till such production be made, or the debt established. The trustee shall, on production of the oaths and grounds of debt, mark the same with his initials, and make an entry thereof in the sederunt-book, and of the date when the same were produced; and if required, he shall return to the creditor the grounds of debt.]

1. ACCOUNTS.—As the admission of the claim is equivalent to a decree of constitution of the debt, reserving all objections *contra executionem*, and as it vests in the claimant several rights of great importance, the Legislature has, besides the security of an oath, required as essential to the claim, that a copy of the account, with all the vouchers and grounds of debt, shall be produced. The view of the law is, that those who are interested may have a full opportunity of examining into the debt and vouchers, so as to detect all the objections to which they are exposed, and to produce evidence to show the extinction of the debt. But, it may be asked, must both the account and the grounds of debt be produced? The rules seem to be, that as there are many debts which run into account between the parties, the only proof or explanation that can be given of them is the production of a copy of the account, that whatever the shape of the claim may be, if there be vouchers or grounds of debt which are capable of being produced, they must be exhibited along with the claim; and that, as there are many debts which are not proved by written evidence, the proof of them must rest on the oath of verity alone.

¹ [But the annuitant may vote pending the appeal. *Watson v Morrison*, 1848, 10 D. 1414.]

² [The amendment must be sanctioned by oath. *Gibson v Greig*, 1853, 16 D. 233.]

³ [See above, p. 292 (4). The rule generally is, that the accounts, vouchers, etc., must be subscribed as relative to the

oath. See *Cullen v M'Farlane*, 1842, 4 D. 1522, contrasted with *Woodside v Esplin*, 1847, 9 D. 1486; *Miller v Lambert*, 1848, 10 D. 1419; *M'Cubbin v Turnbull*, 1850, 12 D. 1123.]

⁴ [It must be stated that reasonable search had been made, and the cause why the documents were not found. *Taylor v Drummond*, 1848, 10 D. 335.]

In speaking of an account, the Legislature appears to have had in view only such dealings as were properly matter of account between parties having books, and therein keeping an account; which subsisting as an original, may admit of a certified copy as it there stands. And accordingly, where the claim rests upon a book debt, it is settled that it is necessary that there should be produced a copy of the account. In judging whether the copy be sufficient, the fair construction seems to be, that a correct copy of the whole account on both sides must be produced as it stands in the books of the creditor, certified as authentic either by the creditor or by his bookkeeper; and, indeed, the oath of the creditor is a certifying of the account in the meaning of the Act. An account must contain not a general statement merely of goods furnished, but must be such an account as shall furnish full means of checking the claim; that is to say, a full copy of the account from its commencement, or at least from the last docquetted rest in the account, with the particular items and dates of furnishing.¹ It has been questioned whether a banker claiming on a cash account against the principal, or against a cautioner, is bound to show more than a copy of the account made out from the book of the bank, and certified by the proper officer; it being a part of the contract in such cases that an account so made out and certified shall be sufficient to prove the balance. It seems to be sufficient to produce such account, with the oath of verity, in order to make an effectual claim, although in a scrutiny into the verity of the debt, in preparing for a dividend, all the vouchers must be exhibited.²

2. VOUCHERS.—The statute absolutely requires the production of the vouchers of debt. Under this description is comprehended all the written evidence by which the debt is vouched, and the documents on which the claim is to rest.³ It is by no means necessary that the vouchers produced shall fully establish the debt: they are required for satisfaction of all concerned as the vouchers of the claim in the meanwhile, and as furnishing the means of scrutinizing more thoroughly the verity of the debts; and however imperfect as proofs, yet when fortified by an oath, under the pains of perjury, they entitle the claimant to the character of a creditor, provided nothing has been withheld. Although the claimant must make production of every document, voucher, and ground of debt, which ought according to the nature of the claim to be in his possession, yet beyond this he is not bound to go in making a claim which will so far establish his character as a creditor to entitle him to take part in all the acts and resolutions of the creditors.⁴ But what the vouchers to be produced are, must depend on the circumstances.⁵ So a liquid debt by bond, bill,⁶ or contract, must be proved by production of the document, if the creditor be in possession of it. As it is possible that the debt may be truly due, although the creditor may not at the time be possessed of the voucher, provision is made for giving him time to recover and produce it, on his swearing in his oath to the cause of his not having the document, and stating in whose hands to the best of his knowledge it is to be found. But there are debts occasionally claimed in bankruptcy for which neither voucher nor account can be produced, as for money lent by a near relation of the bankrupt. It cannot be said that all such claims are to be

¹ *Hunter & Co.*, 14 Jan. 1812, F. C. [*Hair v Berwick*, 1830, 8 S. 671. An account *ex facie* prescribed is not sufficient (*Wink v Mortimer*, 1849, 11 D. 995; *Low v Baxter*, 1851, 13 D. 349); nor a prescribed bill (*Lockhart v Mitchell*, 1849, 11 D. 1341; *Nisbet v Nicoll*, 1856, 18 D. 1042). And an open account, balanced as from a former one, is not sufficient without production of it; nor an account without vouchers, unless from its nature no vouchers can be produced (*Kinnear v Low*, 1849, 12 D. 66; *Forbes v Manson*, 1851, 13 D. 1272); nor a claim by a railway company for unpaid calls, where not vouched by the register of shareholders and evidence of the calls (same case). See, as to a decree *cognitionis causa*, *Turnbull v M'Naughton*, 1850,

12 D. 1097, compared with *Liston v M'Intosh*, 1853, 15 D. 921.]

² *Murray v Phillips*, 1821, 1 S. N. E. 84. [See *Miller v Lambert*, 1848, 10 D. 1419.]

³ [If the voucher (as a bill) be stated in the oath to be of a specific date, and the actual date is different, the vote is bad. *Anderson v Monteath*, 1847, 9 D. 1432. But see p. 309, as to rectification of the oath.]

⁴ [See *Woodside v Esplin*, 1847, 9 D. 1486.]

⁵ [See *Paul v Gibson*, 1834, 12 S. 431, 7 W. S. 462; *Forrest v Borthwick*, 1848, 11 D. 308.]

⁶ [But a vitiated bill will not be sustained. *M'Cubbin v Turnbull*, 1850, 12 D. 1123.]

rejected. On the contrary, under the former statute, claims of this sort have been frequently admitted.¹ A contingent creditor may effectually claim, although he has not the bill to produce on which his name stands as endorser, or the bond in which he has engaged as a cautioner.² If the voucher has perished, still the claim may be effectually made, without a previous decree of proving of the tenor, provided the *casus amissionis* be specified. So, if the vouchers are abroad, it appears that an effectual claim may be made, so as to entitle the claimant to act as a creditor.³ It will not be a good objection to exclude a claimant, that the document or voucher of debt produced is ineffectual to support his claim (*ex. gr.* that it is prescribed,⁴ or liable to an objection on the Stamp Laws), provided a claim of debt can be maintained independently of the document.⁵ No objection which would not be fatal to an action of constitution will bar the receiving of the claim; while the production of the voucher, such as it is, complies with the requisite of the Act.⁶

3. TITLE.—Although there will not in all cases be required a formal title in order to have a claim ranked, yet it may be questioned whether a person acquiring right to a debt not originally due to him is not bound to produce a complete title. As an executor is not entitled to draw a dividend till he has confirmed, so it would appear he cannot in bankruptcy claim a debt effectually. So a general donee or residuary legatee would not seem to be entitled to exercise the right of a creditor without confirmation,⁷ though a special legatee or assignee, or donee *mortis causa*, would be entitled to do so.⁸ So an executor holding a bond of corroboration, or any other acknowledgment of the debt, has a full title.⁹ The question is undecided, whether evidence of the right being truly in the creditor at the time of claiming, it can by relation back become valid on a regular title being shown. One purchases a debt, for example, and has a letter acknowledging payment of the price, and binding the original creditor to grant an assignation: would this be sufficient to maintain his vote, or would a subsequent assignation complete it by relation back to the vote?¹⁰ The person swearing an oath of verity of debt for another will be bound, when called on, to produce his authority as agent, factor, guardian, or manager, to authorize him to represent the creditor. The evidence of such authority ought to be produced at the first; but the claim would appear to be good, although such evidence should not be so produced, provided the claimant be at the time vested with the authority.

¹ *Finlay v M'Nair*, 1 Feb. 1809, F. C. (compromised on appeal); *Williamson v Lowe*, 4 Dec. 1818, F. C.; *Blyth v Baird*, 1825, 4 S. N. E. 155. [See *Crawford v M'Kerrow*, 1838, 16 S. 1197; *Paterson v Lumsden*, 1846, 19 Jurist 144, contrasted with *Dyce v Paterson*, 1846, 9 D. 310 and 9 D. 1141; *Anderson v Thomson*, 1847, 9 D. 1460.]

² [But the debt must be valued before voting, etc. See *ante*, p. 308. *Gordon v M'Cubbin*, 1851, 13 D. 1154.]

³ *Hay's Crs.*, 1794, Bell's Ca. 47. A notarial protest of the bill was held sufficient.

⁴ But see *ante*, p. 291, and note 1.

⁵ So, as already observed, a bill without a stamp having been produced, the oath was held sufficient for the admission of the claim. *Geddes v Mouat*, p. 292, note 9. [But see *Mories v Glen*, 1843, 6 D. 97; *Ironsides v M'Gowan*, 1847, 19 Jurist 597; *Law v M'Laren*, 1849, 11 D. 1489, in which objections were obviated by stamping the documents.]

⁶ [See, as to acknowledgments by the bankrupt to conjunct and confident persons, and on the eve of bankruptcy, *Cullen v M'Farlane*, 1842, 4 D. 1522; *Laidlaw v Wilson*, 1844, 6 D. 530; *Aitken v Stock*, 1846, 8 D. 509; *Anderson v Guild*, 1852, 14 D. 866, compared with *Montgomery v Hart*, 1845, 7 D. 1081.

Also *Wiseman v Skene*, 1870, 8 Macph. 661, where a statement of unconnected claims held not an 'account' under the statute.]

⁷ *Lennox v Grant*, 1784, M. 14381; *Grant*, 1791, Bell's Ca. 319.

⁸ 1690, c. 26.

⁹ In England an executor must prove the will, and obtain a probate to entitle him to administer, sue, and make demand, although the right vests *ipso jure*; but it is held that, where one in whom the right is vested at the time of acting (even in the case of a petitioning creditor) obtains a regular probate afterwards, it makes the act valid by relation back. *Rogers v James*, 7 Taunt. 147; *ex parte Paddy*, Buck's Ca. 235, Eden's B. L. 41. It has not yet been decided in Scotland whether this principle would be adopted in the analogous cases under our law of confirmation, or whether the same licence would be allowed to an English executor.

¹⁰ [In *Nicoll v Romanes*, 1855, 18 D. 283, a third party took up a bill from a messenger about to execute diligence against the acceptor; and it was held that, although he had no endorsement or assignation from the holder, he was entitled to vote on the acceptor's estate. See also *Hair v M'Cubbin*, 1853, 16 D. 179.]

16. MEETING FOR AND ELECTION OF THE TRUSTEE.

[1. CONSTITUTION.—The qualified creditors or their mandatories¹ shall assemble at the time and place fixed for the election of trustee.² And if two or more creditors shall give notice to the sheriff of the county, he shall attend and preside; and the sheriff-clerk or his depute shall attend and mark the oaths and productions with his initials, and write the minutes in the presence of the meeting, and enter the names and designations of the creditors present, or of the mandatories, and the amount for which they claim, and any other circumstances which the sheriff shall judge fit. The sheriff shall sign the minutes, and the clerk shall retain the oaths (subject to the exhibition of them in his hands till the election shall be determined, when he shall deliver them to the trustee). When the sheriff is not present, the creditors shall elect a preses, and (if the sheriff-clerk or a depute be not present) a clerk.³ In that case the preses shall mark the oaths and productions with his initials, and sign the minutes; and the clerk shall in the presence of the meeting write the minutes and enter the names and designations of the creditors or mandatories, and the amount for which they claim, and any other circumstances relating to the meeting which the preses shall judge fit, and which minutes the preses shall sign (sec. 68).]

The preses⁴ of the meeting has no power, but merely to preserve order in the meeting, and to see that the minutes of the proceedings are regularly set down; and as he votes only as a creditor, without any privilege or casting vote, there is no contest for the office. The meeting continues regularly constituted only while the preses continues to preside, or his place supplied by another. It is irregular to hold two meetings. The creditors ought to constitute one meeting only; and that meeting, which is held at the time and place mentioned in the advertisements, is the legitimate meeting. The minutes always should, if possible, be written out and authenticated in presence of the meeting; and, indeed, they are not entitled, strictly speaking, to any credit unless this be done: for they form a record subscribed in the name of the whole creditors by the signature of their preses; and therefore strictly not authentic, unless done in the presence of the creditors. But in practice this is seldom observed. When regularly made out and authenticated, the minutes are legal evidence of the proceedings and votes.⁵ They begin by a list of the persons present, and this forms the record of voters. They should contain the name of each creditor, and state whether he be personally present or represented by a mandatory; a statement that the vouchers, grounds of debt, and oaths of verity, have been regularly produced now or formerly, and that the mandate was shown if the vote was by an agent or attorney; and the amount of the debt on which the claimant votes.

[2. ELECTION.—By sec. 68, the creditors or their mandatories who have produced their oaths and documents of debt,⁶ and who have been entered in the minutes, shall then and there elect a fit person to be trustee, or two or more trustees to act in succession, in case of

¹ [The mandatory of any person entitled to vote as a creditor may vote in the absence of such creditor, provided he exhibit a mandate; and the vote of such mandatory will, within his mandate, be held as the vote of the creditor himself (sec. 63). See, as to a mandate by trustees under a trust-deed, *Dods v Ireland*, 1847, 9 D. 1419; and *Wink v Mortimer*, 1849, 11 D. 995, where the principal became insane, but afterwards convalesced.]

² [Power is given to adjourn for such reasonable time as may seem fit, provided the adjournment do not postpone the meeting beyond the limit of the period within which the meeting is appointed to be held. See, as to the competency of exercising this power where on a competition the sheriff has pronounced a deliverance, *Paterson v Duncan*, 1846, 18 Jurist 481.]

³ [An omission to express that this had been done in the minutes was held to void the election. *Gascoigne v Manford*, 1848, 10 D. 376.]

⁴ [This refers to the case where a preses is elected in absence of the sheriff.]

⁵ Sometimes two several minutes are made up, the creditors choosing to split into parties, each electing its own preses and clerk. This is illegal.

⁶ [Any person who shall acquire after the date of the sequestration, otherwise than by succession or marriage, a debt due by the bankrupt, and the wife of the bankrupt, and any trustee for her, shall not be entitled to vote in the election of trustee or commissioners; but in all other respects such person may be ranked as a creditor (sec. 69).]

[non-acceptance, death, resignation, removal, or disqualification; and in the case of the sequestration of the estates of a company and of the partners, one trustee for all the estates, or separate trustees on the estates of the company and on the estates of all or each of the individual partners or trustees in succession. By sec. 69, if the sheriff be present, and there be no competition or objection stated to the candidate or candidates, he shall, by a deliverance on the minutes, declare the person chosen by the creditors to be trustee; and if there be competition or objections as to the candidate or candidates, such objections shall be stated at the meeting; and the sheriff may either forthwith decide thereon, or make *avizandum*; and he shall, if necessary, make a short note of the objections and of the answers, on which he shall, within four days after the meeting, hear parties *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected, and state the grounds of his decision in a note, and the same, as well as such short note, shall form part of the process. By sec. 70, when the preses has been elected by the creditors, he shall (whether there be any competition or objection or not) forthwith report the proceedings to the sheriff; and the oaths shall, if the sheriff-clerk or his depute be present, remain in his possession, or if he be not present, shall be transmitted to the sheriff-clerk by the preses, to be retained by him till the trustee shall be finally appointed, when he shall deliver them to the trustee. If there be no competition or objection, the sheriff shall declare the person or persons elected trustee or trustees in succession; and if there be competition or objection, the parties shall, within four days from the date of the meeting, lodge in the hands of the sheriff-clerk short notes of objections,¹ whereupon the sheriff shall forthwith hear parties *viva voce*, and give his decision, and state the grounds thereof in a note, which, as well as the above short notes, shall form part of the process. And by sec. 71, his judgment declaring the person or persons elected to be trustee or trustees in succession, shall be given with the least possible delay, and shall be final, and in no case subject to review in any court or in any manner whatever.²]

3. OBJECTIONS TO CANDIDATES TO BE STATED.—When a candidate is put in nomination, any disqualification to which he may be exposed must be stated, if it is afterwards to be relied on, so that the creditors may pass their judgment on it, and give their votes for another candidate, if they should hold the person proposed to be disqualified; and if the objection be sustained, the election by the minority is confirmed.³ If this be neglected, and the objection prove fatal, the whole election will be annulled, and the nominee of the minority will not be held elected.⁴ It is not necessary that the opposite parties in a contested election should protest that the election has fallen to their candidate.⁵ But it is prudent to elect a trustee or trustees in succession, which the statute authorizes the creditors to do: for, should the election of one of the trustees named first in order be annulled on a personal objection, while that of the rival candidate should not be sustained, in respect of the creditors not having been made aware of the personal objection, it may be useful to avoid the necessity of a new election by the nomination of a subsidiary trustee;⁶ and it seems that such subsidiary election will be available to prevent the creditors from being held as throwing away their votes.⁷ One trustee, and no more, can hold the office; nor can the creditors appoint an assistant or auxiliary trustee to divide the labour or responsibility. But the creditors may, to prevent interruption, and save the expense of new

¹ [They must be specific. *Lockhart v Mitchell*, 1849, 11 D. 1341.]

² [It would seem that if the sheriff find the election to be void, this may be reviewed. *Mann v Dickson*, 1857, 19 D. 942. The expenses of a competition are to be paid by the unsuccessful to the successful party, not out of the estate (sec. 4 of Bankruptcy Act, 1857). See sec. 87 of the statute 1856; and subsec. 23 of this chapter, as to advertising the election of the trustee.]

VOL. II.

³ *Forrester's Sequestration*, 1794, n. r.

⁴ *Pattison v Cunninghame*, 26 Jan. 1811, F. C.; *Paterson*, 15 Jan. 1812, F. C.

⁵ *Hunter, Rainy, & Co.*, 11 Jan. 1812, F. C.

⁶ *Paterson*, note 4.

⁷ The vote in such a case ought to be expressed alternatively in the minute: as, For A, or if he should not be duly elected, or the election should fail from whatever cause, then for B.

meetings, name a succession of trustees, each to act as sole trustee in the order of their appointment. In the statute it is declared that they may choose two or more trustees to act in succession, one failing another by death, resignation, or removal; and it has been doubted whether, on occasion of a contested election, the substituted trustee is to be considered as entitled to the office on the first-named candidate not being confirmed. On one occasion the trustee substituted was taken by the Court instead of the principal, though there was neither failure by death, resignation, nor removal.¹ Sometimes, on a contest, it has been attempted to get quit of the successful candidate by a new election. But the objection to this is, that the trustee, once elected, cannot legitimately be removed, while he has not shown himself unfit for the office; and at least some change of circumstances or cause of disapprobation must be shown, occurring since the election, or formerly unknown. Accordingly, the Court has not sanctioned such a proceeding, unless it can be justified by circumstances unknown at the time of the former election.²

4. OBJECTIONS TO VOTES.—The Court is not bound to support the vote of a creditor upon the *prima facie* evidence.³ There may be found in the repositories of the bankrupt a receipt for the whole or part of the debt; there may be a liquidated ground of compensation; or payment may have been received from the estate of a primary debtor. Where any objection, fatal to the debt claimed, can be instantly verified, the Court is bound to give effect to it, and to reject the vote of the claimant.⁴

On the other hand, it is not enough to destroy the vote that the claim is suspicious: if sworn to, and all the evidence produced which is alleged to exist, the claim must be admitted to a vote.⁵ The result of the decisions is, that the scrutiny into debts, considered as qualifications to vote, is not to be made the subject of parole proof. The admission, on the one hand, of such written evidence in refutation as may instantly be produced, and, on the other, the security of an oath, guarded by all the pains of perjury, seem to have appeared to the Legislature sufficient precautions against danger in matters of this sort; while a protracted inquiry, suspensive of functions most important to the common interest, is carefully to be avoided. The line of distinction is happily drawn in a case which came twice before the Court. At first the objection was stated to the claim, as a qualification to vote in the election of interim factor; and afterwards the same objection was repeated to the debt, as a title to draw a dividend. The Court supported the claim on the first occasion, but required further proof on the second.⁶

A creditor is not excluded from a vote in the election because he happens to be a person conjunct or confident with the bankrupt,⁷ although such person cannot himself be elected trustee. But if he is acting fraudulently, and in prosecution of an attempt contrary to the true interests of the estate, for his own benefit, the Court will deprive him of the privilege of voting.⁸

The party who challenges a vote is entitled to diligence for recovering any receipt,

¹ Paterson, p. 313, note 4.

² Sword, Jan. 1820, n. r. In *Douglas & Co. v Watson*, 1821, 1 S. N. E. 173, two judges delivered opinions confirming this doctrine.

³ See *ante*, p. 302, as to objections to the trustee.

⁴ *M'Taggart*, 1 Feb. 1809, n. r.

⁵ In *Furlong v M'Nair*, 1 Feb. 1809, F. C., President Blair stated that it was not the object of this scrutiny to sift questions regarding the constitution of debts; that inquiries so tedious and expensive were most inexpedient in this stage of the proceedings; and that the Court was called on to take the debts as they stand *ex facie* of the claims, vouchers, oaths of verity, and written evidence produced: these, on the one hand, and the penalty of perjury on the other, being the securities relied on by the Legislature to guard the purity of

these elections. *Williamson v Lowe*, 4 Dec. 1818, F. C.; *Blyth v Baird*, 1825, 4 S. N. E. 155.

⁶ *Sequestration of Robb of Leith*, Dec. 1806, n. r.; *Goddard v British Linen Company*, in the same sequestration.

⁷ *Moubray v Niblie's Crs.*, 18 May 1793, President Campbell's Sess. Pap.; *Furlong v M'Nair*, note 5. [In *Paul v Gibson*, 13 Feb. 1834, a vote by a married woman whose husband was transported was sustained.]

⁸ *Thomson*, 4 Feb. 1819, n. r.; *Murray v Phillips*, 1821, 1 S. N. E. 84; *Campbell v Watson*, 1825, 4 S. N. E. 124; *Blyth v Baird*, 1825, 4 S. N. E. 155. [See *Walker v Walker*, 1835, 13 S. 428, where the acquisition of claims, so as to give a creditor the control of the sequestration, was held not *per se* to disqualify; contrasted with *Laidlaw & Son v Wilson*, 1844, 6 D. 530.]

discharge, or voucher, which may instantly destroy or disprove the debt in whole or in part;¹ but he is not entitled thus to recover all vouchers, documents, or letters, contracts, minutes, etc., concerning the debt in question, being a sweeping diligence for expediting the constitution and ultimate validity of the debt.²

While a claim is under discussion in a court of law, either under the provisions of the Sequestration Act or in the course of an ordinary action of constitution or suspension, the claimant seems to be entitled to his vote; as undoubtedly he is entitled to have a dividend set apart for him to abide the result of the discussion.

Where the estates both of a company and of the individual partners are sequestrated, the two sets of creditors may concur in electing the same trustee. But they may find it expedient to appoint different trustees. The vote should in all such cases be put separately, where there are any private creditors of the individual different from the creditors of the company. Company creditors must, in the election of a trustee on the estate of a partner, value and deduct the claim against the company, and vote only for the balance.

[5. CAUTION FOR TRUSTEE.—By sec. 72, the creditors at the meeting are to fix a sum for which the trustee shall find security for his intromissions and performance of the duties and rules of the statute, and decide on the sufficiency of the caution offered; and the person declared to be trustee must forthwith lodge with the sheriff-clerk a bond of caution, signed by the trustee and his cautioner in a prescribed form, which shall be furnished to him by the sheriff-clerk.³]

If the creditors have not expressly limited the sum, the Court requires caution for the whole intromissions before they will confirm the election. Having regard to the interest of absent creditors, they will not confirm an election without caution, although the creditors should expressly dispense with it; and on the same principle, it is probable that, where the extent specified is manifestly illusory, the trustee would be required to find security for his whole intromissions. Where the caution is limited to a certain extent, the obligation on the cautioner is to be responsible for the deficiency on the trustee's intromissions to the extent specified. From this a practical consequence follows: when the creditors fix the amount of caution, they in truth estimate the credit of the trustee elect. If, therefore, a candidate who, not having been declared elected, has not been required to give caution, engages in a judicial competition for the office, he must, if successful in Court, offer caution for all his intromissions. The Court cannot confirm him at the same extent of caution with his competitor, for this would be to exercise a discretionary power which law has placed only with the creditors; and it does not appear that they would have received him without full caution.⁴

17. CONFIRMATION, REMOVAL, RESIGNATION, AND DEATH OF TRUSTEE.

[On the decision of the sheriff being given, declaring the person elected trustee, and on a bond by the trustee and his cautioner being duly lodged, the sheriff shall confirm his election as trustee; which confirmation shall be final, and not subject to review in any manner whatever. And the sheriff-clerk shall issue an act and warrant in the subjoined form⁵ to the trustee, who shall immediately transmit a copy of it to the accountant,⁶ by

¹ [Hair v M'Cubbin, 1853, 16 D. 179; Rhind v Mitchell, 1846, 9 D. 231.]

² Mein v Sanders, 1824, 2 S. N. E. 645.

³ [See also p. 316. The creditors may accept the bond of a guarantee society (sec. 72).]

⁴ [See Mackersey v Galloway, 1841, 3. D. 1213; Miller v Sorely, 1846, 8 D. 1207; M'Farlane v Grieve, 1848, 10 D. 551.]

⁵ [Place and date.]

The sheriff of the county of [insert county] has confirmed and hereby confirms *A B* [name and designation] trustee on

the sequestrated estate of *C D* [name and designation]; and the whole of the estates and effects, heritable and moveable and real and personal, wherever situated, of the said *C D*, are transferred and belong to *A B*, as trustee for behoof of the creditors of the said *C D*, in terms of the 'Bankruptcy (Scotland) Act, 1856;' and the said *A B* has, as trustee aforesaid, in terms of the said Act, full right and power to sue for and recover all estates, effects, debts, and money belonging or due to the said *C D*. (Signed) *C D*, Sheriff-clerk.

⁶ [See below, subsec. 20.]

[whom an entry of the name and designation of the trustee shall be made in the Register of Sequestrations. The act and warrant is an effectual title to the trustee to perform his duties, and evidence of his right and title as trustee,¹ and entitles him to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated (sec. 73).²

By sec. 74, a majority in number and value of the creditors present at any meeting duly called for the purpose may remove the trustee, or accept of his resignation; and one-fourth of the creditors in value may at any time apply by petition to the Lord Ordinary for removal of the trustee:³ in which case the Lord Ordinary shall order the petition to be served on the trustee, and intimated in the Gazette; and if he shall be satisfied that sufficient reason has been shown, he shall remove the trustee, and appoint a meeting of the creditors to be held for devolving the estate on the trustee next in succession, or electing a new trustee. If the trustee shall die, resign, or be removed, or remain at any one time for three months furth of Scotland, any commissioner, or any creditor ranked or claiming and entitled to be ranked on the estate, may apply to the sheriff for an order to hold a meeting for devolving the estate on the trustee next in succession, or electing a new trustee: the sheriff shall thereupon grant warrant to hold such meeting at a certain time and place, which shall be advertised in the Gazette by the commissioner or creditor so applying. At the time and place so appointed, the creditors at the meeting may devolve the estate on the trustee next in succession, or elect a new trustee;⁴ and when the estate is devolved on a trustee, the creditors shall fix the amount for which he shall find security; and on a bond being lodged, the sheriff shall confirm him, and an act and warrant shall be issued and recorded in the same way and to the same effect as in the first election of a trustee. In all cases of a new election of a trustee, the succeeding or new trustee shall be vested with the powers and perform the duties and be subject to the same rules as above mentioned, and shall call to account the former trustee, or his heirs or representatives. By sec. 159, the accountant is required to take cognizance of the conduct of all trustees and commissioners in sequestrations awarded after the passing of the Act, or in which any proceedings shall have been had within five years thereof; and in the event of their not faithfully performing their duties, and duly observing all rules and regulations imposed on them by statute, Act of Sederunt, or otherwise, relative to the performance of those duties, or in the event of any complaint being made to him by any creditor in regard thereto, he shall inquire into the same; and if not satisfied with the explanation given, he shall report thereon to the Lord Ordinary in time of vacation, or during time of session to either Division of the Court of Session, who, after hearing such trustees or commissioners thereon, and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require. By sec. 158, each trustee must make an annual return within fourteen days after the 31st of October to the sheriff-clerk (who shall, within fourteen days thereafter, transmit it to the accountant) of the position of the affairs of the estate under his charge;⁵ and any trustee who shall fail to make such return shall be removeable from his office at the instance of any one creditor, or

¹ [A copy of the act and warrant, certified by the sheriff-clerk, and authenticated by one of the judges of the Court of Session, is to be received in all courts and places within the United Kingdom and Her Majesty's other dominions as *prima facie* evidence of his title, without proof of the authenticity of the signatures or of the official character of the persons signing (sec. 73).]

² If the trustee named will not accept, or if any objection has occurred which renders him ineligible, the Court will confirm the substitute trustee, if one has been named, or order

a new election. In the meanwhile the factor must proceed with the management. See, as to the duties and powers of the trustee, p. 318.

³ [He may be removed at the instance of any one interested, where he has not duly deposited the funds (sec. 86); and see below, p. 319.]

⁴ [They are not bound to devolve on the successor. *M'Laggan v Dewar*, 1851, 13 D. 1394.]

⁵ See below, p. 318, note 6.

[of the accountant, or subject to such censure as the Lord Ordinary may think suitable, and be found liable in expenses. Further, by sec. 161, the accountant must, at all times when requisite, report to the Lord Ordinary or either Division of the Court any disobedience by the trustee of any requisition or order by him, and generally any matter which he may deem it necessary for the due discharge of his office to bring before the Lord Ordinary or the Court, and it is competent for the Lord Ordinary or the Court to deal summarily with the matter reported.¹]

The Removal may either be on cause shown, or by simple resolution on the part of the creditors. The trustee, being an officer bound to duties of great extent and variety, may fail in the performance of them, yet so as not to afford ground of legal objection or judicial removal; and it is a wholesome restraint under which to place the exercise of his authority, that a majority of his constituents shall have power to remove him without assigning a cause. But the judicial removal of the trustee must always be for cause shown. Among the causes of removal may be enumerated bankruptcy, misconduct as trustee in all its shapes, holding an interest adverse to the creditors, purchasing up the estate or debts for his own benefit, removing from the jurisdiction of the Court for three months, the neglect of the rules in distribution.² Slighter irregularities are not held sufficient ground for removal, —a measure necessarily attended with important consequences both to the trustee and the creditors, affecting deeply the character of the trustee on the one hand, and requiring the divestiture and alteration of the titles of the estate on the other.³ It is an important question whether the Court can remove a trustee, or devolve the office on the next trustee in succession, upon matter being brought under their notice in the course of a judicial discussion, which is sufficient ground for holding him unfit for the situation. In one case the Court proceeded at once to remove a trustee, who, in the course of discussing a composition contract, was found to have been guilty of improper conduct relative to it.⁴ But doubts were subsequently entertained on this point.⁵ It was thought that the Court could do no more than order a meeting of creditors, though that seems a very unnecessary course to be taken, where matter has been disclosed which would control the election, if any one having interest should oppose the confirmation of such a trustee. It was further doubted whether the title of the trustee, resting upon an extracted act and warrant, can be reduced without a challenge in the regular course appointed by the statute.

As to Resignation, the general rule seems to be, that, as in private trusts, the trustee cannot resign his office against the wish of the creditors, and without their consent. His acceptance of the office has led to a trust on the part of the creditors which would have been otherwise bestowed had he not induced them to confide in him; and in legal language, they have a *jus quæsitum* in his services while the subject of the trust subsists. But the creditors assembled at a meeting duly called for that purpose may, by a majority in number and value, accept of the trustee's resignation. Such resolution, however, may be brought under review of the Court (sec. 169). For it may be very important that the trustee should not by his resignation be saved from the disgrace of having a complaint presented for his

¹ [If the accountant shall possess information that shall lead him, on reasonable grounds, to suspect fraudulent conduct by the bankrupt, or malversation or misconduct on the part of the trustee or commissioners, such as may infer punishment, he shall be entitled to give information to Her Majesty's Advocate, who shall direct such inquiry and take such proceedings therein as he shall think proper (sec. 162).]

² [In *Brown v Burt*, 1848, 11 D. 338, 164, it was held a sufficient cause that the trustee had covertly purchased the bankrupt estate; and see below, p. 319 (2), as to failure to lodge money in bank. See *Bulley v Henderson*, 1849, 11 D.

1470, as to the title of a creditor claiming, but not ranked, to apply for removal; and *Richmond & Co. v M'Phun*, 1854, 16 D. 546, as to the right of a creditor to sist himself as a petitioner.]

³ *Ewing v Laurie*, 1824, 3 S. 234, aff. 2 W. S. 19. See *Ayton v M'Culloch*, 1824, 3 S. N. E. 54. [*Mitchell v Mein*, 1830, 9 S. 115; *Loudon v Christie*, 1835, 13 S. 389; *Urquhart*, 1855, 17 D. 773.]

⁴ *Cunninghame*, 12 May 1812. [See *Urquhart*, note 3.]

⁵ *Ritchie*, in Second Division, 7 Dec. 1821. Memorials were ordered on this point; but the case was never determined.

removal. It may also be inexpedient for the creditors to lose the services of the trustee at a particular time. And there may be advantages attainable on the part of the trustee, by means of his resignation, to the detriment of the estate.

18. DUTIES AND LIABILITIES OF THE TRUSTEE.

[1. DUTIES.—The trustee must, within twenty-one days after his election is confirmed, present an abbreviate, signed by him or his agent,¹ to the Keeper of the Register of Abbreviates of Adjudications, who must forthwith record the same, and write and subscribe a certificate thereon in the form subjoined (sec. 79).² And the trustee must, as soon as may be after his appointment, take possession of the bankrupt's estate and effects, and of his title-deeds, books, bills, vouchers, and other papers and documents;³ and also make up an inventory of such estate and effects, and a valuation showing the estimated value and the annual revenue thereof, and forthwith transmit copies of such inventory and valuation to the accountant (sec. 80). He is also to manage, realize, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money, according to the directions given by the creditors at any meeting; and if no such directions are given, he is to do so with the advice of the commissioners. He must keep a sederunt-book, in which he shall record all minutes of creditors and of commissioners, states of accounts, reports, and all the proceedings necessary to give a correct view of the management of the estate; also regular accounts of the affairs of the estate,⁴ and transmit to the accountant, before each of the periods assigned for payment of a dividend, a copy certified by himself of such accounts, in so far as not previously transmitted,⁵ which are to be preserved in the office of the accountant (sec. 84).⁶

HE MUST LODGE ALL MONEY which he shall receive in such bank as the majority of the creditors in number and value at any general meeting shall appoint, and failing such appointment, in any joint-stock bank of issue in Scotland (provided that the bank be not one in which the trustee is an acting partner, manager, or cashier); and the money shall be lodged in his official character of trustee, at the highest rate of interest which can be procured for the same.⁷ The bank shall, once yearly at least, balance the account, and accumulate the interest with the principal sum, so that both shall thereafter bear interest as principal; and if the bank fail to do so, it shall be liable to account as if such interest had been so accumulated (sec. 82). The trustee may, with consent of the commissioners, compound and transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon; and the com-

¹ The whole estates and effects, heritable and moveable, and real and personal, wherever situated, of *A B* [*name and designation*], are transferred and belong to *E F* [*name and designation*], as trustee on his sequestrated estate, conform to act and warrant of confirmation dated the day of , issued in terms of the 'Bankruptcy (Scotland) Act, 1856.'

[Signed by the Trustee or his Agent.]

The neglect of the trustee may be remedied at his expense. *A B*, 21 Dec. 1855, 18 D. 286.

² This abbreviate was presented by [*name and designation*], and recorded on [*date*] in the Register of Abbreviates of Adjudications. (Signed) *E F*, Keeper.

³ [See, as to opening letters, sec. 179; and as to his title to pursue, sec. 73.]

⁴ [The sederunt-book and accounts are to be patent to the commissioners and to the creditors or their agents at all times; but when any document is of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors on the estate), the trustee shall not be

bound to insert it in the sederunt-book, or to exhibit it to any other person than the commissioners (sec. 84).]

⁵ [See *Brown v Burt*, p. 317, note 2, as to the effect of failure.]

⁶ [By sec. 158, each trustee must, within fourteen days after the 31st October in each year (or on the first lawful day after expiry of the said fourteen days), deliver, free of expense, to the sheriff-clerk of the county, a return, in a specified form, of every sequestration of which he is trustee. And the sheriff-clerk shall, within fourteen days thereafter, transmit in the same form to the accountant, a return of all the sequestrations depending in the sheriffdom whereof he is clerk; which returns the accountant shall cause to be regularly bound up and preserved, according to the alphabetical order of counties, in a volume to be kept in his office, with an index thereto, framed by him, and which volume shall be patent to all concerned.]

⁷ [See, as to liability in penal interest on failure to lodge, p. 319.]

[promise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt (sec. 176).]

The general description of the office and duties of the trustee is this: He is the trust proprietor and manager of the estate and effects; the judge, in the first instance, of all claims of debt and of preference; and the distributor of the divisible fund. The powers and duties of the trustee are in many points described in the statute; the rest may be deduced from the nature of the conveyance by which the estate is vested in him, and the design of the office, and do not require here a particular enumeration. He is fully vested with the estate and personal right of the bankrupt. As to property and effects abroad, he may be obliged to follow the proceedings prescribed by foreign laws for attaining possession. But he is entitled and bound to complete such titles, both to real and personal estate, as may be necessary for enabling him in foreign countries effectually to claim and realize the property for the use of the creditors. In all that belongs to the administration he acts as a person confidentially entrusted with the interest of the creditors. He cannot take any step which may by possibility prove advantageous to himself at the expense of the creditors, and so he cannot become a purchaser of the estate or effects of the bankrupt.¹ Nor can he, by renouncing his office, acquire a right to purchase without objection. Unless this is done openly and timeously, and with the consent of all interested, it would manifestly lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful, and then renouncing the office, in order to take advantage of the knowledge he has acquired. A trustee, therefore, who buys up debts, must hold them as bought for behoof of the estate, and draw no dividends after he shall have been reimbursed of the purchase-money.²

[2. LIABILITIES. — If the trustee shall keep in his hands any sum exceeding fifty pounds belonging to the estate for more than ten days, he shall pay interest to the creditors at the rate of twenty pounds per centum per annum on the excess of such sum above fifty pounds for such time as the same shall be in his hands beyond ten days; and unless the money has been so kept from innocent causes, the trustee shall be dismissed from his office, upon petition to the Lord Ordinary or sheriff by any creditor, and have no claim to remuneration, and shall be liable to expenses (sec. 83).]

The obligation to lodge the money for the benefit of the estate in bank was intended to prevent the fraudulent use of it by the trustee. The creditors may settle what bank shall be preferred; but failing such appointment, all moneys above £50 must be deposited in a joint-stock bank of issue; and the penalty of neglecting this is, that the trustee shall be charged with interest at the rate of 20 per cent. on whatever shall exceed the sum of £50.³ It is also provided, that the bank in which the moneys are to be deposited shall not be one in which the trustee shall be an acting partner, manager, or cashier.⁴ It is not enough

¹ [This is specially provided by sec. 120; and see *White v Burt*, 1851, 13 D. 679. The same objection which bars the trustee will bar the agent in the sequestration from buying the bankrupt's property. In England this rule holds with respect to solicitors under the commission, as with respect to the assignees; and in a case of this kind determined by Lord Chancellor Eldon, the whole doctrine is laid down on principles which are equally applicable to the law of Scotland as to the administration of justice in England. *Ex parte Jones*, 8 Vesey, p. 337.]

² This is quite settled in England. *Jones, supra*.

³ [The enactment has been rigorously enforced. *Black v Kennedy*, 1824, 3 S. N. E. 261. See *Houston v Duncan*, 1841 and 1842, 4 D. 80 and 1220, as to the liability of a trustee failing to deposit dividends on a disputed claim.]

⁴ Even these provisions have proved ineffectual; and it

was wisely enacted in a statute for England (49 Geo. III. c. 121, sec. 9), that if any assignee become bankrupt, being indebted £100 to the bankrupt's estate for money come to his hands as assignee, and wilfully retained or employed by him, his certificate shall only free his person; but his future effects and estate shall remain liable, except his tools of trade, necessary household goods and furniture, and the necessary wearing apparel of himself, his wife, and children. In Scotland it might be well to follow this example. The Court would probably refuse their sanction to the discharge of a trustee who had thus betrayed his trust. And according to the construction of statutes intended to check fraud, this would probably be held to reach the case of a trustee collusively permitting a debtor to the estate to retain unpaid, for the use of a speculation in which he and the trustee were interested, moneys due to the estate.

merely to lodge the money in the bank appointed; it must be lodged 'upon an account to be opened in the name of the trustee in his official character.' And although there be no express prohibition against drawing out again the money so deposited, and making use of what shall be so drawn out, the obvious meaning of the Act would no doubt be held to extend the remedy to that case. The penal interest ceases on the trustee's removal.¹

[The trustee is amenable to the Lord Ordinary and to the sheriff, although resident beyond the territory of the sheriff, at the instance of any party interested, to account for intromissions and management, by petition served on him; and in case it shall appear that such application ought not to have been made, the trustee shall be entitled to his full expenses, to be either retained out of the funds, or recovered from the party complaining, as the Lord Ordinary or the sheriff shall direct (sec. 86).²]

Although, strictly speaking, the trustee is not the representative of the creditors, not being their assignee, but only administrator of the estate, and the organ of the corporate body, he is responsible to others who have either entered into contracts with the creditors, or engaged in litigation with them as a body. Decree is given, therefore, against a trustee for implement of agreements which he may have entered into;³ or for expenses in actions which he has maintained for the creditors, leaving it to him to make his relief effectual against the creditors;⁴ the Court, however, giving such time to the trustee as may save him from the inconvenience of diligence till a fund shall be provided.⁵

3. EMOLUMENTS.—The trustee's emoluments are given by way of commission on the amount of the sums recovered. This commission is directed to be ascertained by the commissioners, who, previously to each dividend, audit the accounts, and, on an examination of the accounts and proceedings, give their sanction to the law charges, and strike the allowance to the trustee.⁶ The commission commonly allowed is 5 per cent. on the funds recovered, but varying with circumstances. Such a commission is in the common case too high; though, in the spirit of profusion which too often prevails in the management of a common fund, it is seldom challenged. Nay, a commission so high as 25 per cent. has been sanctioned by creditors, though greatly to the disapprobation of the Court.⁷ It is competent to bring the matter under the review of the Court, either on the part of the creditors dissatisfied with the greatness of the allowance, or on the part of the trustee discontented with the amount of his commission. But it has been decided that the opinion of the creditors should in all such cases be expressed in the first place. And in a case in which the commissioners had allowed £200 to a trustee as a remuneration, the Court would not listen to a complaint till the matter had been laid before a meeting of the creditors.⁸

19. DUTIES OF COMMISSIONERS, ACCOUNTANT, AND AGENT.

[1. ELECTION.—At the meeting for election of a trustee, the creditors, after the election of the trustee, are to elect three commissioners (if there be so many creditors who have claimed), who must be either creditors or mandatories of creditors; and the like proceedings

¹ *Johnston v Johnston*, 1826, 4 S. N. E. 487.

² [This provision applies also to the judicial factor and commissioners.]

³ [See *Balfour v Cook*, 1817, Hume 771; *Jeffrey v Brown*, 1821, 1 S. N. E. 103, aff. 2 Sh. App. Ca. 349; *Kirkland v Gibson*, 1831, 9 S. 596, aff. 6 W. S. 340; *Stead v Cox*, 1835, 13 S. 280, contrasted with *Haldane v Haldane*, 1833, 11 S. 872, and *Mitchell's Trs. v Barrow*, 1834, 12 S. 322.]

⁴ *Scott v Paterson*, 1826, 5 S. N. E. 158. See also *Davidson v Falconar*, 1826, 5 S. N. E. 121. [*Torbet v Borthwick*, 1849, 11 D. 694; *Davidson's Tr. v Carr*, 1850, 12 D. 1096. See sec. 57 of the statute as to liability to the agent in the sequestration.]

⁵ [See below, subsec. 21, as to his liability to the law agent and others employed by him.]

⁶ [Secs. 125, 130, 132.]

⁷ *Bruce v Davenport & Co.*, 1825, 4 S. 152.

⁸ *Haston v Chapman*, 1826, 4 S. N. E. 517. As the legislation in this department ought to be directed towards the devising of such principles and arrangements as may best tend to the introduction of a wholesome spirit of administration, it might be better, perhaps, to give a percentage to the trustee on the fund to be divided at each dividend. The trustee would thus be induced both to be economical in his administration of the funds, and to be vigilant and expeditious in the recovery and division of them.

[shall take place in regard to their election as in regard to the election of trustee (except that they shall not be bound to find security). The sheriff is to decide who are the persons duly elected, and declare their election by a deliverance in the sederunt-book, which is final, and entitles them to act without further confirmation, a majority being a quorum; but no person is eligible as a commissioner who is disqualified to be a trustee, and any mandatory who has been elected a commissioner shall lose that office, upon written intimation being sent by his constituent to the trustee that he has recalled the mandate, which shall be immediately recorded in the sederunt-book. In all cases where a commissioner has declined to act, or resigned, or become incapacitated, the trustee must call a meeting of creditors to elect a new commissioner (sec. 75).]

The same title which qualifies a creditor to vote in the election of a trustee gives him a voice in the election of commissioners; and the incapacities which prevent a person from acting as trustee, disqualify him from being a commissioner.¹ A commissioner must be either a creditor or a mandatory; a mere agent cannot be so,² nor the mandatory of a foreign creditor.³ A trustee on another bankrupt estate, claiming in the sequestration as a creditor, is eligible.⁴ It sometimes happens that there are not creditors sufficient to make out the requisite number of commissioners. It would, in such case, appear to be a necessary inference, that as many commissioners shall be elected as can be procured to assume that office; that if there shall not be the full number, the assent of all who are so named shall be requisite to every act requiring the concurrence of the commissioners; that if there be not more claimants than three, the creditors themselves shall be considered as a body not requiring representatives; and that the several acts in which the concurrence of commissioners is required, shall then be done with the concurrence of the creditors themselves. It is not settled whether, if a creditor, elected as a commissioner, should receive payment from another source (as where his ground of debt is a bill endorsed by the bankrupt), the cessation of his interest as a creditor, and of his right to vote in meetings of creditors, would furnish a good ground of removal. It rather appears that it would; for in the due discharge of this office the Legislature seems to trust to the zeal which the commissioner's own interest as a creditor inspires. But if he were before challenge to acquire a new debt on the estate, this seems sufficient to revive his qualification. If any of the commissioners refuse to act, or, after having accepted, think proper to resign, the whole nomination does not fall. The creditors will be authorized to meet and elect one to supply the vacancy.⁵

[2. REMOVAL.—A majority of the creditors assembled at any meeting duly called for that purpose may remove a commissioner, and may elect another in his place (sec. 76).⁶

3. DUTIES.—The commissioners are to superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, decide as to paying or postponing payment of a dividend, and may assemble at any time to ascertain the situation of the bankrupt estate; and any one of them may make such report as he may think proper to a general meeting of the creditors (sec. 85).⁷

The commissioners are a committee for assisting the trustee in the management; authorizing him to submit disputes to arbitration, or to enter into compositions and compromises; auditing his accounts; settling his allowance; and exercising over his whole conduct a constant censorship on behalf of the creditors whom they represent. Such being

¹ See *ante*, p. 302. In *Campbell v M'Nair*, 11 July 1805, 5 Pat. 408, the election and the disqualification of a commissioner were adjudged of in the House of Lords on the same principles as that of a trustee. See *Baird v Baillie*, 1822, 1 S. N. E. 460; *Sanders v Kibble*, 1823, 2 S. N. E. 173; *Turcan v Cox*, 1832, 10 S. 352.

² *M'Kellar v Templeton*, 1805, M. App. Bkt. No. 28.

³ *White & Co. v Cooper*, 1824, 2 S. N. E. 548.

⁴ *White & Co. v Cooper*, 1824, 2 S. N. E. 548.

⁵ *Sequestration of T. Cadel & Co.*, 8 July 1819, n. r.; *Anderson & M'Dowall's Sequestration*, 11 Dec. 1819, n. r.

⁶ [Although resident beyond the territory of the sheriff, they are subject to his jurisdiction (sec. 86). They are also subject to the control of the accountant (secs. 161-2).]

⁷ [Commissioners cannot be purchasers of the estate (sec. 120).]

the office of the commissioners, and the powers of the trustee, with their aid and concurrence, it follows that the creditors cannot be bound by any act of the trustee to which such concurrence is declared to be necessary, unless there shall be legal evidence of such concurrence. Neither a submission, composition, nor compromise, is effectual to bind the creditors, unless the commissioners have concurred in it. And although the trustee may, at the meetings of creditors on another estate, vote in any question of submission, compromise, or discharge, the measure will be effectual (so far as he is concerned) only provided his own commissioners concur. It may be a question whether it be indispensable that the commissioners shall subscribe the deed, or that a minute of their concurrence shall be shown at the time. Perhaps the law would be satisfied if legal evidence could be shown of their having actually concurred when the question is raised.

The office of commissioner is gratuitous: he is entitled to no salary or allowance of any kind. The statute does not, indeed, contain any express declaration to this effect; but no allowance is appointed for commissioners as there is for the trustee, and as there would have been had the Legislature intended to make any. Accordingly, the Court of Session in one case disapproved, in very strong terms, of a claim made for an allowance to commissioners.¹

20. ACCOUNTANT.

[By sec. 156, the Crown is empowered to appoint an officer, called the Accountant in Bankruptcy, for the purpose of superintending and checking the administration of all estates under sequestration (sec. 159), under trustees in processes of *cessio bonorum* (sec. 167), and deeds of settlement placed under judicial cognizance (sec. 164). He is required to keep a Register of Sequestrations, in which shall be made entries of the various steps and proceedings (sec. 157), to receive the annual reports from the sheriff-clerks, and to do the other acts already enumerated.²]

21. AGENTS.

The Legislature has not recognised the office of law agent in a sequestration. The only responsible officer is the trustee, under the immediate inspection and superintendence of the commissioners; and the Court has viewed the office of agent as dangerous, in so far as it might divide the responsibility of the trustee, or prove an encouragement to litigation.³ It was at one time a frequent practice to appoint an agent, either at the meeting for electing the trustee, or at a meeting where the general arrangements of the business were settled; but the Court have uniformly refused to sanction it. Thus, in one case, a person was named as agent in the sequestration at the meeting for electing the trustee; and the trustee having refused to employ him, those creditors who had elected him applied to have an order to place the judicial proceedings under his management; but the Court dismissed the petition.⁴ In another case, an agent having been named by the trustee, the creditors, on the trustee having failed, endeavoured to fix on the agent a responsibility for the mismanagement and general intromissions of the trustee with the estate; but the Court refused to give the least countenance to any division of the trustee's responsibility.⁵ [So strongly has this rule been sanctioned by the Legislature, that it is enacted that no person shall, by merely lodging an oath and claim, or being ranked or receiving payment of a dividend, or appearing or voting at a meeting in a sequestration as a creditor, be liable for any claim by the agent or other person employed by the trustee, for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate; reserving to the agent or other person so employed right to payment out of the estate, and from the trustee by whom he may have been employed, in so far as the same may be competent to him; and no trustee shall have relief in respect of such payment against the creditor, reserving to the

¹ *Forrester's Crs. v Turner*, 1798, M. 1252.

² See *ante*, p. 316.

³ [He cannot purchase the estate. See *ante*, p. 319, note 1.]

⁴ *Baillie v Watson*, 1822, 1 S. N. E. 459. [*Berry v Wallace*, 1830, 8 S. 509.]

⁵ *Gourlay v Straton*, 1827, 5 S. N. E. 743.

[trustee relief against the estate, and against those creditors or others who may on other grounds be liable in relief (sec. 57).]

On the principle that it belongs to the trustee alone to employ an agent, he is not bound to elect a law agent to do the whole business, but is entitled to choose for the different duties the persons most fit to perform them. In the judicial proceedings which are necessary, and in the publication of the advertisements in the London and Edinburgh Gazettes, the trustee must necessarily confide in the co-operation of the law agent; and although he will be responsible for the nomination of a fit person, yet it does not appear that he can be answerable to the creditors for the loss arising from any neglect, if the person selected be of a fair professional character. For the operations of the law agent not specially authorized or homologated by the trustee the agent alone is liable, on the common principles of professional responsibility; the trustee not being otherwise responsible to the creditors than, under the contract of mandate or factory, the mandatory is liable for those whom he is under the necessity of employing ministerially. For those duties which properly belong to the trustee himself, and are remunerated by his commission, no law agent is entitled to charge.

OTHER AGENTS.—A trustee must in many cases rely on the agency and operations of others; and it may be important to settle how far he is responsible for those he may so employ. Where proceedings are necessary in other countries, the trustee will be fully exonerated, if, with the advice of the creditors or of the commissioners, he give his power of attorney to a person deemed responsible at the time. If the persons whom, in the common course of administration, the trustee may employ as brokers, wharfingers, carriers, etc., should embezzle or lose the effects of the bankrupt, the trustee will not be responsible, provided he has *bona fide* employed persons deemed responsible at the time. To the persons so employed (besides their preferences by hypothec and otherwise on the funds) the trustee is so far answerable for their payments, that his employment of them grounds a presumption, of which they are entitled to the benefit, that he has in his hands sufficient funds for the purpose. But they have no claim against individual creditors, unless in so far as they may have specially become bound for their payment.

22. BANKRUPT'S DUTIES AND RIGHTS.

[1. DUTIES.—He must make up, and at the meeting appointed for the election of a trustee deliver to the clerk of the meeting, a state of his affairs, specifying his whole property, wherever situated; the property in expectancy or to which he may have an eventual right; the names and designations of his creditors and debtors, and the debts due by and to him, and a rental of his heritable property, both of which he must subscribe and deliver to the trustee, and they are to be engrossed in the sederunt-book. The bankrupt must further at all times give every information and assistance necessary to enable the trustee to execute his duty; and if he fail to do so, or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the sheriff to compel him to give such information and assistance, and to grant such deeds, under the penalty of imprisonment and of forfeiture of the benefit of the Act; and unless cause be shown to the contrary, the sheriff shall issue a warrant of imprisonment accordingly (sec. 81).

2. ALLOWANCE.—At the meeting for election of the trustee, or at the meeting held after the examination of the bankrupt, or at any meeting called for the purpose, four-fifths in value of the creditors present may authorize payment from time to time to the bankrupt (or to the partners of a company, if the sequestration be of a company estate) of such sum out of the estate as they shall think proper for sustenance, until the period assigned for payment of the second dividend; but the allowance shall not exceed three pounds three shillings per week to the bankrupt, or to each individual partner of a company, from the date of sequestration to the above period. If it shall at any time be the opinion of a

[majority of the creditors present at a regular meeting that it is for the interest of the estate that a special allowance should be further made to the bankrupt, and if the accountant in bankruptcy shall report in its favour, it is competent for the Lord Ordinary or the Court, on application by the trustee, with the said concurrence of creditors and report by the accountant, to award such allowance, which shall then be payable out of the estate. No allowance, however, shall be given if the bankrupt shall not have complied with the provisions of the Act (sec. 77).]

It is not as a stock for future subsistence that the allowance is given, but it is as subsistence-money while the creditors require the aid of the bankrupt, or have him entirely at their call, so as to prevent his turning his exertions to his own benefit.

Instead of a settled proportional allowance, the creditors have the sole right of granting or refusing the allowance; by which means there always is, or may be, a fair adaptation of it to the circumstances and conduct of the bankrupt. If he have not conducted himself according to law, or if his circumstances do not require maintenance (as where he or his wife holds a separate aliment not attachable by his creditors), the creditors may refuse any allowance; and even were a majority of the creditors to be gained over to the bankrupt's views, the minority might challenge their resolution to give him an allowance, and have it judicially reversed, on cause shown.

3. RIGHTS OF THE BANKRUPT.—Notwithstanding the sequestration, he has a right to defend his person against unjust claims of debt, and may maintain a litigation for this purpose, although the creditors or the trustee do not choose to engage in it. It seems, indeed, to be doubtful whether he could maintain a defence, were the action a mere constitution for the purpose of ranking on the estate, or whether in the sequestration the bankrupt could judicially object to the trustee's admission of a debt; for the trustee is the proprietor of the estate on the part of the creditors, and the proper defender of it against unfounded claims. The bankrupt has indeed an interest, both directly and indirectly: directly, as the debt may afterwards be made the subject of demand against him; indirectly, as by the sum drawn on that debt from the common fund, the amount of the unpaid residue, for which the bankrupt is liable, will be enlarged. But there is some danger, if such interest were sustained, lest the bankrupt might interfere with the whole scheme of ranking and division of the trustee, and disturb with litigation the settlement of the bankruptcy; at least he will not be allowed to interfere without finding caution for full payment of the expense of the adverse party, should he fail in his defence.¹ But where the decree sought is one which threatens the bankrupt's person, or where diligence is already issued on which his person may be attached, the bankrupt has an undoubted right to defend himself in the same way as any other man.² And although it has been doubted whether he must not find caution for expenses, this cannot be required where the attack is made by a creditor, who, if he mean to limit his demand to the estate, should proceed by a claim in the sequestration, but who, in choosing to demand a decree against the person, must take his debtor as he finds him, without denying him justice on account of his poverty.

As a bankrupt is not, by his bankruptcy, incapacitated from holding property, and may even retain property independently of his creditors (as alimentary funds, and rights exclusive of creditors), it would seem that, although the trustee and creditors may abandon a claim, the bankrupt is not bound in this case, more than in the defence against a debt which may endanger his person, to hold their resolution as conclusive. If they compound or com-

¹ [See *Heggie v Heggie*, 1855, 17 D. 802, where it was held that there was no invariable rule as to this; and see cases in the next note.]

² *Clerk & Ross v Ewing*, 20 May 1813, F. C. [*M'Intosh v Cooper*, 1826, 4 S. N. E. 783; *Sir W. C. Fairlie's Trs. v Taylor*, 1830, 8 S. 666, as reversed 6 W. S. 301; *Robertson v Hen-*

derson, 1833, 12 S. 70; *Young v Watson*, 1836, 14 S. 794; *Macra v Bowman's Trs.*, July 1840, F. C.; *Bell v Forrest*, 1840, 2 D. 1460; *Mackersey v Muir*, 1850, 12 D. 1057; *Hooper v Ferguson & Co.*, 1850, 12 D. 1309; *Heggie v Heggie*, note 1; *Murray v Donnelly*, 1856, 19 D. 44.]

promise the claim, he must submit; but if they abandon it, he will be entitled to require a retrocession, that he may himself, or by a trustee, prosecute it. In bringing his action, however, he will stand in a different posture from that of merely defending himself, and will be under the necessity of finding security for costs;¹ his situation entirely precluding recourse against his estate for any debt subsequent to his bankruptcy.

SECTION III.

INVESTIGATION, MEETINGS OF CREDITORS, AND JUDICIAL PROCEEDINGS.

23. EXAMINATION OF THE BANKRUPT.

[The trustee must, within eight days after the date of the act and warrant confirming him, apply to the sheriff to name a day for the public examination of the bankrupt; whereupon the sheriff issues his warrant for the bankrupt to attend for examination within the sheriff court-house on a specified day, and at a specified hour, being not sooner than seven days nor later than fourteen days from the date of the sheriff's warrant. On the sheriff granting this warrant, the trustee must publish an advertisement in the Gazette, and send by post, or otherwise, special notice to every creditor who has lodged a claim, or who may be named in the bankrupt's state of affairs, intimating his name and designation, his election as trustee, and the day, hour, and place fixed for the examination of the bankrupt (sec. 87).² Power is conferred on the sheriff to grant a warrant to apprehend the bankrupt, and bring him up for examination, to take him out of prison for that purpose, if imprisoned for a debt or other civil obligation within Scotland, or bring him out of the sanctuary if he be there, or, if necessary, grant commission to examine him; or if he be in England or Ireland, the Lord Ordinary may grant warrant to the same effect (secs. 88, 89).

The bankrupt³ must answer all lawful questions relating to his affairs; and the sheriff may order production for inspection of any books of account, papers, deeds, writings, or other documents in his custody relative to the affairs, and cause the same, or copies thereof, to be delivered to the trustee (sec. 91). The examination of the bankrupt⁴ shall be taken upon oath, and shall (except in the cases already specified, wherein a commission is allowed to be granted) take place before the sheriff. His examination shall be taken and may be written or dictated by the sheriff, and authenticated in the ordinary way as a regular deposition (sec. 92).⁵ Before the close of his examination, the bankrupt may make such additions to or alterations upon the state of his affairs as may have occurred to him to be necessary to give a full view of his affairs; and this state, with the additions and alterations, shall be subscribed by the sheriff and the bankrupt. The bankrupt shall then take the subjoined oath,⁶ which shall be engrossed in the sederunt-book and subscribed by the sheriff

¹ [See the cases *supra*; and as to his right to insist, after his discharge (on a dividend), in an action of reparation for injury to character occurring before sequestration, *Thom v Bridges*, 1857, 19 D. 721.]

² [By sec. 88 (*in fin.*), the sheriff may, on the application of the trustee, order the bankrupt and others to be examined as often as he shall see fit. *Clark v Outhbertson*, 1848, 10 D. 1471.] It has been doubted whether a bankrupt can be forced to attend the trustee for examination after he is discharged. At common law there is no power to examine the bankrupt: it is a power introduced by statute alone; and it would appear that it was meant to be exercised only while he was under the operation of the sequestration undischarged. In England, even after the bankrupt shall have obtained his certificate, he is bound, upon reasonable notice in writing, to attend the assignees, to make up accounts between the estate and any

debtor; or to attend at any court of record to be examined touching the same; or for such other business as the assignees shall judge necessary. 6 Geo. IV. c. 16, sec. 116. See 12 and 13 Vict. c. 106, sec. 117. With us the decision will depend on the construction of the above provision in the 88th section of the Act.

³ [And the other persons liable to be examined. See below, p. 327.]

⁴ Notes of the evidence of the other persons shall be written by the sheriff in the mode prescribed by the Act 16 and 17 Vict. c. 80, with regard to proofs in civil cases, except where it shall appear to the sheriff necessary to record and authenticate such evidence, in whole or in part, in the form of a regular deposition (sec. 92).

⁵ 'I do, in the presence of Almighty God, and as I shall answer to God at the great day of judgment, solemnly swear

[and bankrupt as relative to such state (sec. 95).¹ And if the trustee shall make an application to that effect, the bankrupt² shall be examined in open court (sec. 92). If the bankrupt² shall refuse to be sworn, or to answer to the satisfaction of the sheriff any lawful question put to him by the sheriff or trustee, or by any creditor with the sanction of the sheriff, or without lawful cause shall refuse to sign his examination, or to produce books, deeds, or other documents in his custody or power relating to the estate,³ the sheriff may grant warrant to commit him to prison, there to remain until he comply with the order (sec. 93).⁴]

This is an investigation which each creditor is entitled to see fully made, and the trustee has no right (nay, the most decided majority of the creditors could not authorize him) to protect the bankrupt from examination.⁵ He must answer all questions as to matters relating to his affairs, both prior and posterior to the sequestration, and cannot insist on the exhibition of interrogatories.⁶ He is not bound, indeed, to answer any question that has a tendency to criminate himself.⁷ But then he must submit to the consequence of that refusal involving him in the guilt of undue concealment, where any property is left unaccounted for. He will, however, be entitled to prepare for his examinations by a full inspection of the books and papers in the trustee's hand, under such precautions as may be necessary against the possibility of his altering them. As the trustee cannot part with them out of his possession, if the bankrupt be in prison, he will be entitled, as it seems, to have a person to attend him with the books.⁸ The questions must tend to the benefit of the sequestrated estate; and no answer can be compelled to a question relating merely to a contest among the creditors. It is a difficult and delicate point what answer the trustee, under the sheriff's superintendence and judicial authority, is entitled to require. In England the rule seems to be, that if the bankrupt refuse to answer, or do not fully answer to the reasonable satisfaction of the mind of the person who is to judge of the answer, he may be committed.⁹ The same rule would seem to hold in Scotland, on the fair principles of con-

that the state of my affairs subscribed by me as relative hereto, contains a full and true account, to the best of my knowledge and belief, of all the debts, of whatever nature, due to me, and of all my estate and effects, heritable and moveable, real and personal, wherever situated (the necessary wearing apparel of myself, my wife, and family only excepted), as well as of all claims which I am entitled to make against any person or persons whatsoever, and of all estate in expectancy, or means of whatever kind to which I have an eventual right by contract of marriage, trust-deed, settlement, deed of entail, or otherwise; and that the said state likewise contains a full and true account of all debts due by me or demands upon me; and that I have delivered up the whole books, documents, accounts, title-deeds, and papers of every kind belonging to me which in any way relate to my affairs, and which were or are in my possession or under my power; and that I have made a full disclosure of every particular relating to my affairs. And further, I promise and swear that I will forthwith reveal all and every other circumstance or particular relative to my affairs which may hereafter come to my knowledge, and which may tend to increase or diminish the estate in which my creditors may be interested directly or indirectly.'

¹ When the bankrupt is a partner with others, and examined respecting the affairs of the partnership, the words of the oath shall so far be varied as to make it applicable to the case (sec. 95).

² See note 3, p. 325.

³ See *Nicol v Edmond*, 1851, 13 D. 614.

⁴ This warrant must specify the question and answer, book, deed, document, or the refusal to swear or to sign the examination, and is not subject to the review of the Court of Session. But the bankrupt (or person) imprisoned may apply by written petition (without argument) to the Lord Ordinary for a recall of the warrant; and the Lord Ordinary shall order the petition to be served on the trustee or the creditor, and shall thereafter hear parties *viva voce*, and pronounce judgment. In case of false swearing, the party may be prosecuted by the Lord Advocate, or by the trustee with his concurrence, if in this latter case the prosecution be sanctioned by a majority of the creditors present at a meeting called for the purpose (sec. 178, and see sec. 97).

⁵ [See *Smith & Co. v M'Lellan*, 1843, 6 D. 331; *Barstow v Hutchison*, 1849, 11 D. 687. *Mackay v M'Lachlan*, 1863, 1 Macph. 440; *Meyer v Blogg*, 1867, 5 Macph. 1049.]

⁶ [Not even after he has taken the statutory oath. *Mathie v Gavin*, 1822, 1 S. N. E. 410.]

⁷ This would not seem, however, to protect a bankrupt from answering whether he had granted 'double deeds,' though that is a criminal act under the old statutes of the sixteenth century; nor to save him from the necessity of answering questions which may lead to an accusation of fraudulent bankruptcy. The Act of 46 Geo. III. c. 37 declares that the right to refuse to answer is no bar to any question tending only to raise a civil debt or suit.

⁸ So it is settled in England. *Whitmarsh* 350.

⁹ Formerly a very extraordinary doctrine was held in England, viz. that if the bankrupt answered positively to a

struction of the power to examine.¹ A general answer persisted in to a question which requires and admits of a full and particular one, is held sufficient in England to justify a commitment,² and would probably in Scotland be held as a concealment sufficient to bring him within the description in the statute of a fraudulent bankrupt, and so to authorize proceedings against him as such. Under the cloak of want of recollection may often be hid a fraudulent intention to conceal; but wherever the circumstances and nature of the case admit a reasonable probability of forgetfulness or inattention, an answer according to belief will be held sufficient.³

As the examination is intended only to lead to a full disclosure, when that object is satisfied the powers of commitment cease. The sheriff cannot, in this course of proceeding, legally commit for punishment of the bankrupt's perjury, prevarication, or refusal to answer, as crimes. The remedy is, under the criminal law, a commitment for trial on due application being made. Thus, in the course of the examination, on the bankrupt's refusal to answer as to the disposal of a certain sum, a commitment for this, as an unsatisfactory answer, must cease the moment that such sum is discovered and got back; leaving the bankrupt to the course of trial and punishment as a fraudulent bankrupt. The proper commitment, therefore, in the course of examination, and without any new application of a criminal nature, is a commitment 'till he shall make a full and satisfactory answer to the question put;' and this question ought to be specified in the warrant. He ratifies the whole by a very solemn oath, in which he swears that the state which he has given in contains a full and true account of all his estate, effects, and debts, and all his expectancies and means of every kind, and of all the demands that may be made against him; and that he has made a full disclosure of every particular relative to his affairs.⁴

24. EXAMINATION OF OTHERS THAN THE BANKRUPT.

[The sheriff may at any time, on the application of the trustee, order an examination⁵ of the bankrupt's wife and family, clerks, servants, factors, law agents, and others who can give information relative to his estate, on oath, and issue his warrant requiring such persons to appear. If they refuse or neglect to appear when duly summoned, the sheriff may issue another warrant to apprehend the person so failing to appear. But when such person is not the bankrupt, nor his wife, nor one of his family, nor his clerk or servant, no warrant for apprehension shall be issued until the expiration of eight days from the service of the first warrant, unless the trustee shall, on oath, specify a reasonable cause of belief that such person intends to leave the country to avoid the examination, in which case the sheriff may forthwith issue such warrant (sec. 90).⁶]

fact, however manifestly untrue, he could not be committed. *Pedley's case*, Leach 361. See, for the existing rule, *Nowlan*, 6 T. R. 118; *Taylor*, 8 Ves. 320, and 11 Ves. 511; *Oliver*, 2 Ves. and Beames 244, 1 Rose 407.

¹ [*Paterson v Samuel*, 1829, 7 S. 612; *Nicol v Edmond*, 1851, 13 D. 614.]

² *Langhome*, 2 Blackst. 919.

³ *Perrot v Ballard*, 2 Chan. Ca. 72; *Millar*, 3 Wills 427, 2 Blackst. 881.

⁴ Besides the personal consequences of concealment and fraud in his examinations, the effect of concealment on the composition contract is worthy of attention. If the bankrupt conceal any fund which, after his creditors have agreed to a composition, it is discovered that he is taking advantage of, the whole contract will be reducible; or if he has concealed, till after the composition contract is settled, an objection to the claim of a creditor, which would, if disclosed, have shown to the creditors a larger fund or division than they imagined

to exist, his creditors will have it in their power to reduce the composition, and reap the benefit of the objection. [See subsec. 37; *Wilkie*, 1837, 15 S. 686.]

⁵ [The same rules as to answers, etc., are made as those which are applicable to the bankrupt. See secs. 91, 92, 93, and generally *ante*, pp. 325-7.]

⁶ [These warrants are declared to be sufficient to authorize messengers or the sheriff's officers to execute the same either within or without the territory of the sheriff in Scotland; and if any person liable to be examined cannot attend, the sheriff may grant commission to take his examination, and such examination—whether by the sheriff or by a commissioner—may be adjourned, if it shall seem fit, to an early day, to be then fixed. Persons, other than the bankrupt, summoned to attend for examination, are entitled to such allowances as witnesses are in other cases entitled to, and the amount of which, if disputed, is to be fixed by the sheriff (sec. 90).]

1. **WIFE.**—Although by the common law a wife is not a competent witness for or against her husband, yet by the statute she may be examined for the discovery of the estate and effects concealed, kept, or disposed of by her, in her own person, or by her own act and means, or by any other person.¹

2. **THE FAMILY OF THE BANKRUPT** may also be examined, in order to obtain a full discovery of his estate and effects. Under this description are comprehended the near relations of the bankrupt, and other persons resident in his house. But it does not appear that mere relationship will expose a person to such a warrant, unless he is properly one of the household of the bankrupt, or unless he come under the other description of one connected with his business.

3. **OTHERS.**—Besides those specially enumerated in the statute, 'others who can give information relative to the estate' may be examined. Under this description, partners with the bankrupt, or those who have been joint-adventurers with him, may be examined, and compelled to exhibit the books and papers belonging to the concern, that extracts may be taken so far as the bankrupt has an interest.² And in general, all persons who, from particular circumstances stated in the application,³ shall appear to be particularly connected with the bankrupt's business or affairs, will be ordered for examination, although they should hold no place of ostensible employment under the bankrupt.⁴

A creditor cannot as such be examined, in the course of this inquiry, respecting his claim against the estate.⁵ But where one has received part of the bankrupt's funds in trust, or even for his own security or satisfaction, it would seem that (under the qualification of not being obliged to answer questions tending to criminate himself) he will, if under the description of a person connected with the bankrupt's trade, be liable to examination.⁶

The persons who are thus subjected to examination must answer all questions relating to their knowledge of the dealings and funds of the bankrupt.⁷ And where they admit that they have received the bankrupt's property (although they will not be compellable to answer to what may criminate themselves, and a commitment for refusal would be illegal), yet it would seem that they may on such admission be held liable for the property of which they are thus unable to clear themselves. But although they are not bound to answer to what may expose them to a penalty or forfeiture, yet it is not sufficient excuse for not answering to a relevant question, that it may establish or tend to establish that the person under examination owes a debt or is otherwise subject to a civil suit.⁸ It would appear, however, that no one can be compelled to answer to the circumstances of a cause depending between the estate and the person examined, for the inquiry is already proceeding in another course.

If the person examined admit the possession of papers and books belonging to the sequestrated estate, or in which the affairs of that estate are inseparably blended with his own, and without possession of which the affairs of the estate cannot be extricated, it was in one case held that he must deliver them up to the trustee.⁹ But in a later case the Court only allowed inspection of the books, under the superintendence of a commissioner, with power to have extracts made, so far as an interest could be established.¹⁰

¹ [Neither she nor others are entitled to written interrogatories. *Robertson's Tr. v Oughterson*, 1827, 5 S. N. E. 748.]

² *Salmon v Tod's Trs.*, 1823, 2 S. N. E. 285. [*Robertson's Tr. v Oughterson*, note 1.]

³ [It would seem that the trustee is not required to state reasons for his belief, it being sufficient to state that he believes the person can give information. Compare *Burnet v Calder*, 1855, 17 D. 933, with *Redpath v Forth Marine Insurance Co.*, 1844, 6 D. 1438.]

⁴ [See *Nisbet v M'Lelland*, 1837, 15 S. 439; *Redpath v Forth Marine Insurance Co.*, note 3. And they may be re-examined at a distance of time. *Clark v Cuthbertson*, 1848, 10 D. 1471.]

⁵ *M'Lea v M'Lehose*, 1792, Bell's Ca. 75-80. [*Redpath v Forth Marine Insurance Co.*, note 3, compared with *Pollock v King*, 1844, 7 D. 172.]

⁶ [See *Burnet v Calder*, note 3; *Pollock v King*, note 5.]

⁷ [See, as to this, *Paul v Robb*, 1855, 17 D. 457.]

⁸ 46 Geo. III. c. 37. It has nevertheless been held that one is not bound to answer questions tending to prove himself to be a partner. *Belch*, 16 July 1806, n. r. But this question would probably now be differently decided under the above statute.

⁹ *Dundas v Belch*, 10 June 1806, n. r.

¹⁰ *Salmon v Tod's Trs.*, note 2.

The intention of the examination being merely investigation, and not ultimate evidence, what is declared or sworn by the bankrupt, and the other persons thus examined, is not to be held as evidence conclusive against third parties.¹ It is to be regarded, in respect to others, as a declaration or precognition merely; which, if necessary, is to be followed up by legal evidence. It is taken upon oath, only because that may be necessary to compel the person examined to speak truth, from a knowledge that falsehood may be punished with the pains of perjury. Against the bankrupt and the other persons examined, themselves, their own examinations will be evidence;² and it will be no answer to such use of these depositions that they might have refused to depone, as the matter was either criminal, or such as to subject them to penalties.³

25. EVIDENCE OF BANKRUPT, AND REFERENCE TO HIS OATH.

If the bankrupt be proposed to be examined as a witness where the estate is concerned, the only ground on which any objection can be taken against his evidence is that of interest in the issue of the inquiry. Other causes of favour, real or supposed, are sometimes regarded as qualifications merely of the witness' credibility: this always goes to his entire rejection.⁴ A bankrupt has an interest to obtain his discharge, and to preserve, if possible, a reversion out of the wreck of his funds. He has a clear interest to support whatever tends to enlarge the funds, as he will thus pay a larger dividend, and more easily obtain his discharge, etc. But as the inquiry is truly into the interest which the bankrupt has to swear in favour of the person who seeks his evidence, cases may occur in which it will be necessary to make an exception from the general rule.⁵ It is ostensibly against his interest to enlarge his debts, which is the same thing in one sense with diminishing his funds. But it may happen to be the interest of a bankrupt, in danger of being refused his discharge, to introduce some creditors whose votes will carry him through all his difficulties. When anything of this kind is attempted, the proposal to examine the bankrupt as a witness must be received with great jealousy; and although it is difficult to lay down any general rule on the subject, it is scarcely to be doubted that the evidence of the bankrupt would be entirely rejected if any such secret interest should be established; and the bankrupt's testimony will be rejected, or reserved *cum nota*, according to the proof of interest which the case presents.⁶ The interest which incapacitates the bankrupt as a witness will be extinguished by his obtaining his discharge, and renouncing all claim to a reversion from the sequestrated estate. Strictly speaking, both should be necessary to restore his competency; but in the general case, and indeed by the very nature of the whole proceedings, the presumption of law is that there is no reversion to be expected, and the bankrupt's discharge alone will therefore be sufficient to make him admissible as a witness.

Where a party in an action refers his debt to the oath of his antagonist, a judicial transaction is implied, by which the oath is held as conclusive evidence between them; and where a person becomes a bankrupt, it may be doubted whether the bankruptcy extinguishes this source of evidence. If the party is still solvent, his creditors attaching debts due to him, and so prosecuting a *jus crediti* which belongs to him, must take such right only as he held, and therefore he cannot be a witness to support that right, nor can his creditors discharge themselves of the obligation under which he lies to confess the truth on a reference to his oath; and so it was held, that against an arresting creditor, reference to oath of the

¹ *Goddard & Co. v British Linen Co.*, 26 May 1809, n. r.; *Dundas v Belch*, p. 328, note 10.

² *Dundas v Belch*, p. 328, note 10.

³ *Smith v Beadnel*, 1 Camp. 30.

⁴ [Interest is no longer an objection to competency, but has full effect as to credibility. See 15 Vict. c. 27, and 16

Vict. c. 20. Nor, it would seem, can the bankrupt be objected to as a party to and interested in the sequestration as a judicial proceeding.]

⁵ [See *Ferrier v Grahame*, 1831, 9 S. 419; *Mansfield v Maxwell & Co.*, 1835, 13 S. 721.]

⁶ See *Sir W. Nairne v Drummond*, 1725, M. 12468.

debtor is competent.¹ But a distinction was contended for and sanctioned on the bench, between that case and the case of an assignee. Of the soundness of that distinction, however, some doubt may be entertained, when it is considered that in this way, without the consent of the debtor, his creditor is changed upon him to the loss of a most important right; while the law says that an assignee is only procurator *in rem suam*, and the maxim is *assignatus utitur jure auctoris*. Bankruptcy alone, as under the Act 1696, c. 5, does not seem to afford any ground of distinction in respect of a reference to oath, further than as it may extinguish the debtor's interest. But that interest never can be extinct, as long as the person of the debtor is liable to those claims which he has not funds to answer. Where by sequestration the whole estate of the debtor is transferred to his creditors, still the oath of the debtor seems a legitimate source of evidence to those who, either in the character of debtor or of creditors, are involved in any dispute with the estate. His creditors, after all, are nothing but assignees of his estate; and his interest, though diminished, still subsists until he is discharged of his debts. The bankrupt's oath of verity, then, seems to be competent in all questions of property or debt with third parties.² But where the bankrupt, from any peculiar interest or connection and relationship, is placed in circumstances of great suspicion, an exception is admitted to the above rule, and reference to his oath will not be sustained.³

26. MEETINGS OF CREDITORS.

The creditors under a sequestration may in a certain sense be said to be formed into a body corporate, the admission into which, as a member entitled to take a part in their deliberations and resolutions, depends on the qualification already mentioned. The powers of this body in deliberative meetings or in separate resolutions are these: The creditors are empowered to meet in their deliberative capacity, for directing the management of the estate, settling the allowance to the bankrupt, and disposal of his person; and in such meetings they, by a certain majority, differing in different circumstances, may form resolutions, which the law will enforce.⁴ Two stated meetings are appointed to be held, while other occasional meetings are authorized to be called; and discretionary powers are given to the trustee and commissioners to call meetings for emerging purposes.

1. STATED MEETINGS.—The purposes of the *first* stated meeting are the election of a trustee and commissioners. The time and place of holding it are fixed by the deliverance awarding sequestration, the time being limited so as not to be 'earlier than six nor later than twelve days from the date of the Gazette notice of sequestration having been awarded;' and the place being described as 'a convenient place' within the county of the sheriff awarding sequestration, or to whom the sequestration is remitted (sec. 67).

The *second* meeting has for its object mainly the receiving and proceeding upon the trustee's report as to the state of the affairs, after the examination of the bankrupt and others has been finished. [By sec. 87, the place and time of this meeting must be published by the trustee in the Gazette (in the same advertisement notifying the diet fixed for the examination of the bankrupt), and by special notice to the creditors named in the bankrupt's state, to be held on a specified day, being not sooner than seven days nor later than fourteen days after the day appointed for the examination of the bankrupt; and in the sequestration of the estates of a deceased debtor, a meeting of creditors shall be called by the trustee by public advertisement and notice to each creditor, to be held not later than fourteen days after the date of such advertisement, and also the hour and place.]

¹ Blair v Balfour, 1745, M. 12473.

² [See Selkirk v Sommerville, 1804, Hume 500. But see, against the competency, Campbell & Co. v Shepperd, 1823, 2 S. N. E. 454; Mein v Tower, 1829, 7 S. 902; Ferrier v Graham, 1831, 9 S. 419; Johnstone v Grant, 1835, 13 S. 606; Adam v M'Lachlan, 1847, 9 D. 560.]

³ [See Ritchie v Mackay, 3 W. S. 484.]

⁴ [In Spence v Gibson, 1832, 11 S. 212, it was held that they had no power to compromise a claim in the face of an offer by a creditor to prosecute it.]

At those meetings, besides the appointed business of the meeting, the creditors have power to pass resolutions relative to the management of the estate. [Accordingly, by sec. 96, it is required that, prior to the meeting of creditors after the examination of the bankrupt (or, in the case of a deceased debtor, prior to the first meeting after the election of the trustee), the trustee shall prepare a report setting forth the state of the bankrupt's affairs, and an estimate of what the estate may produce. This report he shall exhibit at the meeting, and give all explanations relative thereto; and the creditors assembled may receive an offer of composition, and may, either at this or any other meeting, give directions for the recovery, management, and disposal of the estate. And when any part of the estate consists of land or other heritable property, it shall be optional to the creditors to determine whether the trustee is to bring the property to judicial sale, or to dispose of it by voluntary public sale or by private sale.]

2. OCCASIONAL MEETINGS may be had for recalling the sequestration; for determining as to renewing the bankrupt's protection; for receiving a report from any of the commissioners, who have each a discretionary power to call the creditors together; for giving directions; for removing the trustee; for electing a new trustee; for considering offers of composition; for considering the trustee's discharge; or for finally selling off the debts and effects.¹

3. RULES AS TO MEETINGS.—The power of calling the creditors together is not given to any one creditor, or any junto, or number of them. The call must be through the recognised functionaries. [Accordingly, the following rules are enacted in regard to meetings:—The trustee, or any commissioner with notice to the trustee, may at any time call a meeting of the creditors; and the trustee shall call such meeting when required by one-fourth in value of the creditors ranked on the estate, or by the accountant (sec. 98). Notice of the day, hour, place, and purpose of all meetings of creditors shall be advertised in the Gazette seven days at least before the day of the meeting, and the meeting may be adjourned to the following day (sec. 99). It shall not in any case be necessary to send any notification of the day or place of meetings by post to any creditor whose debt shall be under £20, unless such creditor shall have given directions in writing that such notification shall be sent; and no notification shall be sent to any creditor who has directed that none shall be sent (sec. 100). All questions at any meeting of creditors shall be determined by the majority in value of those present and entitled to vote, unless in the cases otherwise provided for; and when, for the purpose of voting, the creditors are required to be counted in number, no creditor whose debt is under £20 shall be reckoned in number, but his debt shall be computed in value (sec. 101).]

There is no authority given to the interim factor to call a meeting of the creditors, and the better course would be to apply to the Court if such a meeting should be considered to be necessary. The time and manner prescribed for advertising meetings of creditors must be very particularly observed, as these precautions enter into the very essence of the proceedings, and will on no account be dispensed with.

27. REVIEW OF RESOLUTIONS AND JUDGMENTS.

Although resolutions of the creditors, as to the management and disposal of the estate, may be regarded as the act of a proprietor in his own affairs, still, as it is only in the management of common property, they must, according to the rules of law, be subject to the cognizance of a judge, wherever it can be chargeable with injury to the rights of any of the creditors. Other resolutions there are (such as that respecting the bankrupt's discharge, or a proposal of composition) which also may encroach on the rights of others, and so be subject to judicial cognizance; and in both those cases the decision may be swayed by the

¹ [See *Leck v Gairdner*, 1855, 17 D. 1075, as to the competency of disposal at an occasional meeting of other matters in relation to the affairs of the estate than the business specially advertised.]

self-interest of a few, or may proceed without due knowledge or attention to facts, and so justice requires that means should be afforded of bringing the resolutions under the review of a court. [Accordingly, it is declared that it shall be competent to appeal against the resolutions of the creditors at meetings, either to the Lord Ordinary or the sheriff, provided a note of appeal shall be lodged with and marked by one of the clerks of the Bill Chamber within fourteen days after the date of the meeting at which the resolution objected to has been passed; or (as the case may be) in the hands of and marked by the sheriff-clerk within the same period.¹ In like manner, it is competent to appeal against any deliverance of the trustee or commissioners to the Lord Ordinary, or the sheriff, provided the note of appeal be lodged and marked within fourteen days from the date of the deliverance; and where any appeal is made, or where any petition or complaint is presented against the trustee or commissioners, or against any of the creditors, the Lord Ordinary or the sheriff shall appoint a copy of it, and of his deliverance, to be served on the respondent, or his mandatory or known agent, and appoint him to appear at a specified diet within such period as may be reasonable. At such diet the Lord Ordinary or sheriff shall hear parties *viva voce*, and the former shall proceed to dispose of the case, with or without the record, as he shall consider best; and the sheriff may decide without a record, provided he shall specify the facts, and assign the grounds of his judgment. But if he shall see cause, he may order minutes to be lodged, containing the averments in fact and pleas in law, without argument, and hold the same as a closed record, and proceed in a summary way; and in pronouncing his judgment he shall assign his reasons. It is competent for the Lord Ordinary or the sheriff (if they shall think fit), where any resolution of a meeting is appealed against, to order a new meeting to be held, in order to reconsider the resolution (sec. 169).

By sec. 170 it is made competent to bring under the review of the Inner House of the Court of Session (or before the Lord Ordinary in time of vacation) any deliverance of the sheriff² after the sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the sheriff-clerk within eight days from the date of such deliverance, failing which the same shall be final. This note, together with the process, is forthwith to be transmitted by the sheriff-clerk to the clerk of the Bill Chamber.

The Lord Ordinary's decision, when not expressly made final by the Act, is subject to review of the Inner House; and it is competent to the Inner House to remit to the sheriff with instructions (sec. 170). Where any judgment of the Lord Ordinary is to be brought under review of the Inner House, it must be done by a reclaiming note in common form, presented within fourteen days from the date of the judgment; and this reclaiming note is to be disposed of by the Inner House as speedily as the forms of Court will allow (sec. 171). During the dependence of appeals or petitions and complaints, it is competent to the sheriff to give such orders as may be necessary to regulate the interim possession and administration of the estate (sec. 172).

If any appeal be made to the House of Lords, the sequestration is, in all respects not inconsistent with or injurious to the interests which may be affected by the appeal, to proceed without interruption; and the Lord Ordinary is to make such orders as may be necessary to regulate the interim possession and management of the estate; and these orders are not subject to appeal (sec. 173).]

¹ [In *Henderson v Robb*, 1836, 14 S. 797, a petition and complaint as to the resolution of a meeting of creditors was dismissed, because the trustee was not called as a party; but in *Purdon v Spence*, 1853, 16 D. 164, this was held not necessary in a note of appeal against such a resolution, intimation to him, although after the time for appealing, being sufficient; and see *Smith v Crystal*, 1848, 10 D. 1474.]

² [The Lord Ordinary may remit to the sheriff (sec. 170). There is no appeal against a judgment of the sheriff-substitute to the principal sheriff. *Balderston v Richardson*, 1841, 3 D. 597. The 'deliverance' must be not a mere order for proof before answer. *More v Slate*, 1849, 11 D. 1345.]

SECTION IV.

ATTACHMENT; VESTING; MANAGEMENT; AND REALIZATION OF THE ESTATE.

28. EFFECT OF SEQUESTRATION—DILIGENCE.

1. GENERAL EFFECT OF SEQUESTRATION.—The awarding of sequestration, strictly speaking, merely sets apart, as *in manibus curiæ*, and to be taken under the superintendence and care of a factor appointed by the Court, the bankrupt's estate and effects, to be preserved for the use of the creditors till they shall have had time to fix on a proper person in whom to vest the estate as their trustee. At common law, no act of the debtor can affect the property while under sequestration, and no diligence can be available against it; the neutral possession being held for those who have then interest in the subject, and according to that interest. But the statute has fortified this effect of sequestration, by declaring that the confirmation of the trustee shall operate as a complete attachment and transfer of the estate in favour of the trustee for behoof of all the creditors, as at the date of the first deliverance.¹

[It is accordingly enacted, that in all questions under the Act regarding sequestration of the estates of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for sequestration; and this is held to be the date of the sequestration, although the sequestration be not actually awarded until a later date (sec. 42).

2. EFFECT ON PAYMENTS AND PREFERENCES.—By sec. 111, all payments and preferences, or securities obtained by or granted to prior creditors, and all acts done or deeds granted by the bankrupt after the date of the sequestration and before his discharge, out of or in relation to the estate (unless with the consent of the trustee), shall, in the event of sequestration being awarded, be null and void,² and the trustee shall be entitled to any money so paid,³ and to such preference or security, deducting any expense *bona fide* incurred; but if a *bona fide* purchaser is in possession of moveable effects received from the bankrupt after sequestration, but in ignorance thereof, and when ignorant thereof for a price paid, or which he is ready to pay, he shall not be obliged to restore the effects. If a debtor, in ignorance of the sequestration, has paid his debt *bona fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee. And if the possessor of any bill or promissory note, which is payable by the bankrupt, with recourse on other parties, or of a security for a debt due by the bankrupt, has received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory note, or security to the bankrupt, he is not liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage.

3. EFFECT IN COMPETITION WITH DILIGENCE.—By sec. 108, the sequestration as at its date is declared to be equivalent to an arrestment in execution and decree of forthcoming,

¹ [It transfers to the trustee the beneficial interest under the *jus mariti* of the bankrupt. *Smith v Frier*, 1857, 19 D. 384.

By 24 and 25 Vict. c. 86, sec. 16, 'when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf.' See the statute as

to the form of the claim, and the restrictions to which it is subject.]

² [Deeds and alienations made void by the statute, or voidable at common law, may be so declared by action or exception (sec. 10); and the trustee is entitled to set them aside and have the presumptions of law competent to a creditor (sec. 11); and by sec. 9 of the Bankruptcy Act 1857, this applies to actions not only in the Court of Session, but also in the Sheriff Court.]

³ [See, as to payment of a letter of credit on the day when, but before, sequestration was awarded, *Struthers v Commercial Bank*, 1842, 4 D. 460.]

[and to an executed or completed pointing; and not only is no arrestment or pointing executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration effectual, but the funds or effects, or the proceeds of the effects, if sold, must be made forthcoming to the trustee.¹ Any arrestor or pointer before the date of the sequestration, who is thus deprived of the benefit of his diligence, is to have preference out of the funds or effects for the expense *bona fide* incurred by him in such diligence. By sec. 118, no pointing of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties on which a charge has not been given sixty days before that date, is to be available in any question with the trustee; subject to this qualification, that a creditor who holds a security over the heritable estate preferable to the right of the trustee is not to be prevented from executing a pointing of the ground, or obtaining a decree of maills and duties after the sequestration, to the effect of the pointing or decree being in competition with the trustee, available for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term; but for these sums only.²

4. EFFECT ON DECEASED DEBTOR'S ESTATE.—In regard to the estate of a deceased debtor, it is enacted by sec. 110, that when the sequestration of the estates of a deceased debtor is dated within seven months after his death, any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death; and any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death; and any confirmation as executor-creditor after the debtor's death,—are in these several cases to be of no effect in competition with the trustee.³ The estates and effects over which such preferences or securities have been obtained, or of which confirmation has been expedite, are to belong to the trustee; but the creditor who is so deprived of the benefit of his diligence or confirmation is to have preference for payment out of these estates or effects of the expenses *bona fide* incurred by him in such diligence or confirmation. And by sec. 30 it is declared, that it shall not be competent for any creditor, after the date of the first deliverance on the petition for sequestration, to be confirmed executor-creditor.⁴

29. VESTING OF THE MOVEABLE ESTATE IN THE TRUSTEE.

By sec. 102 it is enacted, that the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the moveable estate and effects of the bankrupt,⁵ wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date; subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible.⁶ And by sec. 103, if any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration; and the full right and interest thereon

¹ [This is held to apply to the case of debtors whose estates have been sequestrated under 2 and 3 Vict. c. 41, sec. 83. *Hume v Miller*, 1857, 19 D. 305.]

² [The trustee is preferable over the moveables to heritable creditors who have not pointed the ground. *Hay v Marshall*, 1824, 3 S. N. E. 156, aff. 2 W. S. 71; and see *ante*, p. 56 et seq.]

³ [See *Gordon v Millar*, 1842, 4 D. 352.]

⁴ [See *Alexander*, 1862, 24 D. 1334; *Wright's Trs. v Jamieson*, 1863, 1 Macph. 815; *Carter*, 1863, 1 Macph. 1157.]

⁵ [See *Pearson & Co. v Brock*, 1842, 4 D. 1509, as to an order on the bankrupt's agent to pay the proceeds of goods; *M'Arthur v M'Brair*, 1844, 6 D. 1174, as to shares of a ship; *Watt v Finlay*, 1846, 8 D. 529, and *Brown v Fleming*, 1850, 13 D. 373, as to provisions in marriage contracts; *Thom v Bridges*, 1857, 19 D. 721, as to a claim of solatium for injury to character.]

⁶ [By sec. 119 it is enacted that nothing in the Act shall affect the landlord's right of hypothec. See *E. of Wemyss v Hewat*, 1818, *Hume* 233.]

[to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof or succession, for the purposes of this Act.¹ On coming to the knowledge of the fact, the trustee is to present a petition setting forth the circumstance to the Lord Ordinary, who is to appoint intimation to be made in the Gazette, and require all concerned to appear within a certain time for their interest; and after the expiration of such time, and no cause being shown to the contrary, the Lord Ordinary is to declare all right and interest in the estate which belongs to the bankrupt to be vested in the trustee, as at the date of the acquisition thereof or succession thereto, to the same effect as in regard to the other estates; and the proceeds, when sold, are to be divided in terms of the Act. If the bankrupt do not immediately notify to the trustee that such estate has been acquired or has come to him, he is to forfeit all the benefits of the Act, and it is competent to the trustee to examine him in relation thereto. But the rights of the creditors of the person from whom such estate comes or descends to the bankrupt are reserved entire. By sec. 149, the Lord Ordinary or sheriff may also order a portion of any pay, half-pay, salary, emolument, or pension of the bankrupt² as he may enjoy, to be paid to the trustee, in order that the same may be applied in payment of his debts; and such order, and a consent by the proper authorities, being lodged in the office of the Paymaster-General, or of the Secretary of the Court of Directors of the East India House, or of any other officer or persons appointed to pay or paying any such half-pay, etc., such portion of the pay, etc., as shall be specified in the order and consent is to be paid to the trustee until the Lord Ordinary or sheriff shall make an order to the contrary.³]

The vesting of the moveable estate, as at the date of the first deliverance in the sequestration, is so complete that it defeats all incomplete rights to moveables in purchasers or creditors; as that of a purchaser of any commodity, though he have paid the price, if the subject be not delivered;⁴ or that of an assignee to a debt for which he has advanced the money, if not duly completed by intimation. This right in the trustee is preferable also not only to that of an arrestor⁵ or poinder whose diligence is incomplete at the date; but there is further conferred on the trustee a *pari passu* preference with creditors arresting or poinding within sixty days before the sequestration, although their diligence has been completed; and with arrestors or poinders also within sixty days previous to a notour bankruptcy, provided the date of the first deliverance is within four months of such bankruptcy.⁶ The effect of the sequestration under the Act of 54 Geo. III., in enabling the trustee to recover funds not within Scotland, was held in England to be so imperfect, that no action in a court of law could be maintained by the trustee.⁷ In the present Act the extract of the trustee's confirmed nomination entitles him to recover any debt due to the bankrupt, and to maintain action in the same way as the bankrupt might have done if his estate had not been seques-

¹ [This applies also to the heritable estate.]

² [The portion is to be such as, on communication from the Lord Ordinary or sheriff to the Secretary of War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officers of the department to which such bankrupt may belong or may have belonged, or under which such pay, etc., may be enjoyed by such bankrupt, or to the Court of Directors of the East India Company, they respectively may, under their hands, or under the hand of their respective chief secretary, or other chief officer for the time being, consent to in writing (sec. 140).]

³ [See *Moinet v Hamilton*, 1833, 11 S. 348; and *ante*, vol. i. p. 126 et seq.]

⁴ [See *Tod v Smith*, 1851, 13 D. 1371; *M'Gregor v Dobie*, 1852, 15 D. 225.]

⁵ [See *Gordon v Millar*, 1842, 4 D. 352.]

⁶ [See *ante*, p. 76, *M'Geachy v Mellis*, 2 March 1808, n. r.;

M'Ewan v Young, 27 May 1817, F. C. It will be observed that the trustee will not be entitled to a preference over the Crown's right, unless the sequestration be actually awarded previous to the fiat. The case of *Tipper v the King*, 1830, 8 S. 786, shows the importance of granting no delay, on any pretence, in the awarding of the sequestration; for there a delay having been granted without any warning of danger, it was held fatal to any attempt to get the better of the effect of the Crown's diligence.]

⁷ [Jeffrey v *M'Taggart*, 6 Maule and Sel. 126. This seems to have proceeded on two grounds: 1. That by the law of England, a debt or chose in action is not assignable, while by secs. 29 and 30 the sequestration is to operate merely as a transfer of property, and not a right to sue; and, 2. That the objection was strengthened by the declaration that this should take effect only 'in so far as may be consistent with the laws of other countries.']

trated.¹ It is clear that the trustee has right to take into his possession all goods and remittances sent to the bankrupt.² But it was held, under the Act 54 Geo. III., that he had no authority, even when remittances were expected, to open letters in which they might be contained; and this even when the bankrupt was out of the country, and had desired his letters to be sent to him in England. [But by the former and by the present Act, sec. 179, it is provided that, on cause shown, the bankrupt's post letters may be ordered during a certain time to be delivered to the sheriff-clerk or trustee, to be opened in presence of the sheriff, after written notice to the bankrupt to attend.]

The trustee has the privilege of reducing on bankruptcy all preferences granted to creditors within sixty days of bankruptcy, or of the sequestration. And he has also right to all the future acquisitions of the bankrupt, without the necessity, as under the former law, of applying for a supplementary sequestration (sec. 103). But here a question of some consequence may occur, viz. what right the creditors of the bankrupt subsequent to the sequestration, but prior to the acquisition, shall have in the new estate? The words of the Act are not clear, though they do seem to confine the title to share in that fund to the creditors in the original sequestration; but there may be some difficulty in acceding to such a conclusion. In the case of a debtor deceased, the trustee has a preference over all creditors holding voluntary security for a prior debt not completed more than sixty days before his death, or acquiring a security by diligence on or after the sixtieth day before the death, or subsequently to it, provided the sequestration shall be dated within seven months of the death.

It seems a very questionable point whether the sequestration and confirmation shall operate by relation back to the date of the first deliverance, so as to render effectual the right of the trustee, as against foreign creditors attaching particular funds abroad after the sequestration, but before the confirmation. By no provision in this country can the attachment of foreign creditors abroad be destroyed or suspended; so that, if once used effectually according to the foreign law, they may even form a bar to the operation of the adjudication back to the date of the first deliverance.³ And the same effect will follow on the principles of international law, where diligence to attach moveables, in Scotland, has been used by Scotch creditors after the commencement of foreign proceedings in bankruptcy, but before their completion as an assignment.⁴

If the trustee should, in competition abroad with any of the creditors, be excluded from the foreign estate or effects, there is no remedy within the power of the Legislature of this country, in the case where the creditor continues abroad without subjecting himself to the jurisdiction of the Scottish courts, and does not claim on the sequestrated estate. But if a creditor shall have obtained a preference or payment abroad, after the first deliverance in the sequestration, he cannot be allowed to be ranked under the sequestration, without assigning or communicating the same to the trustee; and should it happen not to be necessary for him, after such preference, to claim under the sequestration, the trustee may bring an action against him, if the jurisdiction of the Court of Session can reach him, for forcing him to communicate the foreign payment to the other creditors.⁵ But it seems doubtful whether this can apply to any other case than where the creditor who has received

¹ [Even under the old law, there seems to be room for holding that in Chancery the trustee would have succeeded, as the objection to an assignment at law does not hold in equity.]

² [In *Watt v Findlay*, 1846, 8 D. 529, it was held that although goods had been delivered to the bankrupt, yet as this was done on the condition of immediate payment of the price which was not made, they did not fall under the sequestration.]

³ [See *Mein v Turner*, 1855, 17 D. 435, where an undis-

charged bankrupt having traded in England, and being there adjudged a bankrupt, the Court, in a question with the English assignees, refused to order his funds in England to be transferred to the trustee, reserving to the trustee to claim in the English bankruptcy.]

⁴ See below, sec. 6, subsec. 46.

⁵ See *Lindsay v Paterson*, 1840, 2 D. 1373, where a creditor in Scotland was interdicted from following out an attachment of funds in England.

such payment is under the jurisdiction of this country at the date of the sequestration.¹ Thus, if a person settled in America has attached there the property of a Scottish merchant, his debtor, and in consequence of that attachment has received payment, and if, having left off trade, he comes to this country to enjoy the fruits of his industry, it would not appear that he can be called in an action before the Court of Session to relinquish the payment which he fairly and *bona fide* obtained in America, on the ground that his debtor had been rendered bankrupt in Scotland, and his affairs put under sequestration. The intention of the law appears to have been only to prevent creditors in this country from disturbing the course of the Scottish law respecting bankrupts, and from taking an unfair advantage over the other creditors, by sending out to attach funds abroad, in order to constitute a preference for themselves, which they could not have obtained at home.

30. VESTING OF THE HERITABLE ESTATE IN THE TRUSTEE.

[By sec. 102, the act and warrant of confirmation in favour of the trustee *ipso jure* transfers to and vests in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale,² as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed. But this is subject to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and to the creditors' right to poind the ground as above mentioned. By sec. 107, the sequestration is at its date also equivalent to a decree of adjudication³ for payment of the whole debts of the bankrupt, principal and interest, accumulated at its date;⁴ and when the sequestration is dated within year and day of any effectual adjudication, the estate is to be disposed of under the sequestration according to the provisions of the Act, saving the rights of any heritable creditor holding a power of sale preferable to the powers of the trustee. The right of the trustee is not challengeable on the ground of any prior inhibition, saving the effect which the inhibition may be entitled to in the ranking of the creditors; and the transfer and vesting is to have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor claiming on the sequestrated estate, nor upon the rights of the creditors of the ancestor, except that the act and warrant of confirmation shall operate in their favour as complete diligence. If any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee is effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach.

By sec. 105, the bankrupt must, if required, grant all deeds necessary for recovering his property, and feudally vesting his heritable estate in the trustee for the purposes of the Act.⁵ And if his title has not been completed, the trustee may complete titles in his own person (whom failing, in favour of any trustee who may succeed him), for behoof of the

¹ See *Young, Ross, & Co. v Muir & Co.*, 1824, 2 Sh. App. Ca. 25.

² [In *Lawrie v Lawrie*, 1854, 16 D. 860, the trustee was preferred to a party having only a personal title. See, as to growing trees, *Paul v Cuthbertson*, 1840, 2 D. 1286. In *Rattray v White*, 1842, 4 D. 880, a vesting order of the English Insolvent Act, recorded in the Register of Sasines, was preferred to the right of the trustee.]

³ [See *ante*, p. 297, sec. 10 (2), as to its effect as an inhibition.]

⁴ [By sec. 102 (as already mentioned), the trustee must,

within twenty-one days after his election is confirmed, present an abbreviate to the Keeper of the Register of Abbreviates of Adjudications, who is to record the same. See, as to the effect of omitting to record the abbreviate, *Fraser's Tr.*, 1851, 13 D. 1209; *Munro v Tolmie*, 1853, 16 D. 105.]

⁵ [Stamps are not requisite (sec. 184). As to possession of title-deeds, see *Skinner v Henderson*, 1865, 3 Macph. 867. Trustee held entitled to obtain from a creditor an assignation of a security obtained from the bankrupt on paying the debt. *Fleming v Burgess*, 1867, 5 Macph. 856.]

[creditors, or in the person of the bankrupt; and superiors must, if required, enter the trustee or the purchaser from him in terms of law. The trustee may, however, without making up a feudal title in his person, and without concurrence of the bankrupt, grant conveyances of the estate, with such procuratories, precepts, or other warrants as the bankrupt might competently have granted, which conveyances are to be as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee; and they are not to be affected by any inhibition against the bankrupt, reserving the effect of such inhibition in the ranking. If the bankrupt fail to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may, by sec. 81, apply to the sheriff to compel him to grant such deeds, under the penalty of imprisonment and of forfeiture of the benefit of the Act; and unless cause be shown to the contrary, the sheriff shall issue a warrant of imprisonment accordingly. And by sec. 104, any person claiming right to any estate included in the sequestration may present a petition to the Lord Ordinary, praying to have such estate taken out of the sequestration; and the Lord Ordinary shall order the trustee to answer within a certain time, and on expiration of that time he shall proceed to dispose of the application.]

To preserve uniformity in the system of provisions for the benefit of the creditors, the trustee ought to have been vested with the heritable estate, as it stands at the date of the first deliverance in the sequestration, subject to those rights and burdens only which were rendered complete as real rights at that date. But the importance of the rights of heritable creditors, and the time required to complete their rights, were supposed to require that a term should be allowed for completing their securities; and that the holders of such conveyances or securities should be in no worse condition in relation to the trustee than in relation to any single creditor entering into competition with them. It was said, that if the trustee were to be vested at once with the estate as at the date of the first deliverance, it would enable any personal creditor to interrupt the completion of a security, by applying suddenly for sequestration, while some time is required for completing an heritable security. To this the obvious answer occurred, that no one could suffer injustice if with proper precaution he refused to advance his money till his security was complete; and that, at all events, this could require no more than the indulgence of a few days after the advance of the money to complete the security. But the influence prevailed of those concerned in the money market and in the traffic of land, and securities on land. And it is fixed that the right of the trustee in feudal subjects can be rendered complete only by the same means (that is, by sasine) which are open to creditors.¹

This being the law, the rules are, that the trustee shall have the same right as if he were an adjudger in implement of sale with decree pronounced of the date of the first deliverance,² and as an adjudger for debt without reversion, to the effect of ranking with any prior adjudication within year and day; that he has the full right of an inhibitor as at the date of the first deliverance, and of a creditor who has cited the bankrupt in an adjudication of that date, to the effect of enabling him to reduce all voluntary deeds and conveyances thereafter granted by the bankrupt; that he must, by infetment on a conveyance from the bankrupt, or on a charter of adjudication from the superior, complete the feudal title, in order to exclude the preferences of creditors who, on deeds of conveyance, or securities dated before the first deliverance, may by sasine complete their right;³ that the

¹ [In *Cormack v Anderson*, 1829, 7 S. 868, it was held under 54 Geo. III. that the deliverance on a petition for sequestration is no mid-impediment to infetment on a previous bond, and that such an infetment is preferable to a subsequent infetment of the trustee under his adjudication.]

² [See, as to latent rights, *Duncan v Wyllie*, 1803, Hume 445, M. 10269; *Stirling & Son v Stirling*, 1822, 1 S. N. E. 501. See, as to taking *tantum et tale*, *Lady Gordon v Kemp*, 1836,

15 S. 187; *Lindsay v Davidson*, 1853, 15 D. 583; *Miller v Wright*, 1835, 13 S. 1038; *Cooke v Jeffrey*, 1835, 1 S. and M'L. 767.]

³ [See *Peebles v Watson*, 1825, 4 S. N. E. 293; *Mansfield v Walker's Trs.*, 1833, 11 S. 813, aff. 1 S. and M'L. 203; *Paul v Turnbull*, 1835, 13 S. 818; *Barstow v Graham*, 1843, 6 D. 293; *Laurie v Laurie*, 1854, 16 D. 860; *Edmond v Mags. of Aberdeen*, 1855, 18 D. 47.]

trustee's right is complete as at the date of the first deliverance, as to all that property which is at common law carried by a decree of adjudication,—leases,¹ burdens by reservation, etc.; that not only rents are carried by the trustee's adjudication, but he has the right of a real creditor whose poiding of the ground is executed of the above date, and preferable to all other poidings of the ground, or decrees of mails and duties not completed sixty days before the bankruptcy, with the exception of a poiding of the ground for the current term's interest of an heritable debt, and for the arrears of interest of one year;² and that the trustee, acting for behoof of all the creditors, preserves to the creditors of the ancestor their preferences under the Act 1661, c. 24.³ The title conferred by confirmation of the trustee is the *titulus transferendi* merely; and the complete feudal vesting of the estate under this title will require different proceedings, according to circumstances. If the bankrupt feudally vested have granted a deed to a purchaser or to a creditor, it seems that the deed would be held as 'existing,' though not yet completed by sasine, and so not excluded by the awarding of sequestration. It would, in such circumstances, be the duty of the trustee to obtain a conveyance from the bankrupt, and to take infestment on it; or to obtain a charter of adjudication from the superior, and complete it by sasine. If there be no danger of a preference, the trustee need not be at the expense of making up a feudal title, but may, on selling the estate, grant an effectual conveyance to the purchaser; which he is empowered to do to the same effect with a similar conveyance granted by the bankrupt before his bankruptcy.

Questions have occurred as to the circumstances in which a bankrupt may refuse to grant a conveyance. In one case, the Court granted a delay to the bankrupt, in consideration of the state of his funds, and of the appearance of harmlessness in the delay requested; but this was much opposed by some of the judges, who justly dreaded the effects of any relaxation upon arbitrary grounds, and contended that reasonable cause related merely to the state of the bankrupt's health, capacity, absence, etc.⁴ In another case, the bankrupt refused to assign certain leases which were granted to him with an exclusion of assignees and sub-tenants, but the Court held him bound to assign.⁵ Where the bankrupt has already granted securities or conveyances, he seems not to be guilty of stellionate in complying with the requisition to grant a disposition to the trustee; for this is not a voluntary act, but the completion merely of legal diligence.

As the confirmation is declared to be an adjudication in implement, and so requiring no declarator of expiry of the legal, and admitting of no *pari passu* preference, if the titles of the trustee are to be completed on the adjudication, he must obtain a charter of adjudication, and complete his title by sasine.

The operations of the trustee in completing a title may produce consequences which deserve attention, in so far as he may be held to complete, *jure accretionis*, the conveyance or security of any individual creditor adversely to the interest of the creditors at large, for whom alone he acts. And there seems to be no means of avoiding the legal consequence of accretion, but by adopting a course which shall not complete the title in the person of the bankrupt.⁶ If the bankrupt have died subsequently to the vesting of the estate in the

¹ [See *Grieve v Grieve's Crs.*, 1790, Hume 778; *Brook v Cabbell*, 5 W. and S. 476; *Russell v E. of Breadalbane*, 5 W. and S. 256; *Inglis & Co. v Paul*, 1829, 7 S. 469.]

² [See *Barstow v Mowbray*, 1856, 18 D. 846.]

³ *M'Lachlan v Bennet*, 1826, 4 S. N. E. 717, aff. 3 W. and S. 449.

⁴ *Wilkie's Sequestration*, 20 Feb. 1802, n. r. Lords President Campbell, Craig, and Glenlee, strongly argued against the view of the majority, as departing from the meaning of the law, which was never intended to give a latitude of this extraordinary kind, attended with dangers on all hands. The

petition of the trustee for the order was superseded. See *Pentland v Paterson*, 1827, 5 S. N. E. 825.

⁵ In *M'Farlane*, 7 March 1800, n. r., the Court found that the bankrupt was bound to grant in favour of the trustee such right to or powers over the leases in question, and produce of the farms, as may be competent, so as the creditors may have the benefit thereof. And see A. S. 12 Dec. 1805 (sec. 8).

⁶ In *Tatnall v Reid*, 1827, 5 S. N. E. 258, the trustee was about to adopt a course which would have completed the right of the general creditors without any danger of accretion; but a

trustee, the trustee will proceed by a charter of adjudication from the superior, and sasine. But if the heir of the bankrupt have made up titles, the trustee, if he cannot voluntarily obtain a conveyance from the heir, may apply under the directions and to the effect of sec. 106.¹ If the bankrupt have granted a deed of conveyance or security on which sasine has been taken, while yet his own right as disponee or as apparent heir is incomplete, the trustee must take care not to complete the bankrupt's title; for that, *jure accrescendi*, would render effectual the previous right with which he has to compete. He will in that case complete titles in his own person as vested with the personal right of the bankrupt, and so entitled to have a charter of adjudication, and thereupon complete his feudal title. If he were, in such a case, to take a conveyance from the bankrupt, and to infest himself upon it, his title could be made valid only by service and infestment of the bankrupt, which would accresce to the previous deed. If the bankrupt hold a right proceeding from an ancestor uninfest, the trustee may proceed either on his own adjudication, or by general service of and conveyance from the bankrupt, with procuratory or precept, provided he use them for his own infestment, and avoid infesting the bankrupt.

Another question relates to the effect of the sequestration and vesting of the estate in the trustee, as against individual creditors who have completed their securities by sasine, intimation, etc., after sequestration, but before the trustee has completed his title. It will be observed, that it is not by force of the sequestration, strictly so called, that the property of the bankrupt is transferred to the trustee; it is by the act and warrant of confirmation, or adjudication in favour of the trustee, or the bankrupt's conveyance to him operating retrospectively as at the date of the first deliverance. And as whatever may be opposed as a mid-impediment to this retrospective operation will raise a competition, to be regulated according to the priority of the completion of the right, the true question is, What may thus be set up in opposition to the completion of the trustee's right? It would appear that the completion of the trustee's right, as a transference of the whole estate at the date of the first deliverance, cannot be obstructed by any security held or diligence used by an individual creditor, if not completed as a real right till after that time. The conjoined force of the adjudication, or conveyance from the bankrupt, with the retrospective operation transferring the property to the trustee as at the date of the first deliverance, cannot be defeated by ordinary diligence; the laws by which diligence is restrained preventing this. Neither can it be impeded by any extrajudicial act which the law prohibits; and although directly there is not in express terms any prohibition against the taking of sasine (or of delivery of moveables, or against intimation of an assignment), yet, in fair construction, a statute which declares the date of those acts to be the date of the security which they are employed to complete, and which orders regard to be had only to preferences obtained by securities or diligence before the first deliverance, must have the effect of preventing such acts being set up as mid-impediments to the completion of the trustee's title.²

In regard to the estates of a company, the confirmation of the trustee will carry them,

creditor, to whom the bankrupt had granted an heritable bond, applied for an interdict to stop the proceeding, as fatal to his security. The Court felt some difficulty; but as there was no danger from granting the interdict, while to refuse it would have absolutely cut off the creditor, the Court adopted this latter course. On the merits of the question, had there been time to enter into them, it would not appear that there could be much room for doubting the right of the trustee to complete the title, whatever effect it might incidentally produce on the heritable creditor. And this the more especially, as no creditor who has trusted to an imperfect security, and who does not already hold a real security, has any right to claim a preference over the general body of creditors.

¹ See p. 341 (subsec. 31).

² Formerly the completion of an assignation of moveables by intimation after sequestration was held effectual, and in one case the trustee's right was postponed. But the error in principle was observed, and the decision disapproved of. The law was placed on the right footing, by declaring the date of the intimation, or other act necessary to complete the transfer, to be the only recognised date of the conveyance. There seems to be ground for holding the same doctrine to apply to heritable property. In a former edition a different view was taken of the question. But, on reconsidering the matter, it appears to me that the above is the true result of the several provisions of the statute. [See, however, *Cormack v Anderson*, p. 338, note 1.]

wherever situated, and of whatever they may consist, enabling the trustee to complete the transfer according to the law of Scotland, or to take the proper measures in other countries for enforcing the conveyance in his favour. The heritable estate in Scotland will generally be found vested in trustees, or in the partners jointly. The particular form of the deed to be granted must depend in all cases on the state of the property and of the titles. And the proper method must be taken, by declarator of trust if necessary, or by means of an order of Court on the trustee holding for the company to dispoise, or, according to the particular shape of the titles, to have the property vested in the trustee under the sequestration by a title so unexceptionable as to bring the fair price at market. In leasehold property sometimes the right is so expressly limited to the partnership, that the bankruptcy which dissolves the company annihilates the lease.¹ In such cases, it ought carefully to be considered, as part of the general arrangement on the company's bankruptcy, whether there be any way of continuing the existence of the company, so as to give to the creditors the benefit of the lease. The same means of coercion which are provided for the case of an individual bankrupt may be resorted to against each of the partners, to force him to subscribe the necessary conveyances of the estates of the company.

31. HERITABLE ESTATE OF A DECEASED DEBTOR.

[When sequestration is awarded against the estate of a person after his death, and his successor has made up a title to his heritable estate, the trustee may, by sec. 106, apply by petition to the Lord Ordinary, praying that the estate shall be transferred to and vested in him; and the Lord Ordinary shall order the petition to be served upon the successor, and require him to answer the same within fourteen days. An abbreviate of the petition and deliverance, in terms of a specified form, is to be recorded in the Register of Inhibitions kept at Edinburgh, which shall have the effect of an inhibition; and the keeper of the register is to write on the abbreviate a certificate in terms of a schedule. If, on expiration of the above period, no cause is shown to the contrary, the Lord Ordinary shall declare the estate to be transferred to and vested in the trustee, as at the date of the sequestration, to the same effect as is provided in regard to the act and warrant of confirmation.² The trustee must, within eight days thereafter, cause an abbreviate of the petition and deliverance to be recorded in the Register of Abbreviates of Adjudications, in terms of a schedule; and the keeper of the register is to write on such abbreviate a certificate in terms also of a schedule.

32. REAL ESTATE OUT OF SCOTLAND.

By sec. 102 (3d) it is enacted, that by virtue of the act and warrant of confirmation there shall be vested in the trustee all real estate situated in England, Ireland, or in any of Her Majesty's dominions, belonging to the bankrupt, and all interest in or regarding such real estate, which the bankrupt held, or to which he was entitled: provided that, as regards all freehold, copyhold, and leasehold estate in England, Ireland, or any of Her Majesty's dominions (except Scotland), the act and warrant of confirmation shall be registered in the chief Court of Bankruptcy for the country in which the property is situated (in the like manner as an adjudication of bankruptcy or other similar process ought to be registered according to the law of that country), either in a separate book, or in the general book, as the Court of Bankruptcy shall order;³ and no purchaser for valuable consideration of such estate shall be affected by any such bankruptcy until the act and warrant of confirmation shall have been so registered.⁴

¹ *Campbell v Calder Iron Co.*, 11 Dec. 1805, n. r.

² [See *Melville v Paterson*, 1842, 4 D. 1311.]

³ [This is declared to be 'to the intent that all persons concerned may have the same means of ascertaining whether any person has been adjudged a bankrupt according to the

law of Scotland, as they have or shall have of ascertaining whether any person has been adjudged a bankrupt according to the law for the time being of the country in which the property is situated.']

⁴ [It is also provided, that where, according to the laws of

Much valuable property may be situate in other countries, and it is the business of the trustee to take such measures as may be necessary to vest it in himself, for behoof of the creditors, and to make it effectual, and bring home the proceeds as part of the fund of division. The mutual relations of this and foreign countries, in matters of bankruptcy, will be fully discussed hereafter.¹

33. MANAGEMENT OF THE ESTATE.

The great object of the Legislature in regulating the management, sale, and recovery of the estate, has been to combine with the active administration of a single person, the trustee, the counsels of a committee of the creditors, the commissioners as continual superintendents, and the greatest facilities in calling for the deliberate advice of the whole assembled creditors, or for judicial determination in case of difference. Although the immediate conversion of the estate into money is obviously in general the most expedient course, yet it may happen that this would be attended with great loss: it may even be impracticable to sell it at all to advantage, and so it may become necessary or beneficial to follow a course of management for the behoof of the creditors. Of this the creditors are, generally speaking, the best informed, and the most impartial judges. They are, accordingly, after the examinations have been finished, and all the necessary information collected, appointed to give their directions at the second meeting. In subsequent proceedings they are represented by the commissioners, who in concert with the trustee are empowered to determine on all matters not fixed by the resolution of that meeting, or by any other meeting called for the purpose.

The resolution of a general meeting to adopt any particular course of management is final and binding, if not complained of in terms of the statute. And any measure or plan of administration which shall have been adopted by the trustee, with or without the concurrence of the commissioners, or which shall have been prescribed by the commissioners, may be brought before the whole creditors for their consideration. Any creditor who either voted at the meeting, or was entitled to do so, or who has since produced his claim, may challenge the resolution of the creditors as to any particular course of management, and may state the whole question of expediency as competent matter for the Court to review. Creditors, being common proprietors, may differ in their opinions concerning the most beneficial management, and may call on a court to decide between them. But on such questions, where no point of law is involved, the Court will be reluctant to interfere, as it would thus be in danger of assuming a discretionary power, the most dangerous of all judicial usurpations, and as the creditors themselves are in general the best judges of what is for their benefit. Where creditors have resolved upon a sale, the responsibility undertaken by a court who shall alter that determination is very great. But where, instead of a sale, they have determined on a protracted course of management, the Court will interfere with less hesitation, unless the resolution be dictated by necessity or the most obvious expediency.² The creditors may indeed be forced into a course of management. For example, when the bankrupt is tenant of a farm, against the assigning or subsetting of which there are prohibitions, the creditors have scarcely any choice. If the lease be beneficial, they must, in order to reap the advantage, continue to cultivate the farm with the aid of the bankrupt or of a manager. But so inconsistent is this held to be with the

England, Ireland, or other Her Majesty's dominions, any deed or conveyance would require registration, enrolment, or recording, the act and warrant of confirmation shall be so registered, enrolled, or recorded according to the laws of England, Ireland, or other Her Majesty's dominions; and if any purchase is made by any person for valuable consideration, and without notice of the sequestration, prior to the registration, enrolment, or recording of the said act and war-

rant of confirmation, such purchase shall not be invalidated by the existence of such act and warrant, or the subsequent registration, enrolment, or recording thereof.]

¹ See below, subsec. 48.

² In England the doctrine seems to be, that even the smallest number of creditors insisting for a sale, instead of a speculation, are entitled to control the rest. *Hughes*, 6 Ves. jun. 617; *Colebrooke*, 6 Ves. jun. 622.

condition of creditors, that the Court is always inclined to favour any proposal which promises a reasonable price for the lease, however injurious to the bankrupt's reversion, or however advantageously an individual might have carried it on.¹ So, in the case where the bankrupt has an interest in any prospective contract, the creditors may be called upon either to undertake his part or to abandon the contract, leaving his estate exposed to a claim of damages. Of this a common lease furnishes the most familiar example. Where there is no exclusion of assignees and sub-tenants, the trustee may take the benefit of the lease for the creditors. But in doing so, the creditors must either become bound by the contract, or they must sell the bankrupt's interest, and so give the landlord an efficient tenant.² If the lease be abandoned by the creditors, the landlord will be entitled to claim as a creditor for damages on account of failure to perform the contract. This is a proper jury question, the amount of damages being subject to deduction of the value of the lease.

If the bankrupt have undertaken any personal contract of the nature of *locatio operarum*, and his creditors and he offer to continue the performance of his engagement, the contracting party will be bound to proceed, letting the creditors reap such advantage as they may stipulate with the bankrupt. What shall be the effect of the bankrupt either refusing or becoming unable to proceed, is a question on which no determination has yet been pronounced. But, on the principles of the law of contract, a claim of damages will, of course, arise to the other party.

Where the property of the bankrupt is under contract, the party with whom that contract is entered into has a preferable claim on the property till the purposes of the contract are fulfilled; as where a house or land is under lease, a ship under charter-party on time, etc. The creditors, in such case, must either take the accruing profits, or sell the property, with the benefit of the contract annexed to it.

The most delicate question of all, perhaps, arises in those cases where, from the peculiar state of the bankrupt's affairs, it is necessary to incur some expense in order to realize or to protect the fund—to advance money, or to engage in a lawsuit, or to guarantee a payment in order to have a more free and unembarrassed management for the benefit of the creditors.³ It is very inconsistent with the condition of a creditor, that he should be subject to calls for money instead of receiving a dividend; and, without express delegation of power from the Legislature, no majority can have the right of forcing a creditor into a situation which may be most distressing to him. The general meetings of the creditors are no doubt entrusted with very large powers. But hardly can any case be conceived in which a creditor ought to be exposed to such calls without express concurrence in a measure leading to an advance of money. And even when he does object at the meeting, it seems not to be a legitimate exercise of jurisdiction in a court of law to sanction a vote for disposing of a man's money without his consent. His claim against the estate may be regarded as a part of the common wreck, and subject to the general management. But the money in his pocket, or the funds or credit which he has acquired by his industry, and cannot perhaps remove from trade, ought to be sacred. The creditors have been said to

¹ *Williamson v Godwin*, 26 Nov. 1803, n. r. See below, p. 344, note 1.

² A trustee taking benefit of a coal lease and feu-rights was held bound (and his successors in office) to fulfil prestations; but entitled to abandon. *Kirkland v Gibson*, 1831, 9 S. 596, aff. 6 W. S. 340. See also *Balfour v Cook*, 20 May 1817, Hume 771; *Harvie v Haldane*, 1833, 11 S. 872, contrasted with *Mitchell's Tr. v Pearson*, 1834, 12 S. 322; *Richardson v Scott*, 1835, 13 S. 972; *Kirkland v Caddell*, 1838, 16 S. 628. In the deliberations previous to the passing of the Act 2 and 3 Vict. c. 41, it was proposed to guard against such responsibility, by declaring that, unless the creditors should, at the

meeting for electing the trustee, resolve to undertake the obligations of any feu-contract or lease, and should intimate the same within a certain time, they should not be held as parties undertaking the responsibility; power being given to the superior or landlord, within a certain other time, to declare the property free of any feu-contract or lease, and to demand damages under the contract. This precautionary provision, however, was afterwards dropped, and the matter is left on the footing of the common law.

³ [As to buying in property for the estate, see *City of Glasgow Bank*, 1863, 2 Macph. 142.]

be a corporation; but this is a figurative expression, and by no means infers that they are subject to the rules of a corporation in the disposal of money.

Although the bankrupt does not seem to be absolutely barred from challenging the course of management, his grounds of objection are restrained within very narrow limits. He has, it is true, an eventual interest, but the creditors are properly the common proprietors of the estate; and as his interest does not entitle him to impede or suspend the operation of ordinary diligence upon mere views of speculation, so he cannot stop the creditors from having the estate brought to sale, and force them to throw it into a course of management.¹ If the creditors, however, should, on account of the burdens or probable expenses, reject any part of the estate, the bankrupt is not bound to acquiesce in such resolution. He has an interest to diminish the amount of his debts by the application of every possible fund; and will be entitled to vindicate the right rejected by the creditors, provided he relieve them of all responsibility, and find caution to the adverse party for the expenses of any judicial inquiry which may be necessary for making the right effectual.

34. SALE OF THE MOVEABLE ESTATE.

There is no restraint on the mode of disposing of the moveable estate. If the creditors at the general meeting give directions, the trustee must follow them; but the trustee and commissioners have otherwise an unlimited discretion to arrange the sale as may be most expedient, subject always to the control of the creditors and of the Court.

Where a debt forms part of the fund, the natural way of converting it into money is to enforce payment; although it sometimes may happen, where the term of payment is long suspended, or the obligation contingent, or where the debt bears a tract of future time, that it may be more prudent to dispose of it by sale.² The trustee, with advice of the commissioners, is empowered to transact and compound all debts; and the majority at the meeting after the examination, or at any other meeting called for the purpose, seems to be invested with sufficient power to direct how any debt whatever shall be disposed of; any creditor being entitled to bring the determination of the meeting under the review of the Court. A special power also is given to three-fourths in value of the creditors present at a meeting called for the purpose, to direct a general auction of the outstanding debts and remaining effects. This power, however, cannot be exercised till after the expiration of a year from the deliverance actually awarding sequestration. But this would not probably be held to prevent a majority of the creditors from taking the measures best adapted for the recovery or disposal of any particular debt or fund.

35. SALE OF HERITABLE ESTATE.

[If the creditors, at the meeting after the examination of the bankrupt, or at any other meeting called for the purpose, resolve that the trustee shall dispose of the heritable estate by public sale, or bring it to judicial sale,³ and if a public sale be resolved on, the sale shall

¹ *Williamson v Godwin* (p. 343, note 1). The creditors resolved to conclude a bargain with the landlord for a renunciation of a lease. The bankrupt petitioned the Court, and endeavoured to establish that his funds would, with a little forbearance, turn out so well as to give him a small reversion, independently of the lease; that the lease was very valuable; and that the price offered by the landlord was very insignificant, compared with its real worth. The Court held that if such objections were countenanced, a bankrupt would have it in his power to disturb the proceedings of his creditors; that the creditors are entitled to have the estate converted into a fund for division; and that the only relevant objections on the part of the bankrupt would be, that there were now actually realized funds sufficient to pay off the whole debts; or

that there was another more advantageous way of disposing of the lease, without forcing the creditors to engage in farming in order to recover their dividends. [See *Burt v Bell*, 1863, 1 Macph. 382.]

² [A private sale by the trustee and commissioners is ineffectual. *Crichton v Bell*, 1833, 11 S. 781; *Robertson v Adam*, 1857, 19 D. 502.]

³ [If such resolution has been made before an heritable creditor having a power of sale shall have commenced proceedings for sale, or if such proceedings, after being commenced prior to the date of such resolution, have thereafter been unduly delayed, the creditor is not entitled to interfere with the sale by the trustee (sec. 114).]

[be made by auction at the upset price, and in the manner which shall be fixed by the trustee, with consent of the commissioners (sec. 114).¹ It is, however, competent for the trustee, with concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the accountant, to sell the estate by private bargain on such terms and conditions regarding price and otherwise as the trustee, with concurrence of those parties, may fix (sec. 115).

A creditor holding a security over the heritable estate preferable to the right of the trustee, with a power to sell, may sell in terms of his security, notwithstanding the sequestration;² and it is competent to the trustee to concur therein in order to fortify the title. The trustee, or any posterior heritable creditor preferable to him, may, by petition to the Lord Ordinary or to the sheriff, compel the creditor so selling, and the purchaser, to account for any reversion of the price (sec. 112). If a creditor holding an heritable security, with a power to sell, concur with the trustee in bringing the estate to sale, the trustee shall sell the same in his own name; and the articles of roup and conveyance to the purchaser are to be executed by the trustee, with consent of the creditor and the commissioners.³ The price is to be paid by the purchaser to the parties legally entitled to it; and in so far as not paid at the time of the delivery of the conveyance, it must be consigned in the bank in which the money of the sequestrated estate is deposited. This payment or consignment has the effect to free and discharge the estate and the purchaser from the security of the consenting creditor, whether the debt in the security be satisfied or not, and also from all securities postponed to that security (sec. 113).]

It thus appears that, in disposing of the heritable property, the creditors have their choice of a judicial sale or a public voluntary sale. In determining which should be preferred, the points for deliberation are the comparative expense and delay, and the comparative goodness of the purchaser's title. The judicial sale is very expensive, and the delay great in settling the preliminary points relative to the value and upset price, and in the several notices and accompanying proceedings. In the voluntary public sale, the trustee and commissioners, after the proper inquiries, settle the upset price and the most eligible time for disposing of the property.⁴ There is no great difference in respect of the security of the title offered to the purchaser. The judicial sale affords a title of absolute security against the bankrupt, and all deriving right from him; but so does the voluntary sale under sequestration. There is not, indeed, a decree of certification in the sequestration, as in the judicial sale, but there are proceedings which produce a similar effect. And where there are no real burdens on the estate, there is little reason for preferring the judicial sale. But if there be burdens, a remarkable difference is to be observed between the two sales. The purchaser under a judicial sale, paying the price to the creditors as ranked, or consigning it in terms of law, is 'for ever exonerated;' and the lands and others purchased and acquired disburdened of all debts or deeds of the bankrupt, or his predecessors, from whom he had

¹ [The estate cannot be sold for less than the upset price, which must not be less than sufficient to pay the debt, principal and interest, and expenses of the heritable creditor (sec. 114).]

² [In *Beveridge v Wilson*, 1829, 7 S. 279, it was held that the trustee could not interpose to prevent the creditor from selling, without qualifying some substantial injury to the creditors; and see *Kerr v Wood*, 1830, 8 S. 628.]

³ [By sec. 120 it is enacted that, when any estate is sold publicly by virtue of the Act, it shall be lawful for any creditor to purchase the same; but the trustee, or commissioners, or adjudger, selling, shall not be entitled to purchase. An heritable creditor, although concurring in the articles of roup, may purchase. *Cruickshank v Williams*, 1849, 11 D. 614. See, as to the liability of a trustee buying, for damages, *Whyte's Trs. v Burt*, 1851, 13 D. 679.]

⁴ The trustee is entitled to have possession of the bankrupt's title-deeds. If they be in the hands of a law agent, whose accounts are unobjectionable and clear, the trustee must either pay the amount, or consent to a warrant for payment out of the first and readiest of the funds. *Newland's Crs. v Mackenzie*, 1793, M. 6254; *Bertram, Gardner, & Co. v Thomson*, 1794, M. 6256; *Johnston v Bell*, 1823, 2 S. N. E. 133; *Paul v Mathie*, 1826, 4 S. N. E. 424. [See *Dobie v Scales*, 1831, 9 S. 609.] If the accounts are not settled, and in any degree doubtful, the trustee is bound to do nothing more than reserve to the claimant a preference for the amount when the accounts shall be settled (*Paul v Mathie*). If the title-deeds shall be refused, then it is competent to apply to the Court for a warrant for their delivery. (Same case.)

right.¹ But, by the Sequestration Act, the purchaser at a public voluntary sale is secure only against those burdens to which the trustee's right is preferable. It is placed on the footing of a mere ordinary sale, where a man buys subject to the burdens with which the land stands charged. And as the trustee has right only to the balance after the debts are discharged, the purchaser would pay to him at his own peril.² There is also a possibility of rights affecting the property which do not appear from the record; and the holders of which, not being forced to appear in the sequestration, as in the judicial sale, may have a claim against the purchaser for the share of the price corresponding with their debts. If there be any dispute, it may be necessary for the purchaser to raise a multiplepoinding.³ And the purchaser ought to take an assignation to the several burdens, in order to fortify his title. It was questioned whether an inhibition fell under the description of a security; and if so, whether the purchaser was entitled, before paying the price, to insist for a discharge of the inhibition? But an inhibition is a prohibitory diligence only, not a real security on the lands. The inhibiting creditor can have the benefit of it only by adjudication or other real right. And although, under the adjudication of the trustee as an adjudication for all the creditors, the inhibitor may, in virtue of the exclusive force of his inhibition, be entitled to draw more than he would have done, had the creditors against whom the inhibition strikes not been excluded; still the adjudication of the trustee is the only groundwork upon which the inhibitor is himself admitted to the competition on the price of the heritable estate, and through which the inhibition comes to be available to him. It is therefore clear that the inhibiting creditor cannot effectually object to the title, which is in fact his own adjudication; nor can the purchaser require the discharge of an inhibition which is absorbed in the trustee's title. But, to prevent the possibility of doubt, the Legislature has expressly declared that the adjudication or conveyance to the trustee shall not be struck at by any prior inhibition; saving, however, in the ranking upon the price, any other effect which such inhibition may have (sec. 102 (2)). The Court, when this question was first raised, entertained some doubt on the subject; and decided in the first instance, that the trustee was not entitled to demand the price without discharging the inhibition. But, on a full exposition of the statute, they altered that judgment, and adjudged the price to be paid to the trustee without any such discharge.⁴

36. LIABILITY OF HERITABLE CREDITORS FOR EXPENSES.

[By sec. 94 of the statute 2 and 3 Vict. c. 41 it was enacted, that no part of the expenses of the sequestration, nor of the sale in any way of the heritable estate, nor of the trustee's commission, should be payable out of such part of the price as might be necessary to discharge the securities on the heritable estate preferable to the right of the trustee; and no heritable creditor, or creditor preferable to the trustee on the heritable estate, should be liable for the expense of the sequestration or the trustee's commission, nor of such sale, unless he had consented to the sale, in which case he should be liable for the expense of the sale. But there is no enactment to this effect in the existing statute, and therefore the question must be decided by the rules of the common law.⁵]

¹ See *ante*, p. 258 sqq.

² *M'Lane v Robertson*, 1825, 4 S. N. E. 235; *Kirkland & Sharp v Russell*, 1824, 2 S. N. E. 534. See *Moir v Paul*, 1830, 8 S. 823.

³ *Ferrier v Pennycuick*, 8 July 1812, F. C. See *Sprot's Trs. v Mackenzie's Trs.*, 1830, 9 S. 120.

⁴ [By sec. 116, it is the duty of the trustee to make up a scheme of ranking and division of the claims of the heritable creditors and other creditors on the price of the heritable estate sold; which scheme of ranking and division is to be reported by him to the Lord Ordinary or either Division of

the Court, and the judgment thereon forms a warrant for payment out of the price against the purchaser of the heritable estate. And by sec. 117, a power is given to grant interim warrants for payment out of the price.]

⁵ [The reason for this omission is not obvious. It would appear from Mr. Kinnear's statement, p. 138, that while certain new clauses relating to heritable creditors had been introduced into the bill in place of clauses in the former Act, they were afterwards withdrawn; and it was omitted to replace those clauses which they had been intended to supersede, including the one as to expenses.]

An important question is, whether creditors holding heritable securities shall be subjected to the general expense of the sequestration? Where the heritable estate, for example, is burdened to its full extent, and the moveable funds are so inconsiderable as not to defray the expense of the sequestration, how shall the expense be defrayed? It is to be recollected that the heritable creditors, as such, have no voice in the sequestration; while the personal creditors who have claimed are enabled, after the examinations, and early in the course of the proceeding, to judge of the probable extent of the divisible estate; and are by the statute empowered to deliberate, at the second meeting, what course ought to be followed, and to give directions for the management of the estate. It is the duty of the creditors at that meeting fully to examine into the state of affairs, and to meet the difficulties of the situation, by resolving whether they shall direct the proceedings to stop, or shall persist in them with the hope of realizing a fund, and under an implied engagement to defray the expense. In that deliberation, the creditors, in coming to a determination, are not entitled to rely on any fund but that to which their proceedings may be expected to give them a right, and cannot justly trust to the heritable estate already preoccupied by preferable debts. If the expense should exceed the fund which it is their object to realize for division, the creditors must lay their account with defraying it by contribution. And of this they cannot complain, since it is their duty at the first to reflect on the danger which they might incur by claiming as members of the body of creditors; while they ought to be aware that they have no other remedy against improper expense but vigilance to prevent it from being incurred, the right of compelling the trustee at any time to answer for his conduct to the Court, and the power of calling general meetings, and of taking judicial appeals from the resolutions there formed. If such, then, be the grounds on which the personal creditors must proceed in persisting in the sequestration, it follows that when, inadvertently, an expense has been incurred which there are no funds to answer, those creditors must defray that expense by contribution, with relief against the preferable creditors of the expense of the sale by which the latter profit.

In the first cases which occurred, the Court held that the heritable creditors, the subject of whose security had been sold under the sequestration, were liable to the general expense of the sequestration.¹ In the next case, an heritable annuitant did not require the trustee's aid to sell the subject, as the security contained powers of sale, did not claim in the sequestration, and agreed to let the trustee sell as he saw proper, on his binding himself to retain the sum paid for the annuity. The Court distinguished this from the former cases, as the creditor here had a power to sell.² In the next case, which was under the 54 Geo. III. c. 137 (by which the heritable creditors are in a manner excluded altogether from the sequestration), although all pretension to burden the preferable creditors with the general expense of the sequestration was given up, still a claim was made for the trustee's commission and other charges. But the Court refused to burden the heritable creditors with the trustee's commission, and adopted the principle, that those creditors could be subjected to no charges or expenses which were not beneficially expended for them.³ Another case occurred in which the trustee interfered to sell a subject covered by heritable securities, not only in circumstances which precluded all chance of interest or advantage to the personal creditors, but very materially injured the rights of the postponed securities, as the primary securities were for annuities. The Court applied and followed up the principle on which the latter case was determined, by finding the heritable creditors liable for no

¹ *Goodwin v Brown*, 1 Feb. 1815, F. C.; *Gardner v Cuthbertson*, 1824, 2 Sh. App. Ca. 291. These were both cases under the statute of 33 Geo. III. c. 74, in which the condition of creditors holding preferable securities was different from that in which they are now placed. In the House of Lords, when the authority of *Goodwin's* case was relied on in *Cuth-*

bertson's case, great doubt was entertained of that decision; and it was stated from the woolsack as one which, on a fit occasion, would deserve very grave reconsideration. The case of *Cuthbertson* was decided on its special circumstances.

² *Glen v Porterfield*, 1822, 1 S. N. E. 286.

³ *Brock v Brown's Trs.*, 1825, 3 S. N. E. 444.

part of the expense which was not beneficially laid out for them; and decided that not even the charges of the sale, which was not beneficial, could be laid on them.¹

But, on the other hand, there is no principle on which it seems justifiable to impose the expense of selling the estate, as a burden on the general fund, to the effect of relieving the holders of securities, and enabling them to take the full proceeds of the estate. The creditors who hold securities, if they were individually to bring the subject of their security to sale, could draw preferably only the free proceeds of the burdened subject, after paying the expense of the sale, and would rank as personal creditors on the general fund for the balance left unpaid of their debts; so precisely ought it to be where the sale is by process of judicial sale, or under sequestration. The price of the subject, under the deduction of the expense, is the fund for payment of the debts secured over it. If any balance of the preferable debts remain unpaid, it may be claimed as a personal debt out of the common fund; and if there be any reversion of the price, it will go into the general fund of division.

Another question relates to the manner of charging the expense as among the creditors who hold securities over the subject sold. If the expense should be deducted from the price of the burdened subject, before commencing the operation of division among those holding securities over it, the creditor holding the first preference receives his payment in full, and the expense falls as a burden on the postponed creditors. If the debts should be ranked, and the expense proportioned according to the sum to be drawn by each, the first preferable creditor would suffer part of the loss arising from defalcation in the value of the subject, while posterior securities would to that effect be preferred to him. It is of some consequence, therefore, to fix the rule. Although the creditors may take the option of selling by judicial sale or by public voluntary sale, yet the rule observed in judicial sale seems not quite consistent with the true principle. In that action it was at first held that the expense of the sale was to be taken from the whole price before the operation of division; by which means, according to what seems the just principle, the creditors holding the first securities on the subject received their payment unburdened with any part of the expense, leaving the defalcation to fall on the postponed or personal creditors.² This rule was afterwards altered, on the ground that as the expense is of general benefit, it was supposed to be more equitable to hold that it should be made to fall proportionally on every creditor, according to the sum drawn by him.³ But this rule is not adopted in sequestrations. In a case where an heritable subject, burdened with a first and second security, was sold under a sequestration, and the price was sufficient to pay the first creditor after defraying the expense of the sequestration and sale, and in part also the second, but not the whole of his debt, the trustee followed the rule established in judicial sales, and proportioned the expense between those creditors according to the sums to be drawn by each; but the Court altered that arrangement, and held the whole expense to fall on the second heritable creditor.⁴

SECTION V.

COMPOSITION CONTRACT; DISTRIBUTION OF THE FUNDS; WINDING UP; AND DISCHARGE.

37. COMPOSITION CONTRACT.

The composition contract authorized by the statute is of this nature: In consideration of an engagement to pay such a proportion of all the debts demandable against the bankrupt

¹ *M'Lane v Robertson*, 1825, 4 S. N. E. 235. [See *Ferguson's Trs. v M'Kechie's Trs.*, 1829, 7 S. 887; *Gibson v Stephenson*, 1832, 10 S. 711; *Globe Insurance Co. v Turner*, 1835, 13 S. 873; same parties, 1839, 1 D. 605; *Grant v Bain*, 1840, 2 D. 618; *Lindsay v Gordon*, 1844, 6 D. 518.]

² *Pittencrief's Crs.*, 1702, M. 4023-4.

³ Act of Sederunt, 23 Nov. 1711, sec. 9 (Alexr.'s ed. p. 48). [This Act of Sederunt was repealed by the Act of Sederunt 10 Aug. 1754 (*ib.* p. 68), and so the original rule was revived.] See *Auchinvole's Crs. v Blair*, 1718, M. 4027; *Abbotshall's Crs.*, M. 4028; *M'Kail v Brown*, 1761, M. 4029.

⁴ *Crawford v Currie*, 8 March 1817, F. C.

as a certain proportion in number and value of the creditors shall agree to receive, and as cannot be shown to the satisfaction of the Court to be unreasonable, the sequestration ceases; the bankrupt is reinstated in possession of his estate; is discharged, except as to the payment of the composition; and the trustee is exonerated. The benefits of the contract are these: The bankrupt is able to collect the funds more economically and more effectually than a trustee; the creditors receive their money sooner, or at least they sooner have the amount of what they are entitled to ascertained; and have bills granted to them by responsible men for their shares, which they can make use of as money; and there is, on the whole, a great saving of expense and litigation. On the other hand, the dangers which attend it are these: The creditors, by the prospect of those very advantages, are often led to accede too easily to a composition before they have scrutinized the affairs of the bankrupt; and if the bankrupt, by gratuities or otherwise, can procure the favour of some of the larger creditors, he may carry the composition against the wish of the lesser; the bankruptcy is often planned with the sole view of accomplishing this mode of easy settlement, and enabling the bankrupt to gain at the expense of the creditors; and the creditors are often induced to accept of a composition upon the security of men in collusion with the bankrupt, who break after the bankrupt has got the fund disposed of, insomuch that it is a common observation, that more trouble, loss, and dissatisfaction arise from ill-arranged compositions, than is experienced in the course of a sequestration carried on in the regular way. Some of those dangers are provided against by retarding the composition till the whole of the proceedings appointed by the statute for discovering the state and condition of the bankrupt's affairs and funds have been followed out. The creditors have thus time to come forward in order to elect a proper trustee, the bankrupt must undergo his examinations, and everything must proceed regularly, in the same course as if the sequestration were to be carried on to its natural termination. But notwithstanding all these precautions, as it is easily known when the bankruptcy is to be settled by a composition contract, the proceedings are complied with, in form often more than substantially, and the creditors give themselves little concern to investigate the affairs; the bankrupt has his plan laid with the principal creditors even before his bankruptcy is announced; if there be no creditors favourable to the design large enough to secure its adoption, debts are created for the purpose; and the friends of the bankrupt arrange with him who shall be trustee, and what composition is to be accepted, and both of these points they contrive, by their votes and their influence, to carry in the meetings of creditors.

The essence of this contract is, on the one hand, an obligation equally available to every creditor without exception, for which security is pledged to the satisfaction of a large majority; on the other, a discharge to the bankrupt of all his debts except the composition, with a reconveyance of the estate to him, or to his friends, as the fund out of which the composition is to be paid.

[1. OFFER AND ACCEPTANCE.—The statutory rules on this subject are expressed in the following enactments:—

FIRST OFFER.—At the meeting for the election of trustee, the bankrupt or his friends (or, in case of his decease, his successors; and in case of a company, one or more of the partners thereof) may offer a composition to the creditors on the whole debts, with security for payment of the same. If the majority in number and nine-tenths in value present at the meeting resolve that the offer and security shall be entertained for consideration, the trustee must forthwith advertise in the Gazette a notice that an offer of composition has been so made and entertained, and that it will be decided upon at the meeting to be held after the examination of the bankrupt, specifying the hour, day, and place. And he must also transmit by post letters to each of the creditors claiming on the estate, or mentioned in the bankrupt's state of affairs, containing a notice of such resolution, and specifying the day and hour at which, and the place where, the meeting is to be held, the offer and

[security proposed, and giving an abstract of the state of the affairs and of the valuation of the estate, so far as the same can be done, to enable the creditors to judge of the offer and security (sec. 137).

ACCEPTANCE.—If, at the meeting held after the examination of the bankrupt, a majority in number and nine-tenths in value of the creditors there assembled shall accept the offer and security, a bond of caution for payment of the composition, executed by the bankrupt (or his successors, or the partners of a company, as the case may be) and the proposed cautioner, must be forthwith lodged in the hands of the trustee. The trustee must thereupon subscribe and transmit a report¹ of the resolution of the meeting, with the bond,² to the Bill Chamber clerk, or sheriff-clerk, in order that the approval of the Lord Ordinary or sheriff (whichever may be selected by the trustee) may be obtained thereto. And if the Lord Ordinary or the sheriff, after hearing any objections by creditors, shall find that the offer, with the security, has been duly made, and is reasonable, and has been assented to by a majority in number and nine-tenths in value of all the creditors assembled at the meeting, he shall pronounce a deliverance approving thereof; and if he shall refuse to sustain the offer or reject the vote of any creditor, he shall specify the grounds of refusal or rejection (sec. 138).

SECOND OFFER.—In like manner, at the meeting held after the examination of the bankrupt, or at any subsequent meeting called for the purpose by the trustee with the consent of the commissioners, the bankrupt, or his friends (or in case of his decease, his successors, or any of them; and in the case of a company, one or more of the partners thereof), may offer a composition to the creditors on the whole debts, with security for payment of the same. If a majority in number and four-fifths in value of the creditors present resolve that the offer and security shall be entertained for consideration, the trustee must call another meeting to be held at a specified hour on a specified day, being not less than twenty-one days thereafter, and at a specified place; and he must, seven days at least before such other meeting, also send by post letters addressed to each of the creditors who have claimed on the estate or are mentioned in the bankrupt's state of affairs, containing a notice of the resolution, and of the hour, day, and place of the meeting, and its purpose, and specifying the offer and security proposed, and give an abstract of the state of the affairs and valuation of the estate, so far as can be done, to enable the creditors to judge of the offer.

ACCEPTANCE.—If, at the meeting so called, a majority in number and four-fifths in value of the creditors present shall accept the offer and security, a bond of caution shall be lodged and a report made, and a deliverance pronounced, all in the same manner and to the same effect as is above mentioned (sec. 139).

THIRD OFFER AFTER OTHERS REJECTED.—If an offer of composition have been made and rejected, or have become ineffectual, no other offer of composition shall be entertained unless nine-tenths in number and value of all the creditors ranked or entitled to be ranked on the estate shall assent in writing to such offer, which offer must state the amount of composition and the terms of payment, and be subscribed by the cautioner proposed; in which case a meeting shall be called, in manner as before stated, by the trustee for finally disposing of the same.³

ACCEPTANCE.—If, at the meeting so called, a majority in number and nine-tenths in value of the creditors present accept the offer and security, and the same be assented to by

¹ [Where the trustee became insane after preparing the report, but before it was signed by him, the Court allowed it to be signed by the commissioners and received. *Guthrie*, 1846, 7 D. 637.]

² The bond cannot be dispensed with even if the amount of composition be lodged with the trustee. *M'Vicar*, 1829, 8 S. 146. [And a delay of seven months to lodge it was held to nullify the offer. *Robertson v M'Leod*, 1850, 13 D. 316.

See also *Stephen v Strachan*, 1853, 16 D. 63; and *Campbell v Brown*, 1854, 16 D. 519.]

³ [It is provided that, notwithstanding offers of composition, and proceedings consequent thereon, the sequestration shall continue; and the trustee shall proceed in the execution of his duty as if no such offer had been made, until the deliverance by the Lord Ordinary or the sheriff be pronounced (sec. 145).]

[nine-tenths in value of all the creditors who have produced oaths,¹ a bond of caution shall be lodged and a report made, and deliverances pronounced, and the other proceedings shall take place and have effect in the same manner as other offers of composition above mentioned (sec. 145).²]

THE OFFER must be made strictly in terms of the statute, and the Court will be rigid in requiring this.³ It is only an offer of 'composition' which the Legislature has sanctioned; and this necessarily implies that a proportional payment of so much per pound shall be made to each creditor, according to the amount of his debt, and comprehends not merely the debts of those who have claimed, but the debts also of every absent creditor. The Court cannot, therefore, confirm the offer of a slump sum to be paid to the creditors. It must be an offer to pay to each creditor a rateable proportion of his debt.⁴ It would, however, appear that there may be added to the composition a conditional payment in the same rateable form, payable in a certain event; as where the bankrupt engages, on succeeding in a particular lawsuit, or on acquiring a certain succession, to pay an additional composition of so much per pound.⁵ It has sometimes been proposed to assign over to the creditors, in addition to a composition, a particular estate or fund, to be sold and divided among them. But this is inconsistent with the nature of the arrangement, which implies a cessation of the sequestration.⁶ The correct way of proceeding in such a case is to convert the subject or fund proposed to be assigned into a composition of so much per pound, assigning the fund to a person who may be willing to become cautioner to the creditors. But there seems no inconsistency in granting to the creditors, or to a trustee for them, security over a particular subject; for that has in contemplation the failure of the composition, and the necessity of the creditors having again recourse to joint measures for their payment.⁷

The bankrupt may find it necessary in his offer to stipulate not only for a conveyance to all the estate and effects, as they stood in his person before sequestration, but as they stand vested in the trustee, with all the actions he has raised, and all the rights of challenge which the creditors, or he in their name, can exercise. This was at first thought a very questionable stipulation, as it seemed to confer on a bankrupt a right, for his own benefit, to challenge what could be questionable only on the ground of his own fraud against the creditors, but which, as between him and the person to whom the preference is granted, is perfectly fair, and strictly according to the bankrupt's obligation. But it is now settled, that a bankrupt is not in this sort of contract to be considered as acting solely for himself. He is the administrator also for the creditors; and the composition which he binds himself to pay must be taken to be the fair proceeds of the whole estate, which the creditors might have realized, and which he undertakes to recover and to pay in another shape. But where no express mention is made at the meeting of creditors, or in the discussion of the proposal, of challenges depending or competent on the head of bankruptcy, of which the bankrupt is to have the benefit, he has no right to avail himself of those challenges, or to prosecute reductions on grounds which are peculiar to the creditors alone, and which there is nothing to show that the creditors had intended to assign.⁸ Nor is it enough that the creditors

¹ [Where a creditor stands neutral, as in the case of a bank, his debt cannot be taken into view. *Charles*, 1835, 14 S. 139.]

² [If the bankrupt, after the offer has been accepted, should retract, he cannot be permitted afterwards to offer to implement it. *Brown v Whyte*, 1846, 8 D. 822. And see, as to the incompetency of amending the offer by enlarging it after the original offer had been accepted, *M'Intosh v Duncan*, 1846, 18 Jur. 559.]

³ [So, a variance of the offer as entertained and agreed to is bad if material. *Miln v Boyack*, 1845, 7 D. 888. And the terms of the advertisement in the Gazette must be strictly in conformity with the statute. Same case.]

⁴ This was the chief point determined in *Dunlop v Geils*, 25 June 1813, F. C.

⁵ *M'Funn & Sons*, 11 July 1811, F. C. This is too briefly reported. It appears to have been an offer of composition, and of so much more in the event of succeeding in a law-plea, which the Court held to be sufficient compliance with the statute.

⁶ In *Dixon v Edington & Sons*, 1822, 1 S. 447, there was a reservation to the creditors of part of the estate; but the validity of it was not decided, the objector being held barred by personal exception.

⁷ See p. 352 (3), as to caution.

⁸ *Slade v Crawford*, 23 May 1806, n. r.

should be aware of the fact of preferences existing liable to challenge, which they may be supposed to have had in their view in estimating the expediency of accepting the composition offered: the right of challenge must be made a part of the negotiation between the parties, and an assignation of it expressly stipulated by the bankrupt and his cautioners, and agreed to by the creditors.¹ The creditor, of whose preference the challenge is to be assigned to the bankrupt, must have notice of the assignation intended, otherwise he is deprived of the right which, as a creditor, he should have had, of taking part in the decision of the question whether the composition shall be accepted with such a condition annexed.²

[By sec. 143 it is declared, that neither the bankrupt, nor the cautioner for the composition, shall be entitled to object to any debt which the bankrupt has given up in the state of his affairs as due by him, or admitted without question to be reckoned in the acceptance of the offer of composition, or to object to any security held by any creditor, unless in the offer of composition such debt or security shall be stated as objected to, and notice in writing given to the creditor in right thereof.³]

2. RECKONING THE CONCURRENCE.—In reckoning the concurrence, every creditor who may be affected by the discharge must be included, whether their debts be future or contingent;⁴ or even, as it would seem, such as can only be effectual against the debtor's person, though not against his sequestrated estate. Where a creditor has been present, and has voted at the meeting for decision, as one of the assenting creditors, the minutes are sufficient evidence of the fact, subject, of course, to be challenged as not authentic. And if the offer has at that meeting been generally assented to, without any vote being called, a creditor present and not dissenting will be held to assent. But a creditor cannot be reckoned as a concurring creditor merely on the ground of his having assented to the offer proposed at the first meeting; for he may think it deserves consideration, and yet on more mature deliberation may disapprove of it entirely.⁵ When the creditor has not been present, it will require a mandate directed to this special purpose, or very clearly unlimited, to enable an agent or mandatory to vote for a composition.⁶ It has been held that a travelling agent has no power thus to compromise the rights of his principal; and it would seem to be law, that an ordinary mandate, having no such thing as a composition in contemplation, would be no bar against the creditor refusing to sanction the act of his mandatory.⁷ Where the creditors are not ten in number, and so, in case of one dissenting, a majority of nine-tenths is impossible, they must all concur according to the true sense of the Act.⁸ The state of the concurrence at the meeting is conclusive if against the proposal;⁹ but if favourable, the composition may still be rejected by creditors appearing in Court, and opposing it.

3. CAUTION.—The statute requires that the bankrupt or his friends, in making their offer of a composition, shall offer caution. This must extend to the whole composition, and afford security for payment of it to every absent creditor as effectually as to those who have already claimed in the sequestration. The words of the Act do not necessarily import this, but rather seem to leave it discretionary to the statutory majority to take such caution as may be considered right. But recollecting that they are empowered to discharge a part of the debt due to the minority, and that cabals may be formed to force through a com-

¹ *M'Fee & Co. v M'Gilvray & Co.*, June 1809, n. r.

² *Bryce v Monteith, Bogle, & Co.*, 20 Feb. 1818, F. C.; *Irvine v Cliffe*, 1824, 3 S. N. E. 87. [See *Levick v Caddell & Co.*, 1829, 7 S. 327.]

³ [See *M'Glashan v Newman*, 1833, 11 S. 284, as to challenging the value of an annuity; and *Gemmell's Exrs. v Moon*, 1838, 16 S. 505, as to the effect of an entry of a supposed claim in the state of affairs, but not admitted to be due, contrasted with *Thomson v Izat*, 1841, 4 D. 136, and *Adam v Wyllie*, 1842, 5 D. 391; *Morrison v Balfour*, 1849, 11 D. 653.]

⁴ [*Gillfillan*, 1836, 15 S. 149.]

⁵ In the case of a minor, the Court will appoint a curator *ad litem*. *Rankine*, 1821, 1 S. N. E. 117.

⁶ [But this will not authorize the mandatory to grant a release to the cautioner. *Morrison v Balfour*, 1849, 11 D. 653.]

⁷ *Hollingworth v Dunbar*, 21 Jan. 1813, F. C. Although the general presumption here adopted was unquestionable, I doubt whether Gray did not, by the document, stand in the character of creditor in the debt.

⁸ *Brown v Gray & Greig*, 11 July 1817, F. C. See *Buchanan v Dunlop*, 1829, 8 S. 201; and *Brown v Ewing*, 1828, 6 S. 739, 4 W. S. 122.

position in collusion with the bankrupt, the Court has held this to be the true construction of the Act.¹

In strict compliance with the terms of the Act, the offer, when first made, should be accompanied by a proposal of caution; and the caution, as part of the offer, should be approved of by the first meeting. But the Court has, in practice, held it to be sufficient if the offer be accompanied by an engagement to find satisfactory caution, and if the cautioners be named at the second meeting, and approved of by the creditors there assembled.² It has even been held not an insuperable objection, that the name of the cautioner was not mentioned at the second meeting.³ If more cautioners than one are proposed, it will not be a good offer, unless one or both be responsible for the whole composition.⁴ And if caution is offered for the whole composition, it would seem that additional cautioners, engaging for specific sums, may be received as a legitimate corroboration of the caution, so as to justify the meeting of creditors in approving of it.⁵ Where the offer of caution was at the first not complete, so as to cover the whole composition, the Court allowed the offer to be amended in this respect, so as to comprehend the whole composition; and on this being done with the approbation of the creditors, the composition was sanctioned.⁶ On the same principle, it would perhaps be permitted to call the creditors together again on any accidental failure in the caution, in order to receive new cautioners. Although the creditors alone are, by the statute, authorized to approve of the caution offered, yet the Court to a certain extent may judge of it. There are legal objections, for example, independently of the state of credit, which may be disposed of judicially, as where a minor is proposed as cautioner;⁷ and even objections to the credit of the persons proposed, if manifested by notorious acts (as dishonouring bills, being under diligence, or residence abroad), will be judged of by the Court.

The estate of the bankrupt, or any part of it, may be reserved in security of the composition, and guarantee of the cautioners.⁸ And although it may at first sight appear that there is something like a departure from the correct principle of the law in authorizing any definite security whatever (as the intention of the Legislature seems to have been to give to the absent the same security as to the present creditors), yet, in order to make compositions practicable, there must be some limitation of the right of the absent; and it seems quite a fair and sufficient indulgence to the absent if they have the full benefit of the additional security, provided they make their claim within the time appointed for paying the instalments.

Before final approval, it seems to be competent for the cautioners to retract on cause shown; such as upon the emergence of any extraordinary alteration of circumstances, or decline in the value of the estate.⁹ And so, if the bankrupt should die during the dependence of the petition for approval, either the creditors on the one hand, or the cautioners on the other, may take advantage of the circumstance to give up the contract; for their confidence may have been placed on the fidelity, industry, and ability of the bankrupt. But if both parties be willing to proceed, the best way seems to be for the friends of the bankrupt to enter appearance, and move the Court to approve of the composition, with the variation of ordering the estate to be conveyed over to

¹ So it has been decided that it is a bad offer where a composition of five shillings in the pound is proposed to be paid, with caution for four shillings, and the bankrupt's own bill for the remainder. *M'Minn*, 1804, M. No. 2, App. Bankrupt; *Clements v Comeline*, May 1805, n. r.; *Livingstone*, 25 May 1811, n. r.

² *Durie*, 7 July 1811, n. r. The clerks hold this to be the settled construction of the Act in practice.

³ *M'Farlane*, July 1820, n. r.

⁴ *Handyside*, 26 June 1811, F. C.; *Gillespie & Co.*, 15 May 1813, F. C.

⁵ *Inglis*, 23 May 1811, n. r.; *Gray*, 7 March 1812, n. r.; *Gillespie & Co.*, 15 May 1813, F. C. [See *Ironside v Gray*, 1841, 4 D. 629, as to cautioners for instalments.]

⁶ *M'Minn* and *Livingstone*, note 1.

⁷ In *Brown*, July 1820, n. r., the Court held a minor not receivable as cautioner for a composition.

⁸ See *Gillespie & Co.*, and *Gray*, note 5.

⁹ See *Ironside v Gray*, note 5.

the friends and cautioners, for the purpose of accomplishing the proposed composition.¹ The Court would probably order a new intimation and advertisement in the Gazette, that the creditors might have an opportunity of withdrawing if they please, or of stating to the Court their objections to the reasonableness of the composition under the change of circumstances.

In the ordinary way of settling a composition contract, the cautioners rely on the bankrupt for the fulfilment of their obligation, and have no real right or security over any part of the estate and effects; nor have the settlement of the composition contract and the decree of the Court any operation as an assignation to the cautioners. If they do not mean to rely on his fidelity and industry, they must settle their terms with him before the agreement is concluded; and as it is a contract of speculation on the part of the bankrupt as well as of the creditors, the success of which must in the general case depend on the bankrupt being left untrammelled in the management of his affairs, cautioners who have stipulated for no conveyance in security, and no particular course of management, will not be permitted to interrupt and embarrass the management, by insisting for any new conditions of security, unless upon just grounds of suspicion. They are bound to the creditors, as well as to the bankrupt, to give him full opportunity of accomplishing the engagements on which they have all been induced to rely: the sequestration is stopped, and the funds return to the bankrupt himself, who is reinvested in his original right. On the other hand, if the bankrupt has assigned or engaged to assign his funds in security to the cautioners, and to give them an active title to proceed in providing for the instalments, or if in the offer the cautioners have stipulated for an assignation, the bankrupt and the trustee will be bound to assign to them, and the Court will not suffer the bankrupt to interrupt their operations on slight pretences; for here, again, the safety of the parties depends on the operations of the contract proceeding without impediment.²

[When the composition has been approved of, the bond of caution is to be recorded in the books of the Court of Session, or if by the sheriff, in the books of the Sheriff Court; and an extract of the deliverance, signed by the Clerk of the Bills or the sheriff-clerk, must forthwith be transmitted to the accountant, who is to preserve it, with the copy of the proceedings in the sequestration transmitted to him; and the Clerk of the Bills or the sheriff-clerk is also to issue an abbreviate of the deliverance in the form of a schedule, which is to be recorded in the Register of Inhibitions and the Register of Abbreviates of Adjudications at Edinburgh; and the keepers of these registers, if required, must grant certificates of such registration in the form of a schedule (sec. 140). No person who has not produced an oath as a creditor before the date of the deliverance approving of the composition is entitled to make any demand against the cautioner after the space of two years from the date of the deliverance, reserving his claim for the composition against the bankrupt and his estate (sec. 144).]

4. COMPOSITION BY A COMPANY.—A composition contract is competent in the sequestration of the estates of a company as well as of an individual.³ It does not seem necessary in this case, as in the case of a discharge, that the sequestration of the company estate should be accompanied by a sequestration of the separate estates of the individual partners; for this is a bargain between the creditors and the bankrupts, whereby the latter are to pay and give security for a certain proportion of the debts, in consideration of receiving a discharge, with a reconveyance of the estate, as the fund out of which the payment is to be made. It therefore may either be entered into with all the partners of the company, or with any one or more of them, with the concurrence of the others. The consideration may either be the discharge of all the partners; or the discharge of those who offer the composition, reserving the claims of the creditors for the unpaid balance against the other partners;

¹ [See *Robertson's Trs.*, 1842, 4 D. 627.]

² *Douglas v Scott*, 16 Dec. 1809, n. r.

³ [In practice, the company is not discharged. *Steel & Co.*, 1855, 18 D. 34.]

or such discharge, with an assignment of the claims of the creditors against the other partners, to the effect of making good the relief of those who pay, so far as the funds may prove inadequate. But there does not seem to be authority under the statute to conclude a composition contract without the concurrence of all the bankrupts, if it shall not be accompanied by a discharge to them all. Each one of the bankrupts is entitled to insist that the estate shall be managed and brought to sale and division under the sequestration, as being the best mode of deriving the true value from the estate; and he has an interest so to insist, unless his person and his separate estate shall be discharged. The statute authorizes a composition only where it is proposed by the bankrupt (which in the case of a company must comprehend the whole) or by 'his friends,' which must imply that it is with his concurrence, and so in the case of a company with concurrence of each partner, that the composition is proposed. The sequestration may, however, be preserved in force so far as the company estate is concerned, while the individual partners are discharged.¹ As the legal presumption in a composition contract is, that the estate is equal to the composition, and that the benefit derived to all parties arises from the greater advantages with which the bankrupts can turn the estate into money, it seems to follow, that where the composition is proposed by one of the partners, and acquiesced in by the rest, if he stipulate only for his own discharge, the creditors should be held as reserving their remedies against the private estates of the other partners. Where the offerer of the composition stipulates for an assignment to the claims of the creditors, he will not be entitled to demand from the other partners more than the share of what he can show he has paid towards the debts of the company, without reimbursement from the funds. And where a partner proposes a composition on the whole company debts, and pays it, he cannot be called on by any of the company's creditors to make payment in his individual character of the balance unpaid from the company funds. But it may be different if he be bound both as a partner and as an individual; as if he draw a bill on a company, of which he is a partner, and the company accepts it. The Court has in such a case held the contract of composition, signed by the creditors of the company, to be insufficient to discharge the individual obligation separately and specifically undertaken.²

5. JUDICIAL OPPOSITION.—It is not enough that at the meetings the requisite majority shall have assented to the composition. It is still subject to objection before the judge, either on the ground of creditors having assented who were not entitled to a voice in the matter, or on some specific objection to the proposal in the circumstances of the bankrupt, or on some improper interference on the part of the bankrupt or his friends.³ This opposition must in the several cases depend on the circumstances and evidence which the case may supply.⁴

A creditor may state, as an absolute bar to the proposal, not only that the estate, or a part of it, has been unfairly valued or concealed, but that it has risen very much in value since the proposal was first made, so as to make what was then equal a very disadvantageous agreement for the creditors. And it would appear not to be incompetent even to creditors who have already assented, either at the meeting for approving of the composition, or afterwards, to retract their assent on an important change in the bankrupt's situation, or to submit to the Court the unreasonableness of the composition as things have turned out.⁵

In like manner, it may be objected by any of the creditors, even those who have already assented, that the consent of some of the creditors has been obtained by unfair means—by

¹ *Smith v Jones*, 15 Feb. 1827, 5 S. 331. [*Taylor*, 1840, 2 D. 952.]

² *Mellis v Royal Bank*, 22 June 1815, F. C.

³ [See *Miller v Cabbell*, 1828, 6 S. 1101.]

⁴ [The Court refused to approve of the composition where

the advertisements were not in terms of the statute. *M'Donald*, 1829, 8 S. 113; *Sellar*, 1829, 8 S. 145; *Johnstone & Co.*, 1834, 12 S. 293. But see, as to the effect of the creditors being unanimous, *Wylie*, 1830, 8 S. 434.]

⁵ [See this doctrine doubted, 5 W. and S. 10.]

a secret preference or commission, a promise of future payment, or a consideration in which the rest have not participated.¹

The Court itself is vested with a discretionary power in respect to the reasonableness of the composition.² Every inquiry is thus open relative to the nature and extent of the property, the amount of the debts, and the fairness of the whole plan.³

[6. OATH.—By sec. 140, on the deliverance being pronounced approving of the composition,⁴ the bankrupt (or if deceased, his successor, or other party offering the composition) must make a declaration (or, if required by the trustee or any creditor, an oath) before the Lord Ordinary or the sheriff, that he has made a full and fair surrender of his estate, has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to the offer and security.⁵

7. DISCHARGE, AND EFFECT OF IT.—The Lord Ordinary or the sheriff, on being satisfied with the declaration or oath, is to pronounce a deliverance discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration, and declaring the sequestration to be at an end, and the bankrupt reinvested in his estate; reserving the claims of the creditors for the composition against him and the cautioner. This deliverance of the Lord Ordinary or of the sheriff operates as a complete discharge and acquittance to the bankrupt, in terms thereof, and is to receive effect within Great Britain and Ireland and Her Majesty's other dominions; and an entry of it must be made by the accountant in the Register of Sequestrations (sec. 140). The trustee is also thereby exonerated and discharged; nevertheless he and his cautioner are liable, on petition to the Lord Ordinary or sheriff by the bankrupt or his cautioner for the composition, to account for his intromissions and other acts as trustee (sec. 142).⁶

The effect of the discharge to the bankrupt is, that he is freed from all those debts which have been contracted by him previously to the date of the first deliverance, and remains indebted only to the extent of the composition.⁷ And this effect will take place under the words of the decree, although in some particular circumstances it may prove injurious to creditors who have had no vote in the arrangement. Thus, in the case of the bankrupt being the principal debtor with co-obligants, although the creditor may have received part of the debt from the co-obligants, he will still be ranked on the estate to their exclusion,⁸ and the discharge will be effectual against the claim of relief of the co-obligants.

On the failure of the bankrupt and his cautioners to perform their engagement, it was at one time much doubted whether the creditors were not to be restored to their full right

¹ See below, p. 359, as to Challenge of the Discharge.

² [See *Kilpatrick v Wighton*, 1827, 5 S. N. E. 831.]

³ [See *Smith v Robertson*, 1830, 8 S. 1055, aff. 5 W. and S. 1; *Arnott v Hardie*, 1834, 12 S. 931; *Gordon v Sir G. Suttie*, 6 July 1839, F. C.]

⁴ [By sec. 141 it is provided that, before the Lord Ordinary or the sheriff shall pronounce the deliverance approving of the composition, the commissioners shall audit the accounts of the trustee, and ascertain the balance due to or by him, and fix the remuneration for his trouble, subject to the review of the Lord Ordinary or the sheriff if complained of by the trustee, the bankrupt, or any of the creditors; and the expense attending the sequestration and such remuneration shall be paid or provided for to the satisfaction of the trustee and commissioners before such deliverance is pronounced. It is held sufficient that the trustee is satisfied, in so far as he is concerned, although the guarantee or security on which he has relied has not been laid before the creditors or Court. *Tweedie v M'Intyre*, 1823, 2 S. 321.]

⁵ [If the bankrupt be at the time beyond the jurisdiction of the Lord Ordinary or sheriff, or is by a lawful cause prevented from appearing before the Lord Ordinary or sheriff, commission may be granted to any fit person to take the declaration or oath (sec. 140). See, as to the effect of his death, *Robertson's Trs.*, 1842, 4 D. 627.]

⁶ [In *Bell v Carstairs*, 1842, 5 D. 318, it was held by the whole Court that the reinvestment operated in favour of the cautioner for the composition (although the bond is in favour of the creditors), to entitle him to sue an action against the trustee for an account of his intromissions.]

⁷ [But if, after the discharge, he grant a bill for the amount of the original debt, he will be liable to the full extent. *Grimshaw v Malcolm*, 1842, 4 D. 1360. In *Hutchison v Stevenson*, 1833, 11 S. 433, a cautioner for the interest of an heritable debt, prior to the discharge of the principal debtor, was held entitled to be relieved by him of interest paid thereafter; and see *Murray v Moncur*, 1836, 14 S. 624.]

⁸ [See *Black v Melrose & Co.*, 1840, 2 D. 706.]

as they stood originally, or were entitled only to claim as creditors for the composition. At common law, a composition is a conditional agreement between creditors and their debtor that the creditors shall accept part of their debt in satisfaction of the whole, provided that part be paid against a certain fixed time; and the non-performance of the covenant annihilates the composition, and revives the original debt. But under the Sequestration Act this doctrine does not hold good, for there is a peculiarity which raises a distinction. The composition contract under that Act is terminated by an absolute discharge of every debt 'except the composition,' which thus becomes, with such security as may accompany it, the substitute of the original debt; and there is a complete and absolute *novatio debiti*. Accordingly, on a full consideration of the question, and the consultation of all the judges, it was solemnly decided that the discharge granted has the effect of making the composition the only debt due by the bankrupt to his creditors.¹ On the same principle, if it be agreed that instalment bills shall be given, and this be not performed, this infraction of the contract will not revive the old debt, but will entitle the creditors to charge the cautioner on the bond.² If a cautioner shall fail before the term for paying the composition shall have arrived, a claim may be entered on his estate, as for a contingent debt, to the effect of having a dividend, proportioned to the amount of the composition, set apart as a security for payment of the composition should the principal debtor fail.

It has also been doubted whether, in the case of a second bankruptcy, the sequestration may not be revived, to the effect of giving to the creditors the benefit of a preference over such part of the funds as are not of recent acquisition. But it has been decided that the sequestration cannot be revived.³ The bankrupt has been allowed to go into trade anew, to raise a fresh credit on the estate and effects of which the composition contract has given him the disposal, and consequently to pledge them to his new creditors, though without withdrawing them from the old. Besides, the trustee has been exonerated, the estate released from the trammels of the sequestration; and it is declared by the decree, that all the proceedings in the sequestration shall cease. And as that decree is extracted, and so becomes *res judicata*, it is beyond the power of the Court to recall it, unless by means of a reduction.

A question was formerly much discussed, whether, if a creditor spontaneously concur in a discharge of a debtor with whom co-obligants are bound, he must be held to free the co-obligants. But the creditor, if he do not take his share of a composition, may frequently have no chance of payment; and where the co-obligants have been required to pay, and have refused or failed, leaving the creditor to make the best of it, they seem to have no good ground for objecting that the creditor, in taking such measures as remain within his reach for his own benefit, has discharged them. No doubt, where the composition is extrajudicial, there may be danger of advantage being taken of the co-obligants without due notice. But this is scarcely to be dreaded, with all the precautions which are by law enjoined in a composition under the Sequestration Act. It has accordingly been held, that it is no discharge of the co-obligants if the creditor take the composition, when the concurrence is complete, without his consent; and that even the active concurrence of the creditor in the composition will not free them.⁴ [But this has not been left to rest on the common law. By sec. 56 it is enacted, that when a creditor has an obligant bound to him along with the bankrupt for the whole or part of the debt, such obligant shall not be freed from his liability for such debt in respect of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition. The obligant may, however, require and obtain, at his own expense, from the creditor an assignation to the

¹ *Saunders v Renfrewshire Banking Co.*, 1827, 5 S. 531. [In the present Act the discharge is absolute, reserving right to the composition. See *ante*, p. 356 (7).]

² [See *Cooper v Blakemore & Co.*, 1834, 12 S. 834, as to the

effect of concealment by a creditor of his refusal to accede to the composition on a claim against the cautioners.]

³ *Baird v Tucker & Co.*, 23 May 1818, n. r.

⁴ *Whitelaw & Kirk v Steins*, 20 May 1814, F. C.

[debt, on payment of the amount of it, and in virtue thereof enter a claim on the estate, and vote and draw dividends, if otherwise legally entitled to do so.¹ By sec. 55, when any person is bound as cautioner for payment of an annuity, the creditor cannot sue or charge the cautioner after the date of the sequestration, except for the value fixed, and the arrears of annuity and interest thereon; and on such cautioner making payment of such value and arrears to the creditor, and the lawful interest thereon, he is discharged of all liability for the annuity, and he may thereupon enter a claim in the sequestration for the sum so paid, and vote and draw dividends thereon. But if the cautioner shall not pay the sum so fixed, and arrears and interest, before any payment of the annuity subsequent to the fixing thereof becomes due, he is bound to make payment of the annuity, and all subsequent annuities, until he shall make payment of the sum so fixed, arrears of annuity and interest, deducting always such dividends as the creditor shall have received before full payment.]

It is only the personal obligations of the bankrupt that are comprehended under the discharge; and so he cannot plead that discharge against a creditor holding a real lien to any further extent than to free his person from the demand. The real lien continues effectual to the full amount. But a difficulty arose as to inhibitions; an inhibition being a personal prohibition against alienation and against debt, not a real right. In relation to this, it is to be observed, that where there are no debts subsequent to the inhibition, as the sequestration is an adjudication for all the creditors, the inhibition has no effect at all if the sequestration proceed; and so it would have none where the sequestration is terminated by a composition contract, further than to secure to the inhibitor his composition against the contraction of future debts.² But where the debts have been contracted after the inhibition, and then sequestration has followed, the effect would be (on the supposition that the sequestration proceeds), that the inhibitor would be entitled to draw back from the posterior creditors what he would have drawn from the estate had they not been in the way. If, however, the sequestration be discharged by a composition, it has been held that while the bankrupt has engaged to give to each of his creditors the composition agreed on, the inhibitor is entitled to draw as large a composition as if the posterior creditors had not been in the field; and that the bankrupt has undertaken to answer for the effect of the inhibition by relieving the posterior creditors affected by it of the consequences of its operations.³ Where the preference is exposed to challenge, but the composition contract has been made on the supposition that it is to stand effectual, the bankrupt will not be allowed to object to it.

38. ENFORCEMENT AND CHALLENGE OF THE COMPOSITION CONTRACT.

ENFORCEMENT OF THE CONTRACT.—After the composition has been approved of, each creditor should require from the bankrupt and the cautioners such a document as may serve for a due constitution of his debt. This is commonly done by means of bills drawn by the creditor on the bankrupt and his cautioners, and accepted by them. If the creditor hold an unexceptionable written voucher for his debt, he is entitled to charge summarily on the bond of caution for payment of the composition corresponding to the amount.⁴ And if he has entered his claim, with the requisite proofs, in the sequestration, and the trustee has examined the claim and ranked it, without any objection being made within the prescribed time, the creditor will be entitled to charge on the bond of caution for the corresponding

¹ [See *Black v Melrose & Co.*, p. 356, note 8, as to the right of a creditor to draw the composition on his full debt, although he had got a partial payment from collateral obligants.]

² *Harkness v Paul*, 1821, 1 S. 114. [In *Holmes v Reid*, 1829, 7 S. 355, it was held that an inhibition is extinguished by an intervening sequestration followed by a discharge on a composition, though the inhibiting creditor has not ranked, so

that an adjudication cannot proceed to the effect of attaching the interest of the bankrupt; but it was observed that the inhibition remains effectual *quoad* real securities granted prior to the sequestration *spreta inhibitione*.]

³ *Stewart v Patrick*, 23 Feb. 1813, F. C. Compare with *Holmes v Reid*, note 2.

⁴ *Brown v Campbell & Co.*, 11 Feb. 1809, F. C. [*Dick v Murison*, 1845, 8 D. 1.]

composition.¹ But if the claim has not yet been examined and admitted to rank as good and unexceptionable, although the creditor has produced his grounds of debt with an oath of verity, the bankrupt or the cautioners may insist on the debt being duly liquidated.² For although compliance with the requisites of the Act is sufficient to give a title to vote, the composition takes place before the time when the trustee is called upon to scrutinize the debts with a view to their ranking for a dividend. And if the debt has not been claimed in the sequestration, and is not grounded on written vouchers, and the bankrupt contests it, the creditor must constitute his debt in the usual way.³ In either of these two last cases, the creditor, after obtaining his decree of constitution, will be entitled, on the extract of the decree and the bond of caution, to summary execution for payment of the composition.⁴

[CHALLENGE OF THE CONTRACT, AND OF PREFERENCES.—By sec. 151, if the bankrupt has been concerned in or cognizant of the granting, giving, or promising any preference, gratuity, security, payment, or other consideration, or in any secret or collusive agreement or transaction after mentioned, he shall forfeit all right to a discharge and all benefits under the Act; and the discharge, if granted, either on or without an offer of composition, shall be annulled; and the trustee, or any one or more of the creditors, may apply by petition to the Lord Ordinary to have the discharge annulled accordingly. And by sec. 150 it is provided, that all preferences, gratuities, securities, payments, or other consideration not sanctioned by the Act, granted, made, or promised, and all secret or collusive agreements and transactions, for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void.⁵ And if, during the sequestration, any creditor shall have obtained any such preference, etc., or promise thereof, or entered into such secret or collusive consideration or agreement or transaction, the trustee shall be entitled to retain his dividend; and he or any creditor ranked on the estate may petition the Lord Ordinary or the sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, etc.; and if no cause be shown to the contrary, decree shall be pronounced accordingly, and the sums which in such case may be recovered shall, under deduction of the expenses of recovering the same, be distributed by the trustee among the other creditors under the sequestration. If the sequestration shall have been closed, any creditor who shall not have received full payment of his debt may raise a multiplepounding in name of the person who has obtained such preference, etc.; and on the value being ascertained, double such value, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors who were ranked or were entitled to be ranked in the sequestration, and have not received full payment of their debts, and who shall lodge claims in such multiplepounding, according to their respective rights and interests. The multiple-

¹ *Harkness v Maxwell*, 1822, 1 S. N. E. 366; *Smith v Davidson*, 1823, 2 S. N. E. 476; *Smith v Wilson*, 1824, 3 S. N. E. 277. [*Atkinson v Walls*, 1833, 11 S. 429, where the creditor had a certificate of ranking from the trustee.]

² *Pitcairn v Brown*, 1823, 2 S. N. E. 495. [But if the bankrupt has given up the debt in his state of affairs, or if it has been reckoned in the question of composition, neither the bankrupt nor cautioner is entitled to object to it (sec. 143). Nor can he be allowed to refer to oath that the debt is not due. *Gordon v Glen*, 1828, 6 S. 393.]

³ *Cunninghame & Smith v Ellegood & Smith*, 1823, 2 S. 194. [But a decree in a submission is sufficient. *Smith v Hall*, 1828, 6 S. 975.]

⁴ The bond is to pay to each and all the just and lawful creditors of the said A B, of the sum of per pound of

the respective debts due to them. On this bond, by the former practice, letters of horning were issued in the name of the particular creditor, stating the amount of his debt, with the composition agreed to, and containing a warrant to charge for the amount. *Harkness v Maxwell*, note 1; *Smith v Hall*, 1828, 6 S. 975; *Atkinson v Walls*, note 1. In charging on such a bond with a decree of registration under the statute, the messenger must be instructed in the same way to charge the debtor to pay the sum of composition due to the charger; and such charge, with an execution in conformity with it, will be competent and effectual, while any error in the sum will ground a suspension.

⁵ [In *Morrison v Balfour*, 1849, 11 D. 653, the Court expressed an opinion that an agreement to release the cautioner for the composition was unlawful.]

[poining must be duly executed against the colluding creditor, and notice thereof at the same time inserted in the Gazette; and in the event of there being any surplus, after paying the full debts of the creditors, and defraying the expenses of the sequestration or other proceeding, the same shall be paid into the account of unclaimed dividends.]

Whether the latter part of the provision had in view a composition contract may be doubted, seeing that those consequences can scarcely be insisted in with any benefit to the creditors, while the composition contract is allowed to remain unreduced. Both upon the peculiar expressions of the Act, and as there is no common fund to which the forfeiture can be added, this seems doubtful. But in several cases action has been sustained on this provision. Thus, it has been held competent both to creditors and to the cautioners for the composition, to insist in the forfeiture of the debt, and for restitution of what the creditor received in the way of private gratuity;¹ and that no action lies on a bill given by a bankrupt for the full amount of a creditor's claim, in consequence of which the claim was withdrawn from the sequestration.²

If the requisites of the Act have been in any material point neglected, as if the concurrence has not been full, or the publication of the offer neglected, or the meetings held at terms too short, a challenge will be competent to any creditor who has not claimed or concurred at the date of the composition.³ But it is not competent to the bankrupt or the cautioners on the one hand, or any creditor on the other, who had claimed in the sequestration, and had due notice, to bring such a challenge; for the contract is judicial, partaking of the nature of a judgment, and having the force of *res judicata* as to those who were parties. Against them the exception may be pleaded of competent and omitted, or proposed and repelled.⁴

Although everything has been apparently correct, yet if it can be shown that funds were concealed, or objections to debts kept out of sight, so as to give the appearance of a greater inadequacy of funds than truly existed, the composition will be reducible by the creditors as unfair and fraudulent.⁵ And if the concurrence has been obtained by secret and fraudulent preferences or promises, the contract may be reducible. But it does not seem to be sufficient that the bankrupt has induced particular creditors to accede, by representing others as having acceded; for it is the creditor's business to satisfy himself as to the grounds on which he gives his consent, and he cannot be allowed to disturb the general arrangement on account of his own neglect. If any particular creditor have received a higher composition, or a gratuity for giving his concurrence, and if the concurrence has led to the acceptance of the composition, the other creditors will be entitled to challenge the contract, and have it reduced.⁶ But if the gratuity given to one creditor be made known to the rest, and not objected to, it seems in England to furnish no ground of exception to a private composition;⁷ and so it would probably be held with us in a case of private composition. But as the statute is expressly directed against any gratuity or higher composition, it may be doubted whether in sequestration such a thing can be admitted.⁸

Where the creditors challenge the whole contract, and conclude for reduction, the effect of a decree ought to be a restoration of the whole benefit of the sequestration, in so far as they can be restored. This ought to be done by a petition, proceeding on the decree of reduction, and praying that the sequestration should be revived, and ordered to proceed as if it had not been interrupted.

¹ *Junner v Cadell & Sons*, 1822, 1 S. N. E. 325.

² *Arrol v Montgomery*, 1826, 4 S. N. E. 499; *Kerr v M'Dowall*, 1828, 6 S. 546. See also 3 Ves. 456.

³ [See, as to an alteration on the offer at the second meeting, *Miln v Boyack*, 1845, 7 D. 888.]

⁴ [*Buchanan v Dunlop*, 1829, 8 S. 201.]

⁵ [See *Baillie v Young*, 1837, 15 S. 893.]

⁶ [This does not apply when the transaction has occurred after the discharge. *Roy v Scoullar*, 1831, 9 S. 766; *Grimshaw v Malcolm*, 1842, 4 D. 1360.]

⁷ *Montague* 227.

⁸ [See *Levick v Caddell & Co.*, 1829, 7 S. 327.]

39. FUND OF DIVISION, AND RANKING OF CREDITORS.

[1. FUND OF DIVISION.—If there has been no composition contract, and so the estate must be realized and distributed, the statute declares that the whole estate, when reduced into money, shall, after paying all necessary charges, and a commission to the trustee, be divided among those who were creditors of the bankrupt at the date of the sequestration, ranked according to their several rights and interests (sec. 121).

2. OATHS AND CLAIMS.—It has been stated that a creditor must lodge an oath, etc., before being entitled to vote;¹ and by the same enactment (if he has not already done so) he must, in order to draw a dividend, produce to the trustee an oath to the effect and taken in manner before mentioned in the case of creditors petitioning for sequestration, and the account and vouchers necessary to prove the debt referred to in such oath (sec. 49).² And to entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he must on oath put a specified value on the security, and deduct the value from his debt, and specify the balance;³ and the trustee, with consent of the commissioners, is entitled to a conveyance or assignation of such security at the expense of the estate, on payment of the value so specified out of the first of the common fund, or to reserve to the creditor the full benefit of the security; and in either case, the creditor is to be ranked for and receive a dividend on the balance, and no more, without prejudice to the amount of his debt in other respects (sec. 65). When a creditor claims on the estate of the partner of a company in respect of a debt due by the company, the trustee on the estate of the partner must, before ranking the creditor, put a valuation on the estate of the company, and deduct from the claim of the creditor the estimated value, and rank and pay to him a dividend only on the balance (sec. 66).⁴ To entitle any creditor to the payment of the first dividend, he must produce his oath and grounds of debt⁵ at least two months before the time fixed for payment of the first dividend (when the time of payment has not been accelerated, or one month before the time fixed for payment of the first dividend where the time has been accelerated). And to entitle any creditor to payment of any of the subsequent dividends, he must produce his oath and grounds of debt at least one month before the time fixed for payment of the dividend which he means to claim.⁶ If, however, a creditor has not produced his oath and grounds of debt in time to share in the first dividend, but has done so in time to share in the second dividend, he is entitled, on occasion of payment of the second dividend, to receive out of the first of the fund (if there be sufficient for that purpose), an equalizing dividend corresponding to the dividend he would have drawn if he had claimed in time for the first dividend; and the same rule applies to all subsequent dividends (sec. 123). And when any creditor not resident within Great Britain or Ireland at the date of the deliverance awarding sequestration, or at any time within five months thereafter, shall lodge his oath and grounds of debt fourteen days previous to any time fixed for payment of a dividend (though not in time to entitle such creditor to participate in the dividend), the trustee must make such deduction from the divisible fund as shall be equal to the dividend which would have been payable to that creditor had his oath and grounds of debt been timeously lodged and his claim been sustained; and the sum so deducted shall form part of the fund for division on the occasion of payment of the next dividend (sec. 124).]

If a creditor has set a value on his security, it would seem that his claim is determined

¹ See *ante*, p. 304, subsec. 14.

² [If the claim be disputed, full legal evidence of the claim must be adduced. See *Kerr v MacEwan*, 1845, 7 D. 400; *Miller v Lambert*, 1848, 10 D. 1419.]

³ [See, on this subject, *Dyce v Paterson*, 1847, 9 D. 993.]

⁴ [See sec. 61 of the statute, where it is required that the

creditor shall value and deduct in order to vote, while here that valuation and deduction is to be made by the trustee.]

⁵ [See, as to the effect of a decree *cognitionis causa*, *Liston v McIntosh*, 1853, 15 D. 921.]

⁶ [The terms here specified are imperative. *Wright v Corrie*, 1842, 5 D. 164; and see *Kerr v MacEwan*, note 2.]

on that footing, so as not to be subject to any fluctuation. Indeed, it is so where the trustee, closing with his estimate, buys up the security. But if the trustee do not thus terminate the transaction, he shall rank the creditor for the balance, reserving to the creditor the effect of the security; then, if the subject of the security should undergo a change (if a house, for example, over which it extended should be burnt down, or a ship be lost, or goods should fall in value), it would appear that, according to the just construction of the Act, the creditor would be entitled to alter his valuation, and to insist on being ranked as a personal creditor for a greater balance.

Where the subject of the security is not taken by the trustee at the valuation put upon it, and is not realized at the period of the first dividend, it may be questioned whether the creditor is to receive his share of that dividend proportioned to his whole claim, or is obliged to content himself with a dividend on his balance merely, till the time shall come when it may be deemed expedient to bring the subject of the security to sale? The Act is perhaps expressed in terms too absolute, in providing that the amount or value of the security shall be deducted from the debt, and the creditor shall be only ranked, and draw a dividend for the balance, after such deduction. The undoubted meaning was to provide against the creditor finally drawing more from the fund than the dividend due to him as a mere personal creditor, but certainly not to deprive him in the ranking of his rights as a personal creditor, so far as they might be useful to him without injury to the other creditors. As a personal creditor, he is entitled to a dividend on his whole debt; and it is quite fair that this should be restrained, so far as the debt is covered by a security, to the effect of preventing him from claiming both under his security and as a personal creditor. But where the sale of the subject of his security is beyond his control delayed to a distant time, he ought to have the intermediate right of a personal creditor fully reserved to him, leaving the trustee, at settling with him for the price of the burdened subject, to adjust the account, by deducting the dividend already received.

[3. JUDGMENT ON CLAIMS, AND APPEALS.—By sec. 126, the trustee must, within fourteen days after the expiration of four months from the date of the first deliverance,¹ examine the oaths and grounds of debt, and in writing reject or admit them, or require further evidence in support thereof;² for which purpose he may examine the bankrupt, creditor, or any other party on oath relative thereto; and if he reject any claim, he must in his deliverance state the grounds of such rejection. He must also complete the list of the creditors entitled to draw a dividend, specifying the amount of their debts, with interest thereon to the date of the sequestration, and distinguishing whether they are ordinary creditors or preferable or contingent, and make up a separate list of any creditors whose claims he has rejected in whole or in part. Within eight days after the expiration of the above fourteen days, he must, by sec. 127, give notice in the Gazette published next after expiration of these fourteen days, of the time and place of the payment of the dividend, and also notify the same by letters put into the post office, on or before the first lawful day after the said fourteen days, addressed to each creditor, in which he shall specify the amount of the claim and proposed dividend thereon; and when he has rejected any claim, he must notify the same to the claimant by letter as aforesaid, which letter shall also contain a copy of his deliverance, and specify the amount of the claim.³ And if any creditor be dissatisfied with the decision of the trustee, he may appeal by a short written note to the Lord Ordinary or to the sheriff; but if no such note be lodged with and marked by the Bill Chamber or sheriff clerk (as the case may be) before the expiration of fifteen days from the date of the publication in the Gazette of the said notice, the decision of the trustee shall be final and

¹ See sec. 125, next page (4).

² [See *Pilling v Drake*, 1857, 19 D. 938, where additional evidence was allowed to support a bill written on a wrong stamp.]

³ [A certificate by the trustee, or an execution by a messenger or sheriff-officer, that such letters have been put into the post office, shall be sufficient evidence thereof (sec. 127).]

[conclusive so far as regards that dividend; and in case the claim have been rejected, such decision shall be without prejudice to any new claim being afterwards made in reference to future dividends, but which new claim shall not disturb prior dividends.]

The judgment of the trustee ought to contain a distinct and clear intimation that the claim is to be disposed of either by rejection or admission. It is only such clear determination that a creditor is bound to take notice of and object to; and if the trustee should, by the indistinctness of his intimation, and by afterwards proceeding to dispose of a claim without assigning a dividend, injure a creditor, he must stand responsible for the dividend which ought to have been set apart for him.¹

[4. STATE OF FUNDS.—By sec. 125, immediately on the expiration of four months from the date of the deliverance actually awarding sequestration, the trustee must proceed to make up a state of the whole estate of the bankrupt, of the funds recovered by him, and of the property outstanding (specifying the cause why it has not been recovered); and also an account of his intromissions, and generally of his management; and within fourteen days after the expiration of the four months, the commissioners shall meet and examine such state and account,² and declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors.]

The commissioners are ordered to audit the trustee's accounts, and by a minute in their sederunt-book to ascertain the net proceeds of the estate, and the trustee's commission. This seems to give to the creditors who have lodged their claims a *jus quæsitum* to have the fund ascertained at the proper time, by the recording of the minute of the commissioners, and they would undoubtedly be entitled to insist judicially that the commissioners should execute this part of their duty. If there be no fund fit for division, no fund recovered, or not beyond the expenditure, the proceedings with a view to a dividend cannot, of course, be enforced; and although, perhaps, the trustee ought to make up a state of the affairs under the control of the commissioners, to show the impossibility of paying a dividend, commonly the trustee, without doing so, trusts to his being able to justify himself if complained against. If the time have been allowed to pass without any ascertainment of the fund, it does not appear that the creditors who had lodged their claims previously could insist on a retrospective ascertainment of the fund, as it might then have been prepared for division, to the effect of excluding creditors claiming after the lapse of the statutory period. And if a final dividend be proposed at any subsequent time, without any previous ascertainment of the divisible fund by minute of the commissioners, all the creditors who have lodged claims before such final dividend would seem entitled to share equally.

In regard to expenses the general rule is, that the expense of every necessary part of the proceedings in the sequestration, the charges of the management, costs of suits, etc., shall form a burden on the common fund.³ But there must be excepted such part of the expense as may have been laid out in the prosecution of any project, litigation, etc., against the voice of the majority of the creditors, which must be laid on the minority, if the design have proved unsuccessful; if otherwise, the majority cannot reap the benefit without bearing

¹ *Ure v Miller*, 1824, 2 S. 545. [The decision was reversed, 1 W. and S. 565. No grounds are stated, but apparently, judging from the argument, on grounds not inconsistent with the doctrine of the text.]

² [They are also to ascertain whether the trustee has lodged the money recovered by him in bank or not; and if he has failed to do so, they are to debit him with a sum at the rate of twenty pounds on every hundred pounds not so lodged, and so after that rate on any larger or smaller sum, being not less than fifty pounds. They must also audit his accounts, settle the amount of his commission, and authorize him to

take credit for it in his accounts with the estate; and they are to certify, by a writing under their hands engrossed or copied in the sederunt-book, the balance due to or by the trustee in his account with the estate as at the expiration of the four months (sec. 125).]

³ [By sec. 154, all accounts for law business incurred by the trustee must, before payment by the trustee, be taxed by the auditor of the Court of Session, or of the Sheriff Court of the county in which the sequestration was carried on, as may be directed by a general meeting of the creditors.]

part of the expense.¹ Where, in litigation with one of the creditors, such creditor has been found entitled to expenses, no part of the amount is to be laid on that creditor's dividend, and this although the case may have been litigated at the desire of the majority of the creditors.² When, in such litigation, neither party is found entitled to expenses, the expense of the unsuccessful plea of the trustee is not to be charged on the creditor with whom the litigation was maintained.³

[5. SCHEME OF DIVISION AND RANKING.—By sec. 128, the trustee, before the expiration of six months from the date of the deliverance actually awarding sequestration, must make up a scheme of division of the fund directed by the commissioners to be divided, and apportion the same, according to their respective rights, among those creditors whose claims have been sustained by him or by the Lord Ordinary or sheriff, or who shall have appealed against his decision (which scheme shall be patent to all concerned); and he must send notice to each creditor of the amount of the dividend to which he may be entitled.⁴]

The debts of the several creditors are to be taken as they stand at the date of the first deliverance. As at that point of time the sequestration operates as an attachment and adjudication to every creditor *pro indiviso* of the debtor's estate and effects in payment of their several demands; and partial payments made by co-obligants, or from other sources, subsequently to the date of the sequestration, though prior to the entry of the claim, are not to be held as diminishing the claim, or extinguishing *pro tanto* the creditor's right in ranking on the estate.⁵

The following are the only rules for ranking the creditors of which it seems proper to take notice here:—

1. Effect is to be given to all preferences acknowledged in the law of Scotland,⁶ in so far as they have been obtained by conveyances, or diligence before the first deliverance. From this, however, must be excepted, preferences by voluntary deeds within sixty days of bankruptcy; preferences by poinding and arrestment within the same period; preferences by adjudication within year and day of the date of recording the trustee's adjudication; and preferences obtained abroad.

2. Where a creditor holds an heritable security, lien, etc., the trustee, in ascertaining the ranking on the personal estate, is to deduct from the amount of the claim the value of the security, and to rank the creditor only for the balance.

3. In ranking on the sequestrated estate, the holder of a bill, bond, or other obligation, in which several other obligants are bound, is a creditor for the undiminished debt, but not to draw on the whole more than twenty shillings in the pound of the whole debt.

4. Where the bankrupt is a partner of a company, the company creditors rank on the

¹ *Gray v Newlands*, 1821, 1 S. N. E. 96.

² *Girdwood & Co. v Fleming's Crs.*, 1821, 1 S. N. E. 158; *Morrison v Dundas*, 11 July 1809, F. C. [See *Fermin de Tastet & Co. v M'Queen*, 1825, 4 S. N. E. 245; *Shuurmans & Son v Goldie*, 1829, 7 S. 55.]

³ *Coltart v Bank of Scotland*, 1821, 1 S. N. E. 175. [See *Davidson v Lockwood & Co.*, 1824, 6 S. 1083.]

⁴ [See, as to the effect of irregularities in making up the scheme, *Allan & Co. v Liddell*, 1840, 3 D. 238; *Bonar v Liddell*, 1841, 3 D. 830.]

⁵ [See *Aiken v Greenhill*, 1826, 4 S. 479, as to a claim by a wife against the estate of her divorced husband, where she held securities in England. A partial payment from a third party does not affect the ranking for the full debt. *Mein v Saunders*, 1824, 2 S. N. E. 645; *Farquharson v Thomson*, 1832, 10 S. 526; *Houston's Exrs. v Speirs' Trs.*, 1835, 13 S. 945. See *Hamilton v Cuthbertson*, 1841, 3 D. 434, as to a partial payment after the death of a debtor, but before

sequestration of his estates, where he was held bound to deduct.]

⁶ [By sec. 122 it is declared, 'That the wages of workmen, and of clerks and shopmen and servants employed by the bankrupt, where such wages do not exceed sixty pounds per annum, are entitled to the same privilege as the wages of domestic servants to the extent of a month's wages prior to the date of the sequestration being awarded, or where sequestration is not awarded, prior to the concurrence of diligence for distribution of the estate of a party being notour bankrupt.' See *Lockhart v Paterson*, 1804, M. App. No. 2, Priv. Debt; *M'Glashan v D. of Athole*, 29 June 1829, F. C.; *Marshall v Philip*, 1828, 6 S. 515, where the mashman of a brewery was held not privileged; *M'Lean v Sheriff*, 1832, 10 S. 217, where the claim of a gardener was sustained. A trustee is not entitled, as a condition of paying a dividend, to demand an assignation to any collateral security held by the creditor. *Ewart v Latta*, 1865, 3 Macph. H. L. 36, 4 Macq. 983.]

partner's estate only for the balance of their debt, after applying the dividend received from the company's funds.

5. If the claimant have, after the date of the first deliverance, got payment or security out of any subject belonging to the bankrupt beyond the jurisdiction of the Court, he must communicate it before being allowed to draw.

6. All debts merely personal, and not covered by any security, are to be ranked *pari passu*. Pure debts are to be taken, with the interest of each accumulated, where interest is due, so as to make a principal sum as at the date of the first deliverance. Future debts are to suffer an abatement, or discount of interest, for the time to expire between the date at which the claim is made and the term of payment. And contingent debts and annuities are to be ascertained by compromise, arbitration, or process at law, as may be agreed on by the party and the trustee, with the consent of the commissioners.¹

7. The dividend upon a contingent debt (where it is not of the nature of a claim of relief,² a claimant being at the same time ranked in chief) is to be set apart, and deposited in the bank chosen by the creditors. The interest arising belongs to the creditors, and is to be included in the fund for their dividends, until the contingency whereupon the obligation depends is declared, when the dividend so deposited is to belong to the claimant or to the general fund, according to the terms of the obligation. The contingent interest which the creditors have in the sum so deposited, may, after the expiration of a year from the date of the sequestration, be sold, if it shall be thought prudent so to do by three-fourths of the creditors in value, assembled at a general meeting called for the purpose.

40. PAYMENT OF DIVIDENDS.

[By sec. 129, on the first lawful day after the expiration of six months from the date of the deliverance actually awarding sequestration, and at the place appointed, the trustee is to pay to the creditors the dividends allotted to them respectively in terms of the scheme of division;³ and he must lodge the dividends apportioned to those claims which are under appeal, but not finally determined, and the dividends effeiring to contingent creditors or other claimants not then entitled to uplift the same,⁴ in the bank appointed by the creditors, or failing such appointment, in any joint-stock bank of issue in Scotland in a separate account; or if the money be deposited in bank, he shall transfer it to a separate account in name of himself and the commissioners, to remain therein until the appeals be disposed of, or the dividends become payable.⁵

By sec. 130, on the expiration of eight months from the date of the deliverance actually awarding sequestration, the trustee shall again make up a state as above mentioned, which he shall within fourteen days after the expiration of the eight months exhibit to the commissioners. They shall then meet and examine and audit the same, and perform the other acts and duties incumbent on them, in manner before specified, and direct a second dividend to be paid, if there shall be funds to pay the same. If the commissioners shall direct a dividend to be paid, the trustee must make up lists of the creditors who are entitled and who are not entitled to payment of the dividend, and frame a scheme of division, and notify in the Gazette and by letters, and any creditor may appeal, all as is before stated with respect to the first dividend; but no appeal by a creditor is competent unless the note of appeal be lodged within fifteen days of the date of notification in the Gazette. By sec. 131, on the first lawful day after the expiration of ten months from the date of

¹ [They may be valued under secs. 53 and 54.]

² [See *Gibb v Brock*, 1836, 16 S. 1002.]

³ [The trustee cannot, after the scheme is final, strike out a claim ranked on it, on the allegation that it was entered by mistake. *Hamilton v Kerr*, 1830, 9 S. 40. See also *Barbour v Williamson*, 1835, 14 S. 27.]

⁴ [If a dividend be arrested and consigned by the trustee, and the arrestment then loosed, the claimant is entitled to the bank interest. *Parker*, 1841, 3 D. 1013.]

⁵ See, as to appeals, *ante*, p. 362 (3).

[the deliverance actually awarding sequestration, the trustee is to make payment of the second dividend to those creditors who are entitled to it, and lodge the dividend disputed or not then payable in the same manner as with respect to the first dividend.]

The like procedure is, by sec. 132, to be followed out as to subsequent dividends at similar intervals of time thereafter, in order that a dividend may be made on the first lawful day after the expiration of every three months from the day of payment of the immediately preceding dividend, until the whole funds of the bankrupt shall be divided.

By sec. 133, after the second dividend is made, a majority of the creditors, at any general meeting called for the purpose, may determine that future dividends shall be made at shorter intervals, and the affairs of the estate brought to a more speedy close; and even before the period assigned for the first dividend, three-fourths in number and value of the creditors present at the meeting after the bankrupt's examination, or at any subsequent meeting called for the purpose, may direct the trustee to apply to the Lord Ordinary or the sheriff for authority to make the first dividend at an earlier period than the expiration of six months from the date of the deliverance actually awarding sequestration, but not earlier than four months from that date, if upon cause shown it shall be found expedient so to do; and also to accelerate the time for making the second and other dividends. And when the Lord Ordinary or the sheriff shall, upon such application, accelerate the first or any subsequent dividend, which he is empowered to do, he is also to make the requisite provision for the acceleration of any other matters which he may find it necessary to accelerate in consequence thereof.

If it appear to the commissioners that a dividend ought to be postponed, they may, by sec. 134, do so till the recurrence of another stated period for making a dividend, and they shall authorize the trustee to give a notice to that effect in the next Gazette. And by sec. 135, in cases where the sequestrated estate consists chiefly of land, and in any other cases where it may be necessary, the Court of Session, or the Lord Ordinary or sheriff, on a special application by the trustee and commissioners, may authorize such alteration in the periods above mentioned for payment of dividends as shall be found most suitable to the circumstances of the case.]

The trustee is blameable, and may be complained of, if, having funds to divide, he delay the dividend beyond the appointed time; but if a delay should occur, he may proceed to make a dividend, although not at the regular time for the second or third dividend. The irregular or blameable delay will not invalidate the proceeding.

41. WINDING UP THE ESTATE.

[If, on the lapse of twelve months from the date of the deliverance actually awarding sequestration, it appear to the trustee and commissioners expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they are authorized by sec. 136 to fix a day for holding a meeting of the creditors to take these into consideration; and the trustee, besides advertising the same in the Gazette, must, fourteen days before the day appointed, send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with a valuation of the estates and of the outstanding debts and the consigned dividends. And if three-fourths in value of the creditors assembled at the meeting shall decide in favour of a sale, in whole or in lots, the trustee shall cause the estates, debts, and dividends to be sold by auction, after notice thereof published at least one month previous to the sale, once in the Gazette, and in such other newspapers as the creditors at the meeting shall appoint.¹]

¹ [See, as to the illegality of a private sale by the trustee and commissioners, *ante*, p. 344, note 2.]

42. DISCHARGE OF THE BANKRUPT.

1. GENERAL VIEW OF THE DISCHARGE.—It is the policy of the law of mercantile bankruptcy, in so far as regards the person of the bankrupt, to give encouragement, on the one hand, to honesty and fair mercantile enterprise, by affording a reasonable relief against those misfortunes to which every man exposed to the chances of trade is liable; and, on the other hand, to restore to the public the exertions and the talents of a trader or manufacturer, who has, without his own fault, become a bankrupt. Till the passing of the late statutes there was no power recognised by which a debtor could be discharged of his debts, without the consent of every creditor; though, from a very early period, the *cessio bonorum* has afforded a remedy against actual confinement to jail. Those remedies against the personal consequences of insolvency—the ancient one of *cessio bonorum*, and the more complete one of the modern law—are not inconsistent with each other, but, on the contrary, co-operate mutually in accomplishing the policy of the law. A debtor who has no right to expect an absolute discharge may be entitled, notwithstanding, to release from prison by means of *cessio*; and creditors, when called upon to grant or refuse their concurrence to the bankrupt's petition, are left more free and unrestrained in forming their resolution, when they know that their refusal to grant a discharge is not to be attended with the perpetual imprisonment of their debtor, but that the *cessio bonorum* will afford relief against imprisonment, while it enables the creditors to seize any concealed funds which may be brought to light.

The question of the bankrupt's title to a discharge is, in the first place, determined by his creditors; and next, their determination must be sanctioned, after due investigation, by the Court.

To understand how well the law is arranged, it should be remembered that there are two distinct classes of demerits which may obstruct a bankrupt's discharge. Under one is comprehended all those objections of fraud, embezzlement, corruption, and non-compliance with the requisition of the law, which are matter of clear proof and of judicial inquiry. Under the other may be included all those more subtile and delicate considerations relative to the bankrupt's prudence, and the propriety of his conduct, which cannot be subjected to the test of any rule of law, on which no court of justice can well determine, and which depend so much on mercantile information and opinion, that merchants alone can properly judge of the question. In the determination of these two sets of questions, the arrangements settled in the sequestration statute have been found to reconcile the interest of the public, and the due encouragement of mercantile speculation, with the justice due to individuals. For objections to the bankrupt's conduct, either upon the ground of fraud as a trader, or the more arbitrary question of imprudence and injudicious speculation, the creditors, as they form the fit tribunal, so they are alone empowered by the statute to decide on what ought to be done. For objections grounded on non-compliance with the statute, or actual fraud in his conduct as a bankrupt, the trustee in the first instance, and the Court in the next, are the proper judges; the Court, as a court of law, determining all questions respecting the validity of the concurrence by the creditors.

[2. WHEN DISCHARGE IS COMPETENT.—In relation to the discharge, the following enactments are made by sec. 146 :—

(1.) The bankrupt may, at any time after the meeting held after his examination,¹ petition the Lord Ordinary or the sheriff to be finally discharged of all debts contracted by him before the date of the sequestration, provided that every creditor who has duly produced his oath shall concur in the petition.

(2.) The bankrupt may also present such petition on the expiration of six months from

¹ It is not necessary that the bankrupt be in Scotland. 4 Pat. 480, and p. 809, particularly p. 815. [How v Bank of Stirling Bank v Stein, 1 March 1803, n. r.; aff. 27 May 1803, England, 1833, 12 S. 211.]

[the date of the deliverance actually awarding sequestration, provided a majority in number and four-fifths in value of the creditors who have produced oaths concur in the petition.

(3.) The bankrupt may also present such petition on the expiration of twelve months from the date of the deliverance actually awarding sequestration, provided a majority in number and two-thirds in value of the creditors concur in the petition.

(4.) The bankrupt may also present such petition on the expiration of eighteen months from the date of the deliverance actually awarding sequestration, provided a majority in number and value concur in the petition.

(5.) And the bankrupt may present such petition on the expiration of two years from the date of the deliverance actually awarding sequestration without any consents of creditors.

In these several cases the Lord Ordinary or the sheriff (as the case may be) is to order the petition to be intimated in the Gazette and to each creditor; and if, at the distance of not less than twenty-one days from the publication of the intimation, and on evidence being produced of the requisite concurrence (where concurrence is required), there be no appearance to oppose the same, the Lord Ordinary or the sheriff is to pronounce a deliverance finding the bankrupt entitled to a discharge. But if appearance be made by any of the creditors or by the trustee, the Lord Ordinary or the sheriff is to judge of any objections against granting the discharge, and either find the bankrupt entitled to his discharge, or refuse the discharge, or defer the consideration of the same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require. But no discharge can be granted to the bankrupt where, under the provisions of the Act, he is only entitled to apply for a decree of *cessio*.¹ Nor is it competent for the bankrupt to present a petition for his discharge, or to obtain any consent of any creditor to the discharge, until the trustee shall have prepared a report with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of the Act; and in particular, whether he has made a fair discovery and surrender of his estate; whether he has attended the diets of examination; whether he has been guilty of any collusion; and whether his bankruptcy has arisen from innocent misfortunes or losses in business, or from culpable or undue conduct.² This report may be prepared by the trustee, upon the requisition of the bankrupt, at any time after the bankrupt's examination, but shall not be demandable from the trustee till the expiration of five months from the date of the deliverance actually awarding sequestration. The report must be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference in any consent to his discharge.³

3. REQUISITE CONCURRENCE.—The creditors are under no control as to their concurrence. Against their decision there is no appeal, nor are they bound to account for or explain the grounds of it. They are left to proceed upon the whole train of the bankrupt's conduct, as they may have seen occasion to judge of him. And the refusal of their concurrence is an absolute bar to the discharge until the opposition be overcome.⁴ In every question where important rights belonging to the creditors are to be disposed of by the voice of a majority, great care must be taken to prevent the power from being exercised by persons having no right to a voice in the matter. The qualification which entitles a creditor to concur in discharging the bankrupt is examined very strictly. Every creditor who has been admitted by the trustee to receive his dividend, without any objection on the part of the other creditors, is

¹ See below, 375 (45).

² [The report must be specific, and not merely that the trustee is ignorant, otherwise the discharge cannot be granted. *Campbell v Brown*, 1855, 17 D. 430. It is not sufficient that the trustee states that 'he believes' the bankrupt has made a fair disclosure, etc. It must express his judgment after full inquiry. *Dixon's Trs. v Campbell*, 1867, 5 Macph. 767.]

³ [By 23 and 24 Vict. c. 33, it is enacted (sec. 3), that the Court or Lord Ordinary, or sheriff, may refuse the applica-

tion for the discharge of any bankrupt, although two years have elapsed from the date of the sequestration, and although no appearance or opposition shall be made by or on the part of any of the creditors, if it shall appear from the report of the accountant in bankruptcy or other sufficient evidence that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856.]

⁴ [Or two years have expired (sec. 146).]

entitled to concur in the petition for a discharge. A creditor whose claim has been rejected by the trustee, if he has not objected to that judgment, is to be held as struck off the list of creditors. But as there is no settled term, the expiration of which bars appeal, it would appear that such creditor, although he may have been too late for a dividend, may at any time appeal to the Court against the judgment of the trustee, to the effect of being reckoned among the concurring or non-concurring creditors in the question of discharge. A creditor who does not come forward with his claim till the discharge is before the Court, is still entitled to take his part in objecting upon cause shown, though too late as a concurring or non-concurring creditor: his debt will be subject, of course, to such scrutiny as may enable the Court to decide on his right to oppose.¹ Contingent creditors must be included in ascertaining the concurrence required to sanction the petition. A creditor of that class whose debts consist of annual sums, the cessation of which depends on a contingency (as an annuitant), may be, and in practice is, usually ranked for the market-price of the annuity; and to that extent the creditor's influence will reach in the question of discharge. A creditor, the existence of whose debt depends on a contingency, seems entitled to assent or dissent, as if the condition of payment were come.² As to a cautioner, both the principal creditor and he have an interest in the discharge, as fixing whether they shall be entitled still to hold the person bound, or to claim from any future fund of the debtor. But if they both concur in refusing the discharge, the non-concurrence is reckoned only to the amount of the principal debt in value, and as the dissent of one single creditor. If the principal creditor give his consent without consulting the cautioner, the concurrence will be effectual.

No relationship or connection with the bankrupt, however intimate, affords any objection to the vote of a creditor in the question of discharge. No objection on this ground is sanctioned by the statute; and however the evidence of a charge of fraud or collusion may be facilitated by this circumstance, it affords of itself no ground of objection at common law. A creditor becoming bankrupt by sequestration cannot sign the concurrence, for his interest is transferred so far as his powers are concerned. But a bankruptcy under the Act 1696, c. 5, will have no effect in depriving a creditor of his power to assent or to dissent from the discharge of his debtor. It was questioned whether a trustee on another estate can concur in the discharge of a debtor to the estate. It was said that he has no power to grant this as a spontaneous indulgence compensated by no counter consideration to his constituents; that he is empowered to compound and compromise; but that a discharge is neither. The Court were, however, satisfied that the trustee, as the representative of the creditors, is entitled to assent or dissent; that his constituents assembled, or the commissioners by their vote, may prevent him; but that the trustee is *prima facie* the legitimate organ of assent or dissent on the question of discharge to a debtor of the bankrupt.³

Where the creditor is a company, the signature of the firm of the company is necessary. But it may be questioned whether all the partners ought not to sign, as this is an act of extraordinary administration.⁴ In practice, the signature of the firm is daily made by a single partner, and taken as sufficient. But this unquestionably would be under the qualification that, if objected to by the other partners, it would be unavailing.

A general power does not seem sufficient to authorize a mandatory to give consent to the bankrupt's discharge. If any of the debts have been assigned after the concurrence, the assignee is not entitled to retract the concurrence.⁵

¹ The difference is to be marked between the right of such a creditor to object to the discharge on cause shown, and the necessity of his concurrence in a proposal for composition. [To entitle him to vote, the value must be ascertained. See p. 285 (5).]

² [Gemmell v North British Bank, 1853, 16 D. 264.]

³ Shirreff, 25 May 1811, F. C. [See Spence v Garden, 16

Dec. 1817, F. C., where there was the consent of a majority of the creditors.]

⁴ In England it is held *prima facie* sufficient that one partner has signed. *Ex parte Mitchell*, 14 Ves. 598; *ex parte Hall*, 17 Ves. 62, 1 Rose's Cases 3, Eden's B. L. 373.

⁵ *Dunlop v Scott Moncrieff*, 5 July 1803, n. r. So in *Sheriff v Steel*, 23 Nov. 1809. [See *Walker v M'Gilp*, 1835, 13 S. 539.]

The concurrence of the requisite number to the petition is conclusive in authorizing the application; and no alteration of this state of matters, during the time which must elapse before the discharge can be granted, will defeat it.¹ If the whole of the creditors who voted for the discharge were paid off by dividends drawn from the estate of primary obligants during this interval, the original concurrence would still be effectual to support the application, and entitle the Court to dispose of it judicially. But the concurrence is so far conditional, that, as the application cannot be granted without the bankrupt's compliance with all the requisites of the Act, so, should a creditor sign the concurrence, without any report by the trustee of the bankrupt's compliance, he may still object to the granting of the discharge, if it should turn out that the bankrupt has not complied.

Further, the concurrence must be fair, and not corrupt. The bankrupt, we shall immediately see, must swear that he has used no undue influence, and had recourse to no secret compromise with his creditors, to obtain their concurrence.²

If, in the number of creditors necessary to complete the concurrence, there be any who have been induced to concur by undue influence or a private compromise, the discharge will be void. And even if there should be a sufficient concurrence without the assent of the creditors so induced to agree, the same effect will follow; for if it can be said that any of the creditors whose concurrence is necessary, signed after the objectionable subscription, such other creditors may have been misled to agree, in reliance on the apparently fair concurrence of the persons bribed.³ And it may be said that each creditor gives his assent provisionally, in reliance on the truth of what the bankrupt is to swear as to the fairness of the concurrence; and that the discharge would not have been granted, unless means had been used which the statute has reprobated.

The prohibition speaks only of the concurrence of the creditors. But it will be equally applicable to the case of a creditor whose concurrence is not necessary, but who is bought off from opposing the petitioner in court.⁴

The same effect will follow though the agreement be made by the relations of the bankrupt,⁵ and he himself be really ignorant, or appear to be ignorant, of the corrupt bargain.⁶ The expressions in the Act will not probably be held as applicable only to bargains with the bankrupt himself; for, at common law, on the principles of mutual contract, the consent of the creditors cannot be said to be fairly given, where some are bribed by an advantage of which others, who assent only in the belief that they are equally dealt with, do not participate. Besides, it is beyond the reach of any court to penetrate into the secrets of such arrangements, or detect the bankrupt in the operations carried on by the instrumentality of his friends. If any enemy of the bankrupt has, in order to disappoint him, bribed a creditor to concur, when there might have been a sufficient concurrence without him, it will not deprive the bankrupt of his discharge.⁷

It is not a sufficient justification that the money received by the creditor is no part of a fund divisible among the creditors.

If the money has been paid by a person knowingly acting this illegal part, there will be no action of restitution. Where both parties are equally criminal, *melior est conditio defendentis*. If the bankrupt, for example, has a separate alimentary fund out of which he bribes a creditor, he will not be heard in an action of restitution. But where the person who has paid the money is a near relation, on whose compassion the refusal of the bank-

¹ [Reid, Irving, & Co. v Buchanan, 1838, 16 S. 540.]

² [See Riddle v Christie, 1821, 1 S. N. E. 145; Inglis v Gardner, 1843, 5 D. 1029.]

³ See, in illustration of this principle, the English case of Philips v Dreas, 15 East 248, where a creditor having been illegally induced to sign, and others who were accessory to the concurrence having signed after him, they were held to have been induced by his example.

⁴ This sort of case determined in England, in Sumner v Brady, 1 H. Black. 647.

⁵ [Riddle v Christie, note 2.]

⁶ Robison v Calze, Doug. 216; Holland v Palmer, 1 Pull. and Bos. 95. Lord Chancellor Eldon regretted this rule, but applied it in *ex parte Butt*, 10 Ves. jun. 360. See also *ex parte Hall*, 17 Ves. jun. 63.

⁷ *Ex parte Harrison*, 1 Christian 158.

rupt's discharge, in circumstances where it ought to be granted, operates as a torture, the above rule may be relaxed.¹

If the concurrence has been granted in consideration of a sum to be divided equally among all the creditors, the objection on account of inequality and fraud against creditors has no place. But it may be questioned whether it is not an illegal transaction, independently of statute. There is perhaps as much reason to fear the oppression exercised against the bankrupt and his friends in some cases, as in others fraud against the creditors. When a bankrupt has made a fair surrender of all he has, his creditors are bound in morality, though not in law, to grant his discharge; and to compel his friends to advance money in order to procure it, is to turn their humanity and friendship into an instrument of extortion.²

The statute requires the concurrence of the trustee as well as that of the creditors.³ There appears, however, to be this difference between them, that the creditors are entirely uncontrolled in giving or withholding their concurrence, while on the part of the trustee it is *debitum justitiæ* either to the bankrupt or to the creditors to give or withhold his concurrence. On this footing the trustee, being amenable to the jurisdiction of the Court, may be called upon to give his concurrence to the bankrupt's petition, or to show cause for his refusal. He acts not as a creditor, but as a judge. To his jurisdiction the bankrupt is subjected by the choice of his creditors, not by his own reference, nor by public appointment. And in deciding on the bankrupt's conduct, the trustee is not entitled to proceed on the same undisclosed motives or evidence on which a creditor may act, but on grounds of legal objection alone; as fraud, concealment, nonconformity with the statute.⁴

4. EVIDENCE OF CONCURRENCE.—The proper evidence of concurrence is a deed of consent regularly subscribed by the several creditors before witnesses. It is not, however, deemed indispensable that the deed should be so subscribed; and in practice such deeds are generally signed by the creditors without witnesses. If the creditor himself were to object, perhaps he would not be held bound by an informal subscription of a deed of concurrence, although acknowledged to be genuine. In practice, such concurrence is held good, as against other creditors objecting. Concurrence is generally given by a letter from the creditor, which ought undoubtedly to be holograph, or subscribed regularly before witnesses; but less formal declarations of consent are daily taken, and are, unless objected to by the creditor himself, held good evidence of his concurrence. If the concurrence be given at a meeting of creditors, the minutes of that meeting regularly authenticated will be good evidence.

5. JUDICIAL OPPOSITION.—Any creditor may oppose the discharge, although he has consented to the petition,⁵ or although his debt does not amount to £20, the sum which entitles him to be reckoned in number as to the concurrence. Besides objections on account of undue influence and secret compromise, the grounds of objection enumerated are:—Not having made a fair discovery and surrender, within which may be comprehended all those cases in which the bankrupt has practised any concealment, or destroyed any of the records of his trade;⁶ having refused to grant a disposition to the trustee without reasonable cause; having been wilfully absent from the diets of examination, or been guilty of any collusion,—an unhappy expression, as not sufficiently precise, but which hitherto has, under the

¹ In England at least it has been held in such cases, that as it is iniquitous and illegal for the creditor to take, so is it for him to retain, money so paid. *Smith v Bromley*, Doug. 696.

² In England, accordingly, an agreement for a sum to be equally divided is void. *Cooke* 447, and cases there. *Jones v Barclay*, Doug. 669, n. In Scotland the same view has not been adopted. *Stewart*, 2 July 1811, n. r.; *Bell*, 11 March 1815, n. r.; *Hall*, 11 March 1815, n. r.; *Monach*, 25 Feb. 1816, n. r.; *Gordon*, 1822, 1 S. 4.

³ [Under the present statute the trustee must make a report (*ante*, p. 368). Except in this respect, his concurrence seems not to be required.]

⁴ *Galloway v Bruce*, 1826, 4 S. N. E. 845.

⁵ [*Megget v Spence*, 1830, 8 S. 1063. Or although, having claimed in the sequestration, he has not been ranked for a dividend, or his debt be prescribed. *Campbell v M'Neille*, 1856, 18 D. 843.]

⁶ See *Spence v Philp & Law*, 1824, 2 S. N. E. 562.

sound discretion of the Court, served as the means of reaching frauds that otherwise might have been beyond judicial cognizance; and having failed, not from innocent misfortunes or losses in business, but from culpable and undue conduct. In these enumerated grounds of objection, there has been entrusted to the Court a power of investigation and of judgment relative to the conduct of the bankrupt, both before and after his failure, sufficient to reach the justice of every case. But in considering the conduct of a bankrupt, the Court is not confined to the alternative of either absolutely giving or withholding the discharge: there are many considerations which ought to limit the indulgence, without depriving the debtor of his discharge; or which should lay him under future restraint, without a full acquittance. These are provided for by the power either to grant or refuse the discharge, or annex such conditions thereto as the nature and justice of the case may require.

[6. OATH.—By sec. 147, if the bankrupt shall be found entitled to his discharge, he must make a declaration, or if required by the trustee or any creditor, an oath, before the Lord Ordinary or sheriff, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security; nor made or promised any payment; nor entered into any secret or collusive agreement or transactions, to obtain the concurrence of any creditor to his discharge.¹]

Where the bankrupt cannot swear the oath (as by reason of insanity), it would appear that the Court would authorize the discharge to be extracted on an oath sworn by those who had acted for the bankrupt.²

[7. DISCHARGE, AND EFFECT OF IT.—By sec. 147, the Lord Ordinary or the sheriff, on being satisfied with such declaration or oath, is to pronounce a deliverance discharging the bankrupt of all debts and obligations contracted by him or for which he was liable at the date of the sequestration. And when the deliverance discharging the bankrupt is pronounced by the Lord Ordinary or sheriff, an extract thereof, signed by the Clerk of the Bills or the sheriff-clerk, is forthwith³ to be transmitted to the accountant, who is to preserve the same with the copy of the proceedings in the sequestration transmitted to him, and make an entry thereof in the Register of Sequestrations; and extracts thereof, signed as aforesaid, are to be transmitted to the Keepers of the Registers of Inhibitions and Adjudications at Edinburgh, who are to enter the same in these registers. The deliverance by the Lord Ordinary or the sheriff operates as a complete discharge and acquittance to the bankrupt in terms thereof, and is to receive effect within Great Britain and Ireland and all Her Majesty's other dominions.⁴]

The general rule is, that the bankrupt is, from the date of the discharge, freed from all his pecuniary debts arising previously to the date of the first deliverance on the petition for sequestration.⁵ This is to be understood of debts present, future, or contingent. But the dependence of the application for discharge will not stop a creditor from proceeding with diligence.⁶ Nor is it effectual to protect the bankrupt against a debt incurred subsequently to the sequestration. [And by sec. 148, the Act shall not extend to discharge any prisoner

¹ [If the bankrupt shall be at the time beyond the jurisdiction of the Lord Ordinary or sheriff, or is by lawful cause prevented from coming before the Lord Ordinary or sheriff, commission may be granted to any fit person to take such declaration or oath (sec. 147).]

² So, in the case of *Paterson*, 2 Dec. 1813, the Court admitted an oath by the bankrupt's son as sufficient. [*Keiller*, 1842, 4 D. 742.]

³ [See, as to the meaning of the word 'forthwith,' *Stephen v Strachan*, 1853, 16 D. 63; *Campbell v Brown*, 1854, 16 D. 519.]

⁴ [See below, subsec. 49.]

⁵ [It does not apply to aliment of a bastard child, although

it arose prior to the date of the sequestration, in so far as it becomes due thereafter. *Marjoribanks v Amos*, 1831, 10 S. 79. And a discharge of a person as a partner of a company and an individual does not discharge him of a company debt. *Lindsay v Clelland*, 1844, 6 D. 412. A discharge was held not to reinstate the bankrupt in a claim of *solatium* for injury to character prior to the sequestration, so as to exclude the trustee from recovering it. *Thom v Bridges*, 1857, 19 D. 721. See *Steel & Co.*, 1855, 18 D. 34; and *ante*, p. 356, note 7.]

⁶ *Kay v Coates*, 1822, 2 S. 9. [Such an application is competent although a petition for discharge on a composition be in dependence. *Finlay v Donaldson's Trs.*, 15 May 1832, F. C.]

[with respect to any debt due to Her Majesty or her successors, or to any debt or penalty with which he shall stand charged at the suit of the Crown or any person for any offence committed against any Act or Acts relative to any branch of the public revenue, or at the suit of any sheriff or other public officer upon any bail-bond entered into for the appearance of any person prosecuted for any such offence, unless the Commissioners of Her Majesty's Treasury for the time being shall consent to such discharge.]

When, in a sequestration of both the estates of a company and the separate estates, a discharge is applied for by one of the partners, while there are others undischarged who, either from their absence or from their estates not being sequestered, do not apply, or from circumstances in their conduct are afraid to make the attempt, some difficulty may arise concerning the effect of what is done by the creditors. By concurring in the discharge of one of the partners, the creditors seem to renounce their claim against the other partners to that extent. Suppose, for example, that the debts of a company consisting of two partners amount to £5000, that the company funds pay off £3000, leaving a balance of £2000, each partner is liable for this to the whole extent of his fortune, and they are entitled to mutual relief when one has paid more than his share, or above £1000. If the creditors discharge one of those partners, they will be barred, it would appear, from claiming against the other more than his half, or £1000, for to that extent he is liable on his own account; and he cannot be forced to pay more, if the person truly the debtor, and for whom he is as cautioner bound, has been freed from his liability. But these are matters to be settled between the parties. The Court does not allow such difficulties to stand in the way of a discharge to one of the partners.¹ It seems to be only where there is a sequestration of the separate estate of the individual, combined with the sequestration of the estates of the company, that an effectual discharge can be granted to any of the partners by less than an unanimous resolution of all the creditors, or a deed signed by all. Where the creditors unanimously agree to discharge the partners of a company, on the company estate being fairly surrendered, it will of course be effectual. But in a sequestration of the company estate, not including the individual estates, it does not seem to be competent, by a majority of voices, to compel the rest of the creditors to forego their recourse against the separate estates of the partners. The indispensable condition of a discharge is, that the person discharged shall have given up all his estate and effects to be administered and divided among the creditors, according to the directions of the Sequestration Act. But this, in so far as regards the guarantee obligation of the partners, can take place only in a sequestration of the individual estate. Thus the proper place for a discharge is in the sequestration of the individual partner's estate, and a discharge by the vote of a majority appears to be competent in a company sequestration only where it is combined with a sequestration of the separate estate.²

43. DISCHARGE OF THE TRUSTEE, UNCLAIMED DIVIDENDS, AND SURPLUS.

[By sec. 152, after a final division of the funds, the trustee must call a meeting of the creditors by an advertisement in the Gazette, to be held not sooner than twenty-one days after such publication, specifying the time, place, and purpose of holding the meeting; and by letters addressed by post to every creditor who has produced an oath, to consider as to an application for his discharge. At this meeting he must lay before the creditors the sederunt-book and accounts, with a list of unclaimed dividends, and the creditors may then declare their opinion of his conduct as trustee; after which he may apply to the Lord Ordinary or the sheriff, who, on advising the petition, with the minutes of the meeting, and hearing any creditor, may pronounce or refuse decree of exoneration and discharge. An extract of

¹ *Fraser*, 27 May 1815, F. C., where the Court granted a discharge to one partner, though the company itself and the other partners did not apply for it. [See *Mellis v Royal Bank*, 22 June 1815, F. C.; *Lindsay v Clelland*, 1844, 6 D. 412.]

² This seemed to be the opinion of the First Division of the Court in *Dollar v Ross, Richardson, & Co.*, in May 1816, though the question was compromised, and never came to judgment (n. r.). [See *How v Bank of England*, 1833, 12 S. 211.]

[the decree, signed by the Clerk of the Bills or the sheriff-clerk, must forthwith be transmitted to the accountant, and must be entered in the Register of Sequestrations, and the bond of caution for the trustee delivered up.]

Every trustee in any sequestration must, by sec. 153, before his discharge transmit the sederunt-book to the accountant, who shall thereupon direct the trustee to deposit the unclaimed dividends in the same bank in which money received by him was lodged under the provisions of the Act, and the trustee must forthwith transfer the whole dividends not then claimed to such bank.¹ After the discharge of the trustee, it is competent to any person producing evidence of his right, to apply to the Lord Ordinary for authority to receive such dividends; and on the Lord Ordinary being satisfied of the claimant's right, a warrant shall be granted by him for payment of such dividend, whereof the accountant shall make an entry in the register, and upon such warrant the bank shall pay the same, but the claimant is not entitled to interest on such dividend.² And if, at the end of twenty-five years from the date of closing any sequestration, there shall remain in the bank any unclaimed dividends belonging to the estate, the same shall be vested in Government stock; and the dividends thereon must be regularly accumulated for the purpose of forming a fund for defraying the expense of proceedings in bankruptcy or otherwise, as Parliament shall hereafter direct.³

Any surplus of the bankrupt's estate and effects that may remain after payment of his debts, with interest, and the charges of recovering and distributing the estate, is to be paid to the bankrupt, or to his successors or assignees (sec. 155.)

44. WINDING UP THE ESTATE OF A DECEASED DEBTOR.

By sec. 164, it is competent to one or more creditors of parties deceased to the amount of one hundred pounds, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court for the appointment of a judicial factor.⁴ After intimation of the petition to the creditors of the deceased and other persons interested, and hearing parties, the Court may appoint such factor, subject to such conditions as to caution, and such other conditions, as the Court may provide by Act of Sederunt.⁵ The factor is to manage the estate, recover debts due to it, realize the moveable effects by public or private sale, as may be most expedient, dispose of the heritable estate by public sale or private bargain, according to such directions as the Court on report of the accountant may give, and apply the free proceeds (after defraying all expenses) in payment of the claims of creditors according to their several rights and preferences, conformably to a state of funds and scheme of division to be prepared by him, and considered and approved of by the Court on a report by the accountant. Thereafter the factor is to account for the residue, if any, after payment of debts and expenses, to the parties having a right to the deceased's succession. And the accountant must annually examine and audit the proceed-

¹ [They are to be there entered in an account to be kept under the title of 'Account of Unclaimed Dividends;' and a book or books shall be kept in the office of the accountant, to be entitled 'The Register of Unclaimed Dividends,' containing a list, with the names arranged alphabetically, of all the creditors entitled to such unclaimed dividends, and in what bank deposited, which shall be patent to all persons; and the deposit receipts for such unclaimed dividends shall be transmitted to the accountant (sec. 153).]

² [The interest is to go into a general fund, of which an account shall be kept by the bank, to be called 'The Interest Account of Unclaimed Dividends,' and which shall be applied in such manner as shall be regulated by any Act of Parliament (sec. 153).]

³ [The bank must once yearly at least balance the accounts, and accumulate the interest with the principal sum, so that both shall thereafter bear interest as principal; and if the bank fail to do so, it shall be liable to account as if the money had been so accumulated (sec. 153).]

⁴ [See *Macfarlane*, 1857, 19 D. 656.]

⁵ [The Court shall have full power to regulate by Act of Sederunt the caution to be found by the factor, the mode in which he shall proceed in realizing and dividing the funds, and otherwise in the discharge of his duties, and any other matter which they may deem necessary (sec. 165). This has been done by A. S. 25 Nov. 1857, which in more detail makes provisions to the same effect as in the above enactment.]

[ings, intromissions, and accounts of such factor, which shall be duly transmitted for that purpose, and report to the Court thereon from time to time as he may deem expedient, and generally exercise the like powers and discharge the same duties with regard to him as he is empowered and required to exercise and discharge with regard to a trustee under a sequestration, but subject always to the control of the Lord Ordinary or the Court.

If a party deceased has left a settlement, appointing trustees or other parties having power to manage his estate, it is nevertheless competent for the trustees under the settlement, with or without concurrence of the creditors of the deceased and of the persons interested in his succession, to apply in like manner to the Court, and obtain from them an order on the accountant to superintend the administration of the estate; in which case he shall exercise the like powers and discharge the like duties, under the control of the Lord Ordinary or the Court, which have been provided for as above mentioned (sec. 166).

45. *DISCHARGE OF BANKRUPT AS IN CESSIO.*

By sec. 168 it is enacted, that it shall be competent for a majority in number and value of the creditors at any meeting called for the purpose, after the election of the trustee, if it shall appear to them that the estate is not likely to yield free funds for division among the ordinary creditors, after payment of preferable debts and expenses, beyond one hundred pounds, to resolve that the bankrupt shall only be entitled to apply for and obtain a decree of *cessio*, and shall have no right to a discharge in the sequestration. On such resolution being passed, it is the duty of the trustee, after giving eight days' previous notice to the bankrupt, to report such resolution to the Lord Ordinary or the sheriff, who shall hear parties if required, and decide with reference to the whole circumstances of the case, with or without a report from the accountant, whether such resolution shall be confirmed or recalled; and if the resolution shall be confirmed, the bankrupt shall have no right to a discharge in the sequestration, but shall be entitled to apply for a decree of *cessio*, and the Court shall have power to grant such decree in the sequestration without requiring the bankrupt to bring a separate process; and in all other respects the sequestration shall be proceeded with in common form.]

SECTION VI.

INTERNATIONAL LAW IN RELATION TO BANKRUPTCY.

46. *GENERAL PRINCIPLES OF INTERNATIONAL LAW AND BANKRUPTCY.*

It is of great importance to regulate the several relations of the laws of countries connected with each other in commercial intercourse, so as to facilitate an equitable arrangement of the affairs of bankrupts, and a fair distribution of their estates. If there were a perfect accordance among the laws of all countries, the fullest effect would in each country be given to conveyances made for the purpose of collecting and distributing all the estates and funds, of whatever kind, among creditors, according to the law of the bankrupt's residence and seat of trade. For the attainment of this perfect accordance, even in Great Britain and Ireland no provision has been made by legislative enactment. The matter has been left entirely to the regulation of those principles of international law which guide the connections between states, and prescribe the sanction and authority which is to be allowed by each to the institutions and laws of another. Perhaps it is better, on the whole, that a subject so full of difficulty should thus be left to the guidance of the principles of general jurisprudence; and in the settlement of those points which have occasioned contests in the Courts, there is much reason to approve of and applaud the way in which the law has been fixed. Formerly, the principles were ill understood, and great confusion, with a distressing variety and shifting of opinions, were the result. Of late years, the leading points of the doctrine have been well settled in the British dominions.

Persons resident abroad, whether natives of Scotland or foreigners, may be indebted to persons resident in Scotland, and by certain proceedings they may be called upon to answer in our courts for debt, and their property affected by the diligence of the Scottish law. All the provisions of the law of bankruptcy in Scotland, for attaining equality among creditors, are open to the creditors of persons resident abroad; though the peculiar process of sequestration cannot be admitted, even with the debtor's own concurrence, where his trade has not been carried on in Scotland.¹ The bankruptcy, which may be established in the way already explained, will have no effect beyond Scotland, so as to equalize attachments in other countries, or to render voluntary conveyances made abroad objectionable.

47. EFFECT OF INTERNATIONAL LAW ON MOVEABLE ESTATE.

The great rule on which the whole doctrine of the international effect of bankruptcy depends has been fixed in the United Kingdom upon a general principle of the law of nations; namely, that the moveable or personal estate is held as situated in that country where the bankrupt has his domicile; and that it is to be administered in bankruptcy according to the rules of the law of that country, just as if locally placed within it. The consequence of this rule is, that a commission² of bankruptcy in England or in Ireland, and the assignment following on it,³ and a sequestration in Scotland, have the effect of transferring to the assignees or trustee the whole moveable estate of the bankrupt, defeating all preferences attempted to be obtained by the diligence of the law of the country where such estate happens to be placed, or by any voluntary conveyance of the bankrupt, after the period when the effect of the proceedings under the bankruptcy attaches to the funds; but that it is insufficient to carry the real estate.⁴

This doctrine has in Scotland been fully established, though for a long time the principles were unsettled, and the determinations of our Court exhibited a very distressing versatility of opinion.⁵ The principle that moveables follow the law of the owner's domicile had been finally and conclusively settled by the Court of Session in several cases of intestate succession, and the decisions of that Court were affirmed by the House of Lords.⁶ The first case in which this principle came to be applied in bankruptcy was one in which an English creditor of English bankrupts arrested, in Scotland, goods belonging to the bankrupts, after a commission of bankruptcy had been issued in England, and an assignment had been executed, under which the assignees claimed the goods. The Court preferred the English assignees, thus rendering void an arrestment used by an English creditor posterior to the commission and assignment.⁷ Still it was thought that there might be some pecu-

¹ See *ante*, p. 284, subsec. 4.

² It has, however, been decided that a native domiciled abroad (and the analogy will hold as to a foreigner), who granted an heritable bond over his Scotch estate, was liable to the operation of the Act of 1696, c. 5, as extended. *Waldie, Tr. for Chatto, v Blackburn*, 22 Feb. 1810, n. r.; *Falconer v Weston*, Nov. 1814, F. C. [See *Dixon & Co.*, 1828, 7 S. 132; *White v Briggs, Thorburn, & Co.*, 1843, 5 D. 1148.]

³ [The proceeding is now by adjudication in bankruptcy (see 32 and 33 Vict. c. 71, part 1), and keep this in view in reading the text. See *Smith's Merc. Law*, p. 578 et seq.]

⁴ See, as to England, *Solomons v Ross*, 26 Jan. 1764; *Jollet v Reitveldt*, and *Deponthieu v Baril*, in Chancery, 23 Nov. 1769; *Hunter v Potts*, 4 T. R. 182; *Sill v Worswick*, 1 H. Blackst. 665; *Neill v Cottingham*, *ib.* 132.

⁵ It seems unnecessary to enter into any account of those earlier cases, for the matter has undergone a very thorough investigation, and has been settled conformably to just principles. These earlier cases are: *Ogilvie*, 1746, 5 Br. Sup. 280,

note; *Wilson's Assignees v Fairholme*, 1755, M. 4556, 5 Br. Sup. 280; *Thorold v Forrest*, 1764, M. 4561, and App. 1, Foreign; *Pewtress v Thorold*, 1768, M. 4561; *Vasie v Glover*, 7 Aug. 1776; and *Parish v Khones*, 1775, 5 Br. Sup. 451, Hailes 714.

⁶ *Bruce v Bruce*, 1788, M. 4617, aff. 3 Pat. 163. See 2 Bos. and Pull. 230, note; *Bell's Ca.* 519, note. *Hog v Hog*, 1791, M. 4619, aff. 3 Pat. 247; *Durie v Coutts*, 1791, M. 4624, 3 Pat. 448.

⁷ *Strother v Read*, 1803, M. Forum Compet. App. 4. This is a leading case, which is not now to be questioned; and no one who understands the argument or the subject has ever dreamt in any subsequent discussion of questioning the judgment. The doctrine is directly confirmed in *Falconer v Weston*, 18 Nov. 1814, F. C. [The general rule is, that the property vests in the assignees retroactively from the act of bankruptcy, subject to certain exceptions. See *Smith's Merc. Law*, 652. The principle acted on in the above cases was given effect to in *Lindsay v Paterson*, 1840, 2 D. 1373.]

liability in the case of a Scottish creditor, unconnected and unacquainted with the English law, taking a fair advantage of those means of securing his payment which the law of Scotland affords. But a case having occurred for trying this question, the same principle was applied to it as to the former case, and the Scottish creditor was found liable to the distribution of the English bankrupt law, from the moment it attaches to a subject not already affected by a legal security.¹ Next, it was questioned whether arrestment used before the assignment, but after the commission, was available against the assignees; and the Court decided that it should not be available, the commission operating from its date.² The only point which remained undecided was, whether diligence may effectually be used before the teste of the commission, but after the first act of bankruptcy? This case admitted of more doubt, as depending upon the doctrine of relation back to the act of bankruptcy, rather than on the actual and immediate effect of the commission or assignment; and the Court held the act of bankruptcy to have no relation back, so as to affect arrestment in Scotland.³ Great difficulty still remained in the case of a company having a domicile in several countries. Admitting the doctrine of *Strothers v Reid* as ruling the case of individuals, viz. that the law of the domicile regulates in bankruptcy, as in succession, the effect of the conveyance to the creditors, still it was doubtful what should be the effect of a double domicile with a double set of creditors, each trusting to the laws of bankruptcy as established in the domicile of their debtor. This was the difficulty that occurred in the case of the *Royal Bank of Scotland v Stein*, but the Court disregarded the distinction, and held the proceedings in bankruptcy in either of the domiciles of the company to comprehend the whole personal estate of the entire concern.⁴

This, then, settles the whole doctrine in the law of Scotland,⁵ and on a footing so satisfactory, that all future cases may easily be determined on the broad principle which has thus been established.⁶ Another great point in this doctrine is, What effect shall be allowed to a different decision in any foreign country from that which has been adopted in these islands? Let it be supposed, for example, that funds of the bankrupt are in a country in which the sequestration and the conveyance to the trustee are held to be of no force, and where preference is given to the diligence of the country in which the effects are situate :

¹ *Selkrig v Davies*, 20 Nov. 1805, aff. 2 Dow 230, 2 Rose 291.

² *Morrison's Assignees v Watt*, 4 March 1807, n. r. The same decision was pronounced as to an American commission of bankruptcy, in *Maitland v Hoffman*, 1807, M. App. Bkt. No. 26. [See *Battray v White*, 1842, 4 D. 880. In *Mein v Turner*, 1855, 17 D. 435, a sequestration was awarded in 1846 of the estates of Turner, who, without being discharged, went to Liverpool, where he carried on business, and an adjudication in bankruptcy was issued against him by the Court of Bankruptcy there in 1854. The trustee under the sequestration applied in 1855 to have the estates acquired by Turner in the intermediate time in England declared to be vested in him under a provision in the Scotch statute to that effect. But the Court refused the application in respect of the subsistence of the English adjudication.]

³ *Hunter & Co. v Palmers*, 1825, 3 S. N. E. 402. Here the commission was issued 8 July 1819. In February preceding, the bankrupt committed several acts of bankruptcy; in April, was notoriously insolvent; and on 3d May arrestments were used in Scotland of debts due to the bankrupt. The Court held the arrestments not to be affected by the commission of bankruptcy.

⁴ *Royal Bank of Scotland v Stein & Co.*, 20 Jan. 1813, F. C., Rose's Cases 462.

⁵ Where a voluntary deed of trust has been executed abroad
VOL. II.

for the benefit of creditors, it may perhaps be liable to question, so far as concerns property in this country, on the footing of the bankrupt statutes of 1696, c. 5, etc. But at least it is clear that no creditor who has acceded to the trust abroad can, in Scotland, contend for a preference against the trustees. *Parish v Khones*, 1776, 5 Br. Sup. 451, Hailes 714: [See *Donaldson v Ord*, 1855, 17 D. 1053, as to a competition between an English trust-deed for creditors and an arrestment by a non-acceding creditor in Scotland.]

⁶ Doubts have sometimes been entertained, in cases of the above description, whether the assignees under an English commission of bankruptcy are not bound to produce evidence of the bankruptcy, as well as of the commission and assignment. It was indeed formerly required, in all actions by assignees in England, that they should prove the act of bankruptcy, as part of their title to pursue; and it was not easy to get over the necessity of doing this in actions pursued in Scotland. But by 49 Geo. III. c. 121, sec. 10, it was provided that this shall no longer be necessary; and 'that the commission of bankruptcy, and the proceedings under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt,' unless the other party shall give notice that he intends to dispute such matters. [See *Smith's Merc. Law* 668; and 12 and 13 Vict. c. 106, sec. 133 et seq.]

is the creditor, who recovers payment under such local rule, obliged to pay over to the trustee in this country, for general distribution, the money he has received? And this, again, resolves into two questions: Whether the creditor can claim for any balance, without communicating what he has received; and whether he is liable to an action for restitution?¹ In England it is held that an English creditor who, having notice of the bankruptcy, makes affidavit in England in order to proceed abroad, cannot retain against the assignees what he recovers;² that a creditor in the foreign country would not, if preferred by the laws of that country, be obliged to refund in England;³ and that, at all events, such a creditor cannot take advantage of the bankrupt laws in England, without communicating the benefit of his foreign proceedings. In Scotland there is an express provision in the statute relative to payments and preferences abroad, the policy of which it is proper to explain. As the jurisdiction of the Court of Session does not reach foreign countries, it is provided that, whenever the principle of the law of nations does not operate, or has been evaded, the creditor who, after the first deliverance on the petition for sequestration, shall obtain payment or preference abroad, shall be obliged to communicate and assign the same to the trustee for behoof of the creditors before he can draw any dividend out of the funds in the hands of the trustee; and that, at all events, whether he claims under the sequestration or not, he shall be liable to an action before the Court of Session, at the instance of the trustee, to communicate the security or payment, in so far as the jurisdiction of the Court can reach him.⁴ It may, however, as already observed, be doubted whether this enactment, in so far as it exposes a creditor to a challenge, even where he does not claim under the sequestration, might be held to include foreign creditors, not apprised of the bankruptcy and proceedings in this country, but who, having recovered in the usual way the property of their debtor abroad, should have come afterwards to Scotland. The question occurred under these enactments, whether a local statute in one of our colonies abroad, which was said to proceed on views of local utility, did not so far qualify the sequestration statute of this country, that the foreign creditors should be entitled to retain the preference they had obtained. But the Court held that the preference could not be supported.⁵

48. EFFECT OF INTERNATIONAL LAW ON REAL ESTATE.

As to estates in land, or connected with land, there is a difference of principle very remarkable. The heritable or real estate is regulated not by the law of the domicile, but by the territorial law. A real estate in England is not held to be under the disposition of the bankrupt laws of Scotland if the proprietor be a trader there. Nor is an heritable

¹ See *ante*, pp. 336-7.

² *Hunter v Potts*, 4 T. R. 182; *Sill v Worswick*, 1 H. Blackst. 665; *Philips v Hunter*, 2 H. Blackst. 402, where the judgment of the Court of King's Bench was affirmed. [See *Smith's Merc. Law* 646.]

³ In *Sill v Worswick*, 1 H. Blackst. 693: 'I do not wish to have it understood,' said Lord Loughborough, 'that it follows as a consequence from the opinion I am now giving (I rather think the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignees, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided.'

⁴ 54 Geo. III. c. 137, sec. 51. [There does not appear to be in the Bankruptcy Act an express provision to the above effect; but the enactment as to the vesting of the estates in the trustee, and the nullification of subsequent diligence and payments, seem to operate to the same effect.]

⁵ *Bennet, Tr. for Crawford & Co.'s Crs., v Johnston*, Winter Session 1819, n. r. [See *Stewart v Auld*, 1851, 13 D. 1337. A company carrying on business in Glasgow and Sydney became insolvent, and a commission of bankruptcy was issued against them in Sydney. Six weeks afterwards they were sequestrated under the Bankruptcy Act, and both processes proceeded concurrently; the assets in Sydney being managed by the assignee there, and the estates in Scotland by the trustee. It was held that a creditor who had obtained payment of a dividend of 7s. 6d. per pound in Sydney could not claim to be ranked in Scotland for his full debt, without deduction of the sum received by him.]

estate in Scotland affected by the English law; and yet the spirit and policy of the laws, considered internationally, should open to the creditors of a bankrupt in either country the power of attaching his real estates.¹ The Scottish sequestration (besides imposing a legal obligation on the bankrupt to execute a conveyance) carries, by force of the confirmation in favour of the trustee, all the heritable or real estate as well as the personal. But this, in England, has been held to produce no further effect than to entitle the trustee to take proper measures indirectly for obtaining the bankrupt's property, which could not be obtained by legal process.² The English commission of bankruptcy formerly comprehended no conveyance of the real estate, nor did it impose any legal obligation on the bankrupt to grant a conveyance. When assignees under an English commission, therefore, came to take measures in Scotland against the heritable estate, they could do so only by means of a private deed of conveyance, or by the diligence of adjudication. Of these, a deed of conveyance is the most likely to give the assignees a chance of carrying off the heritable estate for distribution in England. But such deeds were liable to challenge on the same footing with a Scottish trust-deed. They were excluded by the diligence of adjudication, or superseded by the action of judicial sale at the instance of the Scottish or non-concurring creditors, or by a sequestration.³

49. BANKRUPT'S DISCHARGE OR CERTIFICATE.

A general principle was laid down by Lord Mansfield, which is universally acknowledged to be just, that where a debt is discharged by the law of one country, it will be discharged in another.⁴ The application of this doctrine admits of no difficulty, where a particular discharge can be pleaded by the debtor; but in applying it to the case of a general discharge to a bankrupt, questions of nicety arise. The chief class of difficulties flow from the maxim, that a debt contracted in one country, or an engagement meant to be performed there, is not to be regulated by the law of another country; the creditor not being supposed to rely on any rule of decision but that of the country where execution is demandable. Thus, where both creditor and debtor reside in the country in which the debt has arisen, and where the discharge is granted, the question is, whether the creditor can, after a general discharge (as by an English certificate), follow the debtor into another country, and there prosecute him? In England, the leading case on this point was, where the defendant, having been a bankrupt in Ireland, had there obtained his certificate, and was sued in England by an Irish creditor for a bill of exchange drawn in Ireland, and payable by the defendants. The certificate was found a good defence.⁵ Lord Mansfield in that case referred to another, which he remembered in Chancery, of a *cessio bonorum* in Holland, which is held a discharge in that country; and it had the same effect in England.⁶

In Scotland the same doctrine is established by the cases quoted below.⁷

¹ See the provisions in the English Insolvent Debtors Act, 1 and 2 Vict. c. 110, for vesting in an assignee all the bankrupt's real and personal estate, 'both within this realm and abroad.' [In *Rattray v White*, 1842, 4 D. 880, it was held that the above statute applies to Scotland; and that the English vesting order and appointment of an assignee, when registered in the General Register of Sasines at Edinburgh, operates a transference of the real right in the bankrupt's heritable property in Scotland in favour of the English assignee, and consequently that it is incompetent for the bankrupt's creditors in Scotland to interfere with heritable property there so vested in the assignee, or with his disposal or judicial management thereof.]

² See the observations by the Lord Chancellor on occasion of the appeal in *Selkrig v Davies*, 2 Rose 311. See *ante*, p. 341.

³ [*Falconer v Weston*, 18 Nov. 1814, F. C. A question was

afterwards raised, 17 Dec. 1817, whether the English assignees should not have the proceeds of the heritable estate paid over to them by the trustee in the sequestration, for distribution under the commission of bankruptcy? The Court held that they were not entitled to this. [See 12 and 13 Vict. c. 106, sec. 141 et seq.; *Smith's Merc. Law*, p. 635 et seq., for the English law.]

⁴ *Ballantine v Golding*, Cooke's B. L. 515.

⁵ Same case.

⁶ See *Potter v Brown*, 5 East 124, where one of the points turned on the effect of an American discharge, supposing the debt to be American.

⁷ *Sir James Rothead v Scott*, 1724, M. 4566; *Marshall v Yeaman*, 1746, M. 4568; *Christie v Straiton*, 1746, M. 4569; *Coalston v Stewart*, 1770, M. 4579; *Watson v Renton*, 1792, M. 4582, Bell's Ca. 92. See *ante*, p. 372.

The residence of the creditor being in another country does not seem to vary the case; for upon no principle can it be held that his right, arising on a personal contract against the debtor, can alter with his change of place.¹ But the locality of the contract has, in England, been admitted to raise a distinction. Thus, an English merchant having sold goods in England to a merchant in Maryland, the contract was held by its locality to be exempt from the discharge under the bankrupt laws of Maryland.² In Scotland a similar decision was pronounced in a case where goods were delivered by a Scottish merchant for and on the order of an English merchant, to the carrier from Dunbar to Berwick. The debt was held to be Scottish, and the English certificate not to be effectual against it.³ But where the debt is made payable in any particular country, that seems to be the place according to the law of which the discharge must, by the force of stipulation, be regulated. In the case of *Watson*, a part of the debt was liquidated by a bill payable at Berwick, and the Court held this to be an English debt; while the open balance of the same debt, resting on the contract of sale alone, they considered as Scottish. A bill drawn on a person in a particular country, without any other place of payment, is held to be a debt of that country.⁴ But wherever the proceedings in bankruptcy are such as to include the whole of the debtor's estate, his discharge in that bankruptcy has been held effectual as a discharge in Scotland.⁵

Another class of difficulties springs from the peculiar effect which is sometimes given to a general discharge, or to particular proceedings in the country of the bankrupt's residence.⁶ In England, a certificate under a commission of bankruptcy is of itself a discharge of all proceedings at law, by creditors who have come in under the commission, but not against those creditors who make their election to neglect the commission, and take proceedings at law. It would be manifestly against the spirit of the bankrupt law, which offers to the debtor a full discharge as the price and condition of his surrender, if creditors proceeding at law were not subject to have their debts discharged by the certificate; and therefore the certificate is declared to be effectual against all creditors who might have come in under the commission, although they have made their election to proceed at law. On the one hand, then, a creditor who has made his election to proceed at law may bring his action against the debtor, in order to attach his person either in England or in another country, notwithstanding the subsistence of the commission, provided the certificate has not been allowed. On the other, no creditor who has proved his debt under the commission can take such proceedings, even before certificate allowed; his action will be discharged, as if the bankrupt held his certificate.⁷ Under the former law, if such a creditor chose to refund the

¹ In *Watson v Renton*, p. 379, note 7, the English certificate was held effectual to discharge one of the debts, although the creditor resided in Scotland. See *Richardson v Lady Haddington*, 1824, 1 Shaw's App. Ca. 406. [Also *Williamson v Taylor*, 1845, 8 D. 156.]

² *Smith v Buchanan*, 1 East 6.

³ *Watson v Renton*, p. 379, note 7.

⁴ In *Armour v Campbell*, 1792, M. 4476, Bell's Ca. 109, a bill was drawn from New York on Greenock, in favour of Armour in Scotland; but it was not accepted. The Court held it to be a Scottish debt, not discharged by the bankrupt certificate in New York in favour of the drawer. In *Royal Bank v Stein & Co.*, 20 Jan. 1813, F. C., the bills were accepted by the drawees in England, and held to be English.

⁵ In the above case of the *Royal Bank* this was held in the Court of Session, although the commission of bankruptcy clearly did not carry the whole estate, and the bankrupt was not even bound to convey his heritable estate to the assignees. So far the case was decided on a ground which in point of fact failed. The estate had indeed been conveyed to the assignees under the commission, but this was by a private

deed. That, however, could scarcely support the decision were it again brought into question. As a decision between the parties, it stands securely enough upon another ground, viz. that the debts in question were English debts.

⁶ [See *Lusk v Elder*, 1843, 5 D. 1279. Here the estates of a party carrying on business in Scotland, but who was also a partner of an English company, were sequestrated under the Scotch Bankruptcy Act; and it was held that a creditor of the company was entitled to be ranked upon his sequestrated estate, *pari passu*, with his personal creditors according to the Scotch law of ranking, though by the law of England company creditors are not entitled to rank upon the estate of an individual partner till his personal creditors have been fully paid. See also *Richardson v Gavin's Trs.*, 1853, 15 D. 434.]

⁷ See Cullen, p. 148 et seq. By the statute 49 Geo. III. c. 121, the claiming or proving under a commission is declared to be an election to take under the commission. See 6 Geo. IV. c. 16, sec. 59. [12 and 13 Vict. c. 106, sec. 182; *Smith's Merc. Law*, p. 596.]

dividend under the commission, he might have proceeded at law before certificate allowed; but this privilege is now cut off.¹

This doctrine should, according to the principles of international law, receive effect in other countries as well as within the territory of England, where the person against whom it is pleaded, and the debt to which it is contended to apply, are clearly within the reach of the law. Thus, where an English creditor claims under a commission in England, and so by the law of England the debtor is discharged from all proceedings at law, it would seem that, on the debtor going to Scotland, he cannot there be arrested or proceeded against, but will be protected by the operation of the commission, on the same principle as he would be held discharged by a certificate allowed.² The certificate, in England, is an effectual discharge only of such debts as may be claimed under the commission; and till very lately the class of creditors who could not claim was very considerable, for no contingent debt gave the creditor a right to prove under the commission. But Sir Samuel Romilly found a remedy, at least for part of this evil, though he could not venture to go quite so far as he wished. In one of the Acts proposed by him, it is provided that annuity creditors shall be entitled to claim under a commission for the value of the annuity; and that the certificate shall be a discharge against all demands, in respect of such annuity and the arrears and future payments thereof, as in ordinary debt.³ Still, against no other class of contingent creditors will the English certificate prove a discharge either in England or in Scotland.⁴

The discharge of a bankrupt in Scotland, under a sequestration, is effectual against all debts of whatever description, present, future, and contingent, in every imaginable shape; and therefore, on the principles of international law, such discharge must be admitted in England as a good acquittance of any debt which does not fall under the exception of being a foreign debt, not under the disposition of the law of Scotland.⁵

The discharge in a *cessio bonorum* is of a limited nature; and when pleaded in another country, it cannot produce a stronger effect than if pleaded in a Scottish court. And although a foreigner may have the relief of *cessio* in Scotland, yet it seems to be quite clear that the decree of *cessio* will have no effect as a discharge, even of a limited nature, against the foreign creditors, in any proceedings against the debtor abroad, but will only stop their diligence against his person in Scotland; and that the disposition *omnium bonorum* will have no other effect against the debtor's funds, in the country of his residence, than a voluntary conveyance in security or satisfaction of debt.

PART III.

OF EXTRAJUDICIAL SETTLEMENTS BETWEEN INSOLVENT DEBTORS AND THEIR CREDITORS.

WITH all the advantages which judicial proceedings afford in settling the affairs of [486] insolvent debtors, distributing their funds, and freeing their persons, there are undoubtedly accompanying evils, which may be avoided by a good understanding and common agreement among all concerned. Attempts to accomplish the settlement of an insolvent debtor's affairs extrajudicially are exposed, however, to disappointment, wherever the creditors are

¹ 49 Geo. III. c. 121. [12 and 13 Vict. c. 106.]

² *Robinson v Coupar*, Feb. 1811, F. C.

³ 49 Geo. III. c. 121, sec. 17. [See 12 and 13 Vict. c. 106, sec. 175.]

⁴ [All contingent creditors may now prove. *Ib.* sec. 177.]

⁵ [This is expressly enacted by sec. 147 of the Bankruptcy Act.]

not unanimous, and too frequently end in confusion, expense, and partial preferences. Much has, indeed, been done of late years to remedy this evil, and I trust it will not be long ere the remaining evils and dangers shall be removed.

In a former part of this work the general doctrine of trust-deeds and settlements has been explained. Here it is proposed to consider the peculiarities of TRUSTS, as applied to insolvent estates. And referring to the concluding section of this chapter for a statement of the comparative difficulties, benefits, and disadvantages which attend the several methods of settling bankruptcies, judicial and extrajudicial, I shall proceed to consider the way in which, by means of voluntary contracts, the affairs of an insolvent debtor may be arranged, his estate sold and distributed, his intermediate subsistence provided for, and his person protected and discharged.

Contracts of this sort are either complete and perfect, or more frequently they are left imperfect, from a dread lest it should be impossible to procure unanimous consent to the necessary stipulations.

The more imperfect are: 1. Unilateral trust-deeds for effecting the sale and equal distribution of an estate, without any reciprocal contract on the part of the creditors; or, 2. Deeds of *supersedere*, for the purpose of giving delay without the expense of judicial proceedings.

The more perfect consist of various combinations of these simple elements, and are: 1. Trust-deed, and deed of accession, by which is formed a full contract, mutual between the parties, and having in view reciprocal advantages of sale, distribution, and discharge; or, 2. A composition contract, settling everything on the principle of compromise.

CHAPTER I.

OF TRUST-DEEDS INDEPENDENTLY OF ACCESSION BY THE CREDITORS.

A DEBTOR who knows himself to be insolvent may, with a view to the equal distribution of his funds, convey them to a trustee for the benefit of all his creditors. If such deed shall be completed before diligence commenced by any of his creditors, and if sixty days shall [487] have elapsed without the granter being made a bankrupt, the conveyance will be effectual to the creditors. This measure may be adopted either in concert with the creditors, or by the debtor himself secretly. In the former case the agreement on the part of the creditors is generally and most safely expressed in a counter deed of accession. Where the debtor, afraid lest the selfish designs of particular creditors may defeat his just intention, shall make a trust-deed without seeking the consent of his creditors, the deed must stand or fall by its own strength or weakness. This simple case is first to be considered.

But it may not be improper, in entering on this subject, to mark the distinction between trust-deeds for family purposes, for the arrangement or management of the affairs of a person in solvent circumstances, and trusts which are created for the purpose of satisfying the demands of creditors, on a fund actually or in all likelihood insolvent.

In trusts of the former kind¹ the trustee is accountable to the truster alone, or his heirs. He stands in the truster's place, and by his delegation exercises his power as a proprietor, to administer, to sell, to distribute the proceeds, and to settle the reversion. The powers thus committed to him are revocable by the granter: the trustee must renounce

¹ See vol. i. p. 29 et seq.

his right at the granter's bidding, except in so far as the trustee may have undertaken engagements or made advances; and the creditors have no right to interfere or object to the trustee's administration, unless in so far as they may have attached the trust-estate. In a trust for creditors, the trustee is accountable to those creditors. He is *their* trustee, holds the estate for them, sustains the formal title under which they have the radical *jus crediti*. He cannot be divested at the will of the granter, but must hold adversely to him, and for the benefit of the creditors, until discharged of his responsibility by them; and for his administration he is accountable directly to the creditors.¹

The difficulties to be explained relative to a trust-deed of this last description, arise either from creditors who, not having acceded, may proceed with diligence to attach the estate; or from the provisions of the bankrupt statutes. Of these in their order.

SECTION I.

OF TRUST-DEEDS FOR BEHOOF OF CREDITORS NOT AFFECTED BY THE BANKRUPT STATUTES.

The dangers which threaten the efficacy of a trust-deed when beyond the reach of the Bankrupt Acts, proceed either from the encumbrance of conditions to which the creditors are not bound to submit, or from the imperfection of the deed in point of conveyancing.

1. OF CONDITIONS IN THE TRUST.

As a creditor has the right of proceeding by diligence to attach the estate of his debtor, without being encumbered with any condition of personal exemption or indulgence to the debtor, or any submission to his disposition in the conversion and disposal of his property, and as no gratuitous conveyance can injure creditors, it follows that no trust-deed, by which the granter shall impose conditions on the creditors, or confer other powers on the trustee than those of selling the estate for the benefit of all concerned, will be effectual.

Besides VESTING THE ESTATE and effects of the bankrupt in the person of the trustee for behoof of the creditors (which is the only legitimate purpose to be accomplished by the [488] debtor's own act), the great objects generally proposed to be accomplished by means of a trust-deed are: to have the funds distributed by that trustee according to the several rights and interests of the creditors, without the expense of judicial proceedings; and to give to the debtor the benefit of a discharge, on the trustee being satisfied that he has fairly surrendered his effects. To the provisions which are sometimes directed to these two objects, creditors are not bound to give their assent.

1. For the purpose of effecting an extrajudicial division, the trustee is sometimes entrusted with power to judge of claims; or a lawyer or accountant is appointed as an umpire, or arbiter, to determine finally the questions which may arise in the ranking. But those are powers which no debtor can confer on a trustee without the consent of his creditors.²

¹ The consequence of this on the administration of the trustee will be afterwards considered. See below, chap. iii. [See opinions in *Globe Insurance Co. v Scott's Crs.*, 1849, 11 D. 618; and on appeal, 7 Bell 296.]

² Lord Kames, in reporting the case of *M'Kell*, says: 'In this case the Court had no occasion to determine whether creditors are bound to submit to the management of trustees named by their insolvent debtor. A bankrupt may and ought to convey to his creditors his whole effects for their payment, but he cannot legally bind them down to any particular form of management, whether by trustees or otherwise: therefore every trust-deed of this kind, when brought under reduction, whether upon the bankrupt statutes or upon common law,

ought to be reduced, as far as concerns the bankrupt's nomination of trustees; but, on the other hand, any such trust-deed ought to be sustained, as far as to operate a division of the bankrupt's effects, equally and proportionally, among his creditors. The reason is, that neither by the bankrupt statutes nor by the common law can there lie any objection against a disposition by a bankrupt to his whole creditors *nominatim*, nor against a disposition to a single person for behoof of the whole creditors, the person being named not as a trustee to manage for the creditors independent of them, but merely as a name to hold the subject for the creditors.' Kames' Sel. Dec. p. 321, M. 894.

2. The benefit of a DISCHARGE to the debtor is generally made a condition, either by declaring that the creditors shall accept of the dividend in satisfaction of the debt; or by giving a power to the trustee, or to him and a committee of the creditors, to grant a discharge, if the debtor shall by his conduct merit such indulgence. But in whatever way the condition shall be expressed, the debtor is not entitled thus to qualify a conveyance, which it is his bounden duty unconditionally to grant to his creditors.¹

3. Without descending into further particulars, but leaving this matter on the general principle already laid down, it becomes an important question, whether such conditions entirely destroy the whole trust; or whether it may not stand to the effect of a simple conveyance, and a bar to diligence and preferences, while the conditions are held *pro non scriptis*? It can only be where the granter of the trust-deed is willing to dispense with the conditions, that the deed can be thus supported as a simple conveyance of the estate. But where they are not insisted on by the granter (as where he is willing to give up all claim to a discharge, though stipulated in the deed), it would rather appear, that to the effect of conveying the property for the benefit of the creditors, so as to prevent any partial preferences by diligence, the deed will be effectual. If the trustee selected by the debtor shall be objected to by the creditors, still it would appear that the benefit of the conveyance will not be lost to them, but that another trustee may be chosen, in whose favour the granter's nominee may be required to denude. In all these cases the trustee may be considered as the holder of a common fund; and a multiplepointing may be raised either by himself, or in his name, calling on the creditors to appear, and judicially dispute their preferences.

4. It does not seem to be a valid condition of such a trust (at least where it professes to be in consideration of insolvency, or where it is conceived as a disposition *omnium bonorum*), that it shall be restricted to those creditors who within a certain time shall enter [489] their claims. Any creditor whose debt exists at the date of the trust will be entitled to his share, provided he shall appear before division of the fund, though after the prescribed time.

2. OF THE REQUISITES OF TRUST-CONVEYANCE.

In order to produce any beneficial effect, the trust-deed must be a complete transfer of the estate to the trustee, according to the rules of conveyancing. It will not otherwise be available to the creditors against the diligence of the dissenting creditors.

1. One form of trust is that of an ABSOLUTE CONVEYANCE bearing no limitation or grant of powers, or statement of uses and purposes; but having these expressed in a backbond by the trustee, as the law of his trust, and the groundwork of a charge against him. This effectual form of trust enables the trustee to give an unexceptionable title, unencumbered with any of the conditions of the grant. But it is exposed to danger, in so far as the unfaithfulness of the trustee, or his bankruptcy, may oblige the trust creditors to have recourse to uncommon vigilance and exertion, in order to prevent the alienation or attachment of the estate by the creditors of the trustee.

2. The BACKBOND granted by a trustee in such a trust may be taken in favour of the several creditors for their respective debts, so far as known, and generally in favour of all the just and lawful creditors; and this backbond, when recorded in the Register of Sasines and Reversions, constitutes a real burden on the right of the trustee of all the debts specified in the backbond.

3. In the disastrous days of rebellion and civil war, as already observed,² trusts were frequent for another purpose than the payment of debts. To avoid forfeiture, landowners vested in third parties their estates previous to their joining the rebels, and to conceal their interest made the conveyance absolute. Such conveyances had been known in the older practice, and parole proof of the trust was allowed. But in the end of the seventeenth

¹ *Grant v Cunningham*, 1747, M. 1210; *Sutherland v Watson's Crs.*, 1724, M. 1199.

² Vol. i. p. 32.

century, political views concurred with the desire of preventing the painful lawsuits that arose, to induce the Legislature to enact, that no action for declaring a trust should be sustained except on the oath of the trustee himself, or a written declaration from him acknowledging it. 1696, c. 25. See above, vol. i. p. 32.

4. The ordinary form of conveyance is by a deed disposing and assigning the estate to the trustee (or to trustees in succession), for certain uses and purposes; viz. 1. The sale of the subject; 2. The payment of the just and lawful debts of the granter; and, 3. The restitution of any reversion to the granter and his heirs.

5. A deed, conceived in the form of a conveyance directly to the creditors by name, when completed, vests the real right of property in their persons, as joint proprietors *pro indiviso*.¹ But this is a cumbrous method of accomplishing the object; beset with danger to the individual creditors, who, if there shall be any omission or mistake, may suffer the loss of their debts, and it may be dangerous even to the trust itself, since creditors omitted have it in their power to dissent from the trust, and reduce it altogether as unjust and partial, if it bear that the debtor is insolvent, or if it be a disposition *omnium bonorum*.² Accordingly, in practice, this is held an improper method of vesting an estate in [490] creditors. The preferable way, and that which is common in practice, is to convey the estate to a trustee, for the behoof of all the granter's creditors, according to their respective debts and interests.

6. Whether, in order to make a trust-deed effectual to confer a preference on the creditors to be comprehended in it, it be necessary to ENUMERATE the creditors, and specify the amount of their debts, is a question of some moment.³ If it were necessary that the debts should be constituted as proper real burdens on the estate, such enumeration would be indispensable, since nothing but a definite burden can be effectual against future creditors.⁴ But, on another principle, a trust-deed will be effectual without any enumeration of the debts, provided the granter be entirely denuded of the real right, and the trustee have power to sell and distribute the price among the creditors, with a declaration that the purchaser shall have no concern with the application of the price. The principle upon which this depends is, that the trust-estate is vested in the trustee for the benefit of the creditors, as a right under reversion. It is desirable that this principle were expressly sanctioned by statute as effectual to sustain a trust-right for the benefit of all the creditors, according to their several rights and interests. But without such statutory declaration, the principle seems to be established at common law. The feudal right where the subject is heritable, and the real right where it is moveable, are sufficiently established *sub conditione* in the person of the trustee, by sasine in the one case, and tradition or intimation in the other. The condition involves two distinct radical rights: 1. A right to the creditors for whom, by the deed, the trustee is primarily to hold; 2. A reversionary right to the granter of the trust. It is this reversionary right alone which the future creditors are entitled to rely upon; for no one coming in the granter's place can be entitled to call upon the trustees to denude or account to them, till the proper purposes of the trust shall have been fulfilled.⁵

¹ Blackwood of Pitreavie v E. of Sutherland, 1740, M. 14140. Where a joint disposition of property is granted to several persons, the disponees have no concern with one another; and there can be no competition between them, nor no action but for a division. But where a joint disposition is granted to several persons for security of debts, the security granted to each creditor is over the whole subject: they have a joint interest, and the excluding of one of them on an objection to his debt, or any other ground, augments the security of the rest.

² Crs. of Eyemouth, 1738; Elch. Bankrupt, No. 12, notes, p. 45.

³ [See Ettles v Robertson, 1833, 11 S. 397.]

⁴ See above, vol. i. p. 729, with the cases of Douglas of Dornock, and M'Kenzie of Redcastle.

⁵ In the case of M'Kenzie of Redcastle (*supra*, vol. i. p. 729), had the trust-deed remained effectual, the Court would have considered it as sufficient to confer a preference on the trust-creditors. Such was the opinion of the Lord Justice-Clerk M'Queen, who was the Ordinary in the case. Although the case was decided a very long time ago, I distinctly recollect the impression of this opinion in the year in which I was called to the bar. The interlocutor pronounced almost sufficiently indicates this; and in Mr. Bell's Cases, 1790 and 1792, p.

7. Where the granter of the trust enumerates the debts for satisfaction of which it is granted, it has been held that this is an acknowledgment of those debts, although a clause [491] be introduced, declaring that the enumeration of the debts as claimed should not bar any competent objection.¹ This probably would not now be adhered to.

8. The right of the trustee, in order to be effectual against non-acceding creditors, must be fully completed by a **RECORDED INFEEFMENT** in the case of heritage; by delivery in the case of moveables; and by intimation in the case of debts, or moveables in the possession of third parties. And it will be particularly observed: 1. That it is according to the completion of the trustee's right that the competition between him, as holding for the general body of creditors, and the non-acceding creditors pursuing separate measures, is to be regulated; and, 2. That the term of sixty days before bankruptcy is to be reckoned, not, as formerly, from the date of the sasine in heritage, or of the trust-deed in moveables, but from the date of recording in the former case, and that of tradition, intimation, etc., in the latter.²

9. It has sometimes been doubted whether a trust-deed requires **ACCEPTANCE** by the trustee, in order to make it available to the creditors. But as it does not require acceptance by the creditors, so neither does it seem to be necessary that the trustee should accept. The radical interest being in the creditors, and the trust a mere form of conveyance, it is not likely that a Court would suffer important interests to be defeated by the trustee's refusal.³ The proper remedy would be a declarator, concluding to have it found and declared that the estate was conveyed in trust for the benefit of the creditors; and that the trustee named should be decerned and ordained to execute a conveyance in favour of another as trustee; or that the estate should be adjudged to another as trustee for behoof of the creditors. At the same time, what passed in the case of *Mackenzie of Redcastle*, where the whole benefit of the trust was defeated by the divestment of the trustees (although it proceeded in some degree on a different principle), makes it at least a matter of prudence to secure the acceptance of the trustee before entirely relying on the deed.

10. The trust-deed ought to be conceived in favour of the trustee's **HEIRS AND ASSIGNEES** in trust. But even where it is granted without mention of heirs or assignees, the right will subsist effectually to the benefit of those having the radical interest, notwith-

544, the following opinion, though upon another branch of the case, confirms it:—

Lord Justice-Clerk (M'Queen): 'You will observe that the trustees were in possession of the feudal right; they might have given a good title to a purchaser; and the purchaser would not have been bound to attend to the application of the price. They had also a power to borrow money, and burden the estate; and the lender had nothing to do with the application of the money they borrowed. They would have done wrong had they borrowed money and not applied it in paying off the debts; still the creditor would have had a good claim. They were bound to execute the purposes of the trust, but their failure in that respect does not affect their acts. The private consent of the trustees in this case was enough; and as the trustees were possessed of the feudal right, a missive was sufficient to enable them to execute the bond in favour of Mr. Ross. The letters which passed show clearly that the truster could not have complained that the trustees, by granting that bond, had abused their trust: this refers to the right of the truster. And with regard to creditors, there is no anterior creditor by infestment, and the posterior creditors can have no better right than that of the truster; consequently the security must be good against them also.'

In this opinion Lord President Campbell and Lord Eakgrove concurred.

See also *M'Ewan v Thomson*, 1793, M. 5596.

In the case of *Anderson v Young & Trotter*, 1784, M. 4128, the report in the Faculty Collection is imperfect in stating the opinion delivered from the bench. Lord Newton, who was counsel in the cause, told me that the true principle of the decision was, that the real and substantial right stood in the person of the holder of the faculty, the trust being entirely for his behoof.

¹ *Coulter v Martin*, 1775, M. 1601. [The doctrine here referred to is of doubtful authority. *Ettles v Robertson*, 1833, 11 S. 397; reversed, but on a different point.]

² See above, vol. ii. p. 213.

³ The analogy of the cases of *Dallas v Leishman*, 1710, M. 16191, and *Campbell v Lord Monzie*, 1752, M. 14708, seem strongly to support this conclusion. In the former of these cases, a person had filled up his friend's name in a bond as his trustee without his knowledge; and the Court found him under an obligation to denude when required. And in the latter, the trustees in a mortification having failed, the Court found that the mortification did not fall or become void, but that it was competent to the Court to nominate and appoint persons to carry on the trust.

standing the death of the trustee. This brings out a case of rather an anomalous nature. The trust in one sense has expired, since there can be no trust without a trustee. But the granter of the trust being divested, the estate cannot return to him. Although the subject therefore remains without a proprietor, the substantial interest is such as the law must afford a remedy to make effectual. The remedy consists in a union of the adjudication, and of that admirable form of action which seems peculiar to Scottish jurisprudence, the process of declarator. The creditors may, either in their own name or in the name of a trustee, to whom for that purpose they may assign their debts, raise a declaratory adjudication, calling as defenders the representatives of the trustee, the truster and his representatives, and all concerned, and concluding that the trust-subject left *in medio* shall be adjudged to the creditors having the radical interest (or to a trustee in their name), in fulfilment of the original purposes of the trust-conveyance.

11. It is a provision frequently made in trusts, that the trustees, or those having [492] the radical right, shall be entitled to ASSUME or nominate other trustees, either to aid those already named, or to prevent the falling of the trust. The administration of such a trust, after new trustees are assumed, may either proceed without completing a title to the estate in the assumed trustees, or after such title shall be completed. And, 1. After the assumption of trustees, it will be necessary that their assent shall, according to the terms of the trust, be given to any act of administration; and it will be sufficient, in any sale or transference, that the requisite deed shall be signed by the proper number of trustees, original or assumed,—the conveyance strictly speaking being made by the original trustees in whom the subjects are vested, and the subscription of the assumed trustees being a concurrence for all right competent to them. 2. If necessary, it would appear that the precept contained in the trust-deed, together with the power and deed of assumption, will authorize a notary to give a supplementary sasine to the assumed trustee.

SECTION II.

EFFECT OF THE BANKRUPT LAWS ON TRUST-DEEDS NOT ACCEDED TO BY ALL THE CREDITORS.

A trust-deed, which has been granted after diligence begun, or which remains incomplete as a transference, however long it may have been granted before bankruptcy, or which has been completed by sasine or tradition of moveables within sixty days of the bankruptcy, is exposed to challenge on the bankrupt statutes of 1621 and 1696. And even a trust-deed which is beyond the reach of such challenge may be superseded by sequestration, if the granter be a merchant or manufacturer within the operation of that process.

1. INSOLVENCY ALONE NO GROUND OF CHALLENGE.

Mere insolvency is no bar to the efficacy of a deed of trust for creditors. On this point it was strongly argued, that although the debtor remains vested with his property even after insolvency, he holds it not as absolute proprietor, but merely as trustee, or rather as *negotiorum gestor* for his creditors; bound to take care of the subject which he has under charge, but not entitled to do any act by which the situation of those who have the radical right to it can be altered, or their legal privilege of using diligence against his estate abridged. But conveyances by a proprietor are at common law reducible only when fraudulent, and it is with no other view than to prevent fraud that his powers suffer upon insolvency any sort of limitation. Fraud is committed only by the unfair diminution of the funds, or by the constitution of unfair preferences in favour of particular creditors; but where the debtor, acting for the common benefit, and dealing equally with all his creditors, steps forward only to do that very thing which, if he refused, the law would force him to do, he cannot be said to be

guilty of fraud.¹ The opinions repeatedly expressed from the bench cannot now be questioned. Lord Kilkerran said, in the case quoted below: 'Where there lies no ground of reduction on the statutes, there appears to be no foundation in the common law upon which a disposition by a man, however insolvent, to all his creditors equally among them, can be reduced.' Lord Pitfour, speaking of the same case, after more than twenty years: 'In the question upon a disposition granted by David Bett in 1744 to trustees, all the arguments against such dispositions were used by Charles Erskine, afterwards Lord Justice-Clerk. He had a feeble antagonist in myself, and yet he was unsuccessful.' Lord Pitfour says on the general point: 'The common law is on the side of trust-rights. In former times, dispositions *omnium bonorum* were generally to favourite creditors. The Court did not reduce them, but construed them as they ought to have been granted, that is, for behoof of the whole creditors. There is another evidence that trust-deeds are favoured by the common law: Where one comes out upon the Act of Grace, he is obliged to grant a disposition to all his creditors. It was never doubted that such disposition was good, unless the Act 1696 stood in the way.'²

2. EFFECT OF THE BANKRUPT STATUTES OF 1621 AND 1696 ON TRUST-DEEDS.

Although it is no sufficient objection to a trust-deed that the granter was insolvent, a challenge may be competent on the bankrupt statutes of 1621, c. 18, and 1696, c. 5, although the trust-deed is unconditional, and fair and just to all the creditors. It is not, however, surprising, that before a doctrine was established so adverse to the genuine principles of bankrupt law, a considerable struggle should have been maintained, and many conflicting decisions pronounced.

1. ACT 1621, c. 18.—It is only under the second branch of this Act that a trust-deed in favour of onerous creditors can be objected to. The challenge proceeds on the right of a creditor to complete diligence once commenced for attaching the estate, real or personal, of the debtor, without suffering any interruption by his voluntary act. It was in this respect that the statute of 1621 produced those unforeseen and unfortunate consequences which were formerly taken notice of. The principles of bankrupt law were at the date of the Act imperfectly understood; and the attention of those who framed the Act was confined entirely to the protecting of individual creditors who had begun diligence, against the fraudulent attempts of the debtor to disappoint them. The statute, once enacted in the broad terms which it bears, was held to affect trust-deeds equally with deeds in favour of individuals; for they equally interrupted creditors who had begun diligence for attaching their debtor's estate. And it was considered as a good answer to every argument of expediency or of justice in favour of trust-deeds, that the law having provided means for attaching the property of a debtor, no debtor should after insolvency interfere to destroy what the law had begun to rear.³ The necessary effect of this doctrine was, that every creditor who had

¹ *Snodgrass v Bett's Crs.*, 1744, M. 1209.

Lord Kilkerran says: 'Where there lies no ground of reduction on the statute, there appears to be no foundation in the common law upon which a disposition by a man, however insolvent, to all his creditors equally among them, can be reduced. And accordingly in this case, where David Bett, the debtor, though insolvent, was not bankrupt in terms of the statute, a disposition by him in favour of trustees for the behoof of his whole creditors, duly intimated, was preferred to posterior arrestments, and the allegiance repelled, that a person insolvent had it not in his power by such dispositions to deprive his creditors of their right of obtaining a preference over each other *vigilantia*.'

A disposition in favour of the granter's whole creditors *pari passu*, if it be not reducible on the Acts 1621 or 1696, cannot be reduced on common law; the effect of such reduc-

tion being only to bring in the creditors omitted *pari passu*. *Crs. of Cordiners of Canongate v Grant*, 1747, Elch. voce Fraud, No. 16, M. 1210, 5 Brown's Sup. 927. The same judgment in *M'Kell v Trs. of Anthony M'Lurg*, 1766, M. 94, 1 Hailes 104; *Watson v Orr and others*, 1769, M. 1220; *Ramsay v M'Kenzie's Trs.*, 15 June 1773; *Hutchison v Gibson's Crs.*, 1791, M. 1221.

See *Simpson v Dalzel*, 1757, 5 Brown's Sup. 861.

² *Johnson & Colquhoun v Fairholm's Crs.*, 1770, 1 Hailes 336.

³ In the first case on this subject, the Court found the statute inapplicable to a trust-deed for the general behoof. *Farquharson v Cumming's Crs.* in 1729, M. 1205.

But the decisions have since gone the other way. *Dawson & Lupton v Anderson*, 26 July 1734; *Mansfield v Brown*, 1735, M. 1205; *Wardrop v Fairholm*, 1744, M. 4860.

commenced his diligence before the date of a voluntary deed of trust, however equal [494] and beneficial for the whole creditors the plan of trust might be, had it in his power to counteract its operation, and proceed with his separate diligence, so as either to acquire a preference, to force the other creditors to follow similar measures, or to oblige them to purchase his concurrence by paying off his debt.

2. ACT 1696, c. 5.—Immediately prior to the enacting of the statute 1696, c. 5, it was decided that a debtor insolvent and in the sanctuary was not entitled to make a trust-deed, though for the benefit of all his creditors.¹

In the cases that occurred soon after the statute, the Court held unconditional trust-deeds to be effectual, and only those which were qualified to be objectionable.² The first case in which a change of opinion appeared, was too much involved in circumstances to be considered as anything more than an indication of the varying sentiments of the Court.³ And the opinion came to be settled against the validity of trust-deeds in several cases which followed.⁴ The law at this period may be summed up in the words of Lord Kilkerran, who says, in his report of the case of Snodgrass in 1744: 'The Lords have come and gone upon the question how far, where one is bankrupt in terms of the statute, he can, by a general disposition to his creditors, tie them up from after diligence? And by the latest decisions it is found that he cannot.'

Strongly, however, as the opinion seemed to have been fixed in favour of the application of the statute, yet of six cases which occurred in the thirty years which followed the judgment in the cases of Snee and of Blair's Creditors, three were decided in the one way, and three in the other.⁵ There continued to be much difference of opinion on the [495] bench; and upon a question of power, which the imperfection of the law relative to diligence made so important, it is not wonderful that many trials should have occurred; nor, perhaps, that the opinions of our judges should have fluctuated, while the force of the statute on the one hand, and a sense of justice and views of expediency on the other, operated in opposition to each other.⁶

¹ *Crs. of Drysdale*, 1696, M. 1197.

² *Crs. of Watson* competing, 1724, M. 1199; *Watson's Crs. v Muirhead*, 1725, M. 1201. Competition of *Eyemouth's Crs.*, 1726, *supra*, p. 385, note 2.

³ *Bell v Barclay's Crs.*, 1727, M. 1203.

⁴ *Snee & Co. v Anderson's Tr.*, 1734, M. 1206; *E. of Aberdeen v Crs. of Blair*, 1736, M. 1208.

⁵ 1. In the case the *Tr. for the Crs. of Jackson v Simson's*, 1757, M. 1212, there was one peculiarity which induced the Court to support the deed. All the creditors except Simson had begun diligence, by which unquestionably they would have affected the whole subject of the conveyance to his utter exclusion; and having ceased their diligence only upon this deed being granted, the deed in reality had given Simson an advantage which otherwise he would not have enjoyed.

2. In the next case, *John Forbes Leith and others v Livingston*, 1759, M. 1212, the trust-deed was, consistently with the decision in *Snee's* case, cut down, although prepared at a meeting of the creditors, and although the trustees were named by the creditors themselves.

3. In *Wilson v M'Vicar*, 1762, M. 1214, there was a very distinguishing circumstance (not mentioned in the Faculty Report), upon which in a great degree the decision, I believe, proceeded. The son of the arresting creditor had attended at a full meeting previous to the execution of the trust-disposition, and tacitly acquiesced in a resolution taken by that meeting to follow common measures.

See the papers in the subsequent case of *Dr. Heriot v Farquharson, Tr. for Fairholm's Crs.*, below, p. 394.

4. In the case of *Jamieson v Digges*, 1763, M. 1216, the judgment of the Court expresses the peculiarity. 'The Lords having considered the terms of the trust-disposition, the particular state of the fund assigned depending entirely on the creditors acting in concert [it was a conveyance of four guineas weekly of Digges' salary as an actor], and David Bett's letter' [agreeing that this was the only hope of getting payment], 'they prefer Mr. Jamieson, the trustee, he being accountable to the whole creditors of Digges *pari passu*.'

5. With these deviations, all of which are easily accounted for, the Court in 1764 returned to the judgment pronounced in *Snee's* case, and the others alluded to by Lord Kilkerran. *Mudie v Dickson & Mitchell*, 1764, M. 1217.

⁶ Lord Kames, in reporting the case of *M'Kell v M'Lurg*, in 1766, M. 1210, takes occasion to remark, 'that every trust-deed by a bankrupt ought to be sustained, as far as to operate a division of the bankrupt's effects equally and proportionally among his creditors;' 'that where such disposition is made, it remedies a gross defect in the bankrupt statutes, viz. permitting creditors to take, by force of legal execution, what they are not permitted to take by the bankrupt's voluntary deed.' And he goes on to remark, 'that it seems to be settled that an insolvent person, who is not in the terms of either of the bankrupt statutes, has it in his power to do justice to all his creditors by dividing his effects equally among them. And as it was never intended by either of the

At last the Court of Session, and afterwards the House of Lords, decided on the Act of 1696, c. 5, against the validity of trust-deeds by bankrupts;¹ and this judgment was afterwards confirmed,² on the very eve of the statute which introduced sequestration in mercantile bankruptcies, and allusion is made in the opinions of the judges to the design of introducing such a law. Since that law was passed the question has again occurred, and the doctrine which prevailed, while more imperfect provisions existed for a fair distribution of bankrupt estates, was less scrupulously adhered to. In several cases, accordingly, after the introduction of sequestration, the Court has decided that trust-deeds granted within sixty days of bankruptcy are not effectual.³

After trustees have been invested, and in the exercise of a beneficial administration, a challenge on the Bankrupt Act of 1696, c. 5, will not be allowed to operate as a suspension of their management, so as to stop operations admitted to be beneficial for all concerned, where there is no danger of malversation or insolvency, all questions being reserved entire.⁴

To protect a trust against the operation of the Bankrupt Acts, there are no other means but, 1. The concurrence of all the creditors; or, 2. Adjudication or other diligence by the trustee, on an assignment to him of the debts of the several creditors, by which he may either acquire a preference for behoof of his constituents, or at least secure *pari passu* preference with the non-concurring creditors.

On this subject it may be observed further: 1. That although all the creditors have not concurred, it is not held competent for one who has acceded to begin diligence in order to acquire a preference directly or indirectly, while the non-concurring creditors are standing neutral;⁵ and, 2. That in the deed of accession, or in a deed of assignation separate, or by separate mandates, the trustee ought to be empowered, either as assignee or mandatory, to constitute the debts, and do diligence for the acceding creditors. This not only will have the effect, already explained, of defeating any proceedings intended to give preference to [496] the non-acceding creditors, but will frequently produce the salutary effect of deterring such creditors from making the attempt.

3. EFFECT OF SEQUESTRATION STATUTE.

The sequestration statute of 54 Geo. III. c. 137 has an operation similar to that of 1696, c. 5, or rather co-operates with that Act in preventing the creation of private trusts within sixty days of the date of the first deliverance (sec. 1). And so, even where the trust-deed has been completed by sasine or tradition of moveables, it may be superseded by sequestration, if within the reach of a challenge on bankruptcy.

SECTION III.

EFFECT OF TRUST WITHOUT ACCESSION, AGAINST RANKING AND SALE OR SEQUESTRATION.

A trust-deed, completed so as to vest the estate in the trustee beyond the reach of reduction on the bankrupt laws, will still be ineffectual to bar those creditors who have not

bankrupt statutes to bar the exercise of this equitable power, it is probable that when the principles of equity are better understood than at present, the Court will sustain every disposition of this kind, though even made by a notour bankrupt.

¹ *Peters v Spiers & Blackburn*, 1767, House of Lords, 18 Dec. 1767; *M. Bankrupt*, App. 1; Hailes 179.

² *Johnson & Colquhoun v Fairholme's Trs.*, 1770, M. App. Bankrupt, No. 5; Hailes 387. See also *Monro v Fraser*, 5 Brown's Sup. 385.

³ *Hutchinson v Gibson*, 1791, M. 1221; *Whyte, Tr. for Laing's Crs., v Watson*, 21 Dec. 1803.

⁴ *Ker & Dickson v Graham's Trs.*, 1827, 6 S. 73; and same case, *ib.* 270. Here the trustees were in possession, the estate was strictly entailed, the creditors had only the life-interest of the debtor to rely on, and the Court refused to interrupt the cutting and sale of the wood.

⁵ *Watson v Fede*, 1724, M. 6397.

acceded to it, from proceeding judicially to have the estate sold and distributed, according to the legal rules of ranking and sale or sequestration. The creditors having the radical right under such a trust may not have confidence in the disclosure and surrender made or intended, and may think that no means of discovery short of a judicial examination on oath of the bankrupt, and his relations and confidants, can serve to bring his affairs sufficiently to light; they may not have confidence in the trustee to administer the estate; and, above all, they may be wearied out by the delay, the expense, and the inefficiency of the ill-adapted processes of the common law for effecting a final distribution of the funds.

1. When an estate vested in trustees is sold, and disputes arise as to the division of the price, the only practicable mode of settling matters is by a MULTIPLEPOINDING, raised either by the trustees or in their name; and there can be no doubt that such a proceeding is competent.

2. A RANKING AND SALE has in view not merely the distribution of the price, but the conversion of the estate into a divisible shape, and by means of the best and most unexceptionable title. Such a proceeding is also competent, notwithstanding the subsistence of a trust effectual to bar preferences. Such a trust, accordingly, has been held no bar to an action of ranking and sale.¹

3. It follows, that where an ADJUDICATION is necessary to put a creditor *in titulo* to raise such an action, adjudication is competent.² The creditors, in proceeding with adjudications against the trust-estate, may direct those adjudications against the granter of the trust or his heirs;³ or they may also, it has been said, direct those adjudications against the trustee. Such adjudications will have no effect in divesting the trustee, or creating a preference over those creditors who are properly included under the trust, if the trust- [497] right has been completed before those adjudications commenced, and before inhibitions used. But still it is legitimate diligence, and may be followed out by a process of ranking and sale.

4. It is still less to be questioned, that in a mercantile bankruptcy the creditors may proceed to SEQUESTRATION under the 54 Geo. III. c. 137, notwithstanding an effectual trust-deed. It has already been seen that in two cases the Court held the trust to be no bar to sequestration, and even in one of them the plea of a personal exception against the bankrupt, as having granted the trust-deed, was rejected; and it is settled by these cases, that when sequestration is awarded after a private trust, it completely supersedes that trust, and that the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration.

SECTION IV.

OF THE EFFECT OF TRUST-DEEDS IN RELATION TO THE CREDITORS.

Supposing the trust-conveyance to be complete and unexceptionable, its operation as an instrument by which the creditors can accomplish their payment is next to be considered.

¹ *Scott's Crs. v Russell*; *Cruttenden & M'Killop v Ratray*, 1824, 3 S. 347, N. E. 247.

² *Forbes Leith v Livingston*, 1759, M. 1212. Held that a bankrupt's trust-deed, followed by infettment, was no bar to adjudications.

Colville's Crs. v Trustee, 1779, M. 1221; *E. of Breadalbane v M'Donald*, 1824, 2 S. 621, N. E. 529.

³ In the case of *Ederline*, vol. i. p. 779, this point established. It was also said in that case by Lord President Campbell, that the adjudication against the trustee was competent, and might have been entitled to rank *pari passu* with

the other creditors adjudging against the heir; and he observed that it seemed a defect in the case that this was not argued. I have a note from Mr. Archibald Fletcher, counsel in this case, in these words, written soon after the decision: 'The Lord President concurred in the judgment, and yet he thought that the estate might be adjudged from the *trustees*; and that if the adjudication against them had been within year and day of that against the heir, there would have been *pari passu* preference. This, he justly said, was not argued in the petition, and the reason was that the fact was against us as to the dates.'

As to the trustee, there is in him only what might in England be called a SPECIAL PROPERTY, but no property for his own behoof, further than to give him a lien for the expenses laid out, or money borrowed for the legitimate purposes of the trust. The persons from whom money may so have been borrowed, or by whom furnishings may have been made to the trustees in the course of their administration, will have the benefit of the lien of the trustees; and if that lien shall have been parted with, the trustees will be held as rendering themselves personally liable.¹

The trustee holds for the creditors on the one hand, for the debtor on the other.

1. The creditors, as the constituents of the trustee, or the persons holding the primary radical right in the trust-property, are entitled to call upon the trustee to denude in their favour. They may have a declarator of trust against him, with a judgment decerning him to convey to another trustee or to a purchaser.²

2. The debtor has also a radical right to call on the trustee to denude when the purposes of the trust are accomplished, or when the trustee is unable or unwilling to proceed with the execution of the trust. But,

3. It is in both those cases a difficult matter to show that the requisition to denude is sanctioned by the creditors. A trust-deed is granted for the use of all the creditors who have approved, or may approve; and a trustee who is responsible to them all, has it in his power to bid defiance to any call upon him by the creditors (much more by the debtor), unless they shall unanimously agree in this call, or the Court shall in a process of exoneration authorize him to denude.

This forms one evil in the law, or rather in the practice of trusts. The extreme difficulty of forcing a trustee TO DENUDE, or to bring the subject to a sale, or to account for his intrusions, gives to trustees a power of evading those duties, and much impedes the benefit that might otherwise be derived from this sort of arrangement. Trusts are peculiarly under the control of a court of equity; and in England the facility with which a trustee is amenable to the Court of Chancery to answer for his conduct, gives to the English trusts an eminent advantage over trusts in this country.

If creditors have used inhibition before the trust, the trustee is not safe to sell the estate by private sale, for the inhibitor would thus acquire a preference, in consequence of [498] his power of adjudging.³ Nay, he is not safe to trust to the accession of the inhibitor, unless he shall agree to discharge his preference; for where an inhibitor signs a deed of accession which reserves all preferences, he has been held (even where the trust-deed contained a power to sell) as still entitled to his preference.⁴

See below, Of the Administration of Trustees, chap. iii.

CHAPTER II.

OF MUTUAL CONTRACTS BY TRUST-DEED AND DEED OF ACCESSION.

THE combination of a Trust with a Deed of Accession on the part of the creditors, if it were accompanied with greater facilities for enforcing the performance of the trustee's duties,

¹ *Gibson v M'Donald*, 1824, 3 S. 374.

² *Allan v M'Graw*, 1792, Bell, Oct. Ca. 538. Lord Justice-Clerk M'Queen there says: 'It is now fixed that every person holding a feudal subject as trustee for others, is bound, when called upon, to denude in their favour.'

³ See the case of *Munro, etc.*, *supra*, vol. ii. p. 139.

⁴ *Russell, Tr. for Cockburn Ross, v M'Leod, etc.*, *Exrs. of Innes*, 16 Jan. 1821, Fac. Coll.

would afford a very satisfactory mode of settling a bankruptcy. It consists of two parts : 1. The trust-deed ; and, 2. The deed of accession.

SECTION I.

OF THE TRUST-DEED.

Respecting the trust-deed, nothing seems requisite to be added to what has already been said, except the observation, that as the trust-deed is to form a link in the chain of feudal titles, the less it is encumbered with conditions the better. Indeed, where there is a separate deed of accession, the better form seems to be an absolute conveyance to the trustee qualified by a backbond.

SECTION II.

OF THE ACCESSION OF THE CREDITORS.

The term accession, in this application of it, is used to signify an agreement, express or tacit, to join in certain common measures, with an engagement not to disturb or interrupt them. And in considering the doctrine of accession, it may be proper, 1. To inquire into the evidence and effect of accession ; and, 2. To consider the general frame and effect of the deed which is commonly executed where creditors expressly bind themselves to a system of common proceedings.

1. OF ACCESSION IN GENERAL.

PROOF OF ACCESSION.—When the accession of creditors to a plan of trust-management, or to common measures, is to be proved by express deed, the signature of the creditors, or of mandatories empowered to act for them, binds them, and operates as a complete bar against their following forth private diligence, provided the concurrence be unanimous.

Where no deed is signed, a distinction may be taken between such an accession as will bar a creditor by personal exception from following separate measures in order to acquire a preference, and that which is necessary to bind him, as in a submission, to the judgment of the trustee, or as concurring in a discharge to the debtor on payment of the dividends.¹

1. It is the object of the laws of bankruptcy to establish equality among the [499] creditors ; and although it may be said that the law accomplishes this purpose by other means than trust-deeds, still in every question of accession, where the prevention of partial preferences alone is in view, the construction of the evidence is favourable to the general interest. In this view, it seems to be justly held that not only the subscribing of agreements, or minutes of meetings of the creditors, but even such acquiescence as may deceive the other creditors into a line of conduct which, had they been made aware of opposition, they would not have pursued, will be sufficient to bar a creditor from proceeding with separate measures. It will not, indeed, be enough for this purpose that he has absented himself from a meeting called to deliberate on common measures, for that may be construed as indicating a resolution not to act with the general body. But a creditor will be held to accede who is present at a meeting at which common measures are resolved upon, without dissenting from them ;² or

¹ See *E. of Rosebery's Crs. v Geddes*, 1737, 5 Brown's Sup. 187.

² *M'Vicar v Crs. of Baillie*, 1762, M. 1214. Robert Baillie, merchant in Edinburgh, having become bankrupt, a very numerous meeting of his creditors was held, at which it was resolved to concur in common measures. At this meeting,

the son of Neil M'Vicar, a creditor, attended as agent for his father, and tacitly acquiesced in the general resolution. This circumstance is entirely omitted in the Faculty Collection. It is, on the contrary, stated there, 'that he had neither acceded to joint measures nor to the trust-disposition.' In consequence of this resolution, a trust-deed was executed by

who knowingly permits himself to be named as a trustee or commissioner for conducting [500] such measure;¹ or who is silent when a resolution is passed at a meeting in which he is present, authorizing an agent to take care that no preference be obtained by any of the creditors.²

2. But where the accession is to infer a CONSENT TO DISCHARGE the bankrupt on receiving such dividend as his estate shall yield; or to compromise the debt; or to submit to the award of the trustee all questions of debt, ranking, or preference; or to grant an allowance to the debtor till his affairs be settled,—these are points a great deal too important to be implied on slight evidence. And although it is of much importance to avoid the delay and expense of proceedings at law, the legitimate proof to bind a creditor to conditions so extraordinary is an express accession in writing.³

Baillie in favour of a trustee for his creditors; and the trustee entered to possession. M'Vicar having afterwards proceeded to do diligence, a competition arose between him and the trustee. The Court preferred the trustee, and found that M'Vicar was not entitled to be preferred upon his diligence. In the subsequent case of Dr. Heriot, in which M'Vicar's was much canvassed, it was stated as the ground of that decision that the Court held the son to have attended as agent for his father, that the silence was deceitful, and that having amused the meeting by a seeming acquiescence, M'Vicar was barred, *personali exceptione*, from disturbing the equality established by the trust-deed.

Heriot v Farquharson, Tr. for Fairholmes' Crs., 1766, M. 12404. A great complication of circumstances was founded upon in support of the personal exception. On the bankruptcy of Messrs. Thomas & Adam Fairholmes, who carried on business as merchants and bankers to a great extent in Edinburgh, a trust-deed was executed in favour of the late Mr. Farquharson for behoof of all the creditors, with power to dispose of the property, and divide the proceeds among the creditors according to their rights and interests. The trustee was also declared liable only for actual intromissions. This deed was accepted of by the trustee, and great diligence used in getting it intimated to the debtors of the bankrupts. A meeting was called, and the trust-deed communicated to the creditors present; but the matter was referred to a fuller meeting, as the creditors had not had time to determine what they should do. The second meeting was very full; and a deed of accession, containing a submission to the trustee, and *superseding* of diligence, having been proposed and read over, it was agreed to without any dissentient voice. A minute to this purpose was signed by the preses of the meeting, and the deed lay for the signatures of the creditors. Dr. Heriot never signed the deed of accession; but the circumstances from which his accession was inferred by the creditors were these:—That Dr. Heriot being at London, wrote thus to his agent here: 'I expect you'll exert yourself for me, with the rest of the creditors, so as to come in, share and share alike, according to the nature of my debt.' That the agent having reported to Dr. Heriot the nature of the trust-deed, and the propriety of following common measures, he wrote to him: 'I empower you to act for me in the best manner you can, jointly for the rest of the creditors, which is all I apprehend we can do now;' and again: 'I shall agree to your signing the deed of accession for me, with the rest of the majority of the creditors, or anything else which they may deem for the good of the whole concerned.' That the agent attended the

meeting at which the resolution to accede was expressed, without dissenting: That he, in consequence of advertisements issued by the trustee, lodged the Doctor's claim and grounds of debt: And that the Doctor himself, when he came down to Edinburgh, attended a meeting concerning the connection of the English and Scottish companies, without intimating any dissent from the common measures. The Court was clear that Dr. Heriot was not bound by the deed of accession, but that he was barred from taking separate measures. It was observed from the bench, that in a question of this kind a court is at liberty to consider the nature and effect of the contract to which the creditor is said to have acceded; that the circumstances from which the accession is attempted to be inferred will naturally be taken with more scruple, if the contract said to have been acceded to is attended with hardship; that here the only effect of the contract was to introduce equality among the creditors, and to prevent unjust preferences; that if Dr. Heriot had fairly said at first, or given notice before proceeding with his diligence, other creditors might have taken measures for their own security; but that having lulled them into security, and made them believe that he was an acceding creditor, he was not afterwards entitled to pursue separate measures.

See *Trs. of Croll v Robertson*, 1791, M. 12404; and *Campbell v Simpson*, 1791, M. 11683. See also *E. of Rosebery's case*, *supra*, p. 393, note 1.

¹ In *Anderson v Starkey, Fletcher, & Co.*, 2 March 1813, Fac. Coll., the agent for an English company having attended at a meeting of the insolvent's creditors, at which a private trust was arranged, and having been named as a commissioner, and acted as such, the company was held by the Court to be barred from taking any separate measures for obtaining a preference.

In England, one appointed as trustee, and as such acting under a private deed of assignment, was held to be barred from petitioning for a commission, though he did not sign the deed. *Ex parte Whally*, 1803, 1 P. Smith 118. See *Whitmarsh's B. L.* 25.

² *Lea v Landale*, 1828, 6 S. 350. See *Lyell v Christie*, 1823, 2 S. 288; and *Larkins v Smith*, 1824, 3 S. 200, N. E. 140.

³ In the above case of *Dr. Heriot v Fairholmes' Crs.*, *supra*, the Court found that 'there was sufficient evidence that Dr. Heriot did accede to the trust-right and disposition granted by Messrs. Fairholmes to their creditors; but found no evidence that he acceded to the deed of accession relative to the said trust-deed, or that he is bound thereby.' [*Thomson v Dudgeon*, 1855, 17 D. 455.]

But at the same time, in this, as in every other contract, accession may be inferred from circumstances. When the general creditors or particular individuals have been induced to forego an advantage for the sake of gaining the benefit of the accession of a creditor, things are no longer entire, and the creditor cannot resile. Thus, it sometimes happens that the friends of the bankrupt agree to relinquish securities, or to forego the opportunity of doing diligence, in order to procure the consent of the rest to an amicable settlement. Creditors who hear and acquiesce in this proposal at a meeting, and who take partial benefit, as by drawing dividends under the concert proceeding on it, would not be entitled to plead that the deed of accession had not been subscribed by them.

Accession, however established, presupposes two conditions: Fairness on the part of the others concerned in the agreement, and assent by all equally.

1. As the essential character of such a contract is EQUALITY, wherever the accession of the creditors, though apparently fair, is truly fraudulent and unequal, redress will be given. Thus, if the assent of some of the creditors has secretly been purchased by advantages given or promised, the other creditors will be entitled to reduce the contract, or to demand repetition of what has been unfairly given, and a communication of the benefit to all the other creditors.¹

2. The ASSENT given by each acceding creditor is provisional, on condition that all the others shall also accede. If, therefore, other non-acceding creditors proceed to use diligence against the person or estates of the debtor, a creditor who has acceded may, notwithstanding his accession, proceed also with diligence.²

EFFECT OF ACCESSION.—When a creditor has acceded to common measures, and [501] is to be held as thus barred from diligence, or bound to co-operate with the rest of the creditors, it may be questioned whether this contract, express or implied, subsists in relation to the person or to the debt; and so, whether it binds not only in respect of the interest held at the time, but for such other interest as the creditor may subsequently have acquired. It would appear, 1. That a creditor holding a debt in respect of which he has acceded to common measures, cannot, by parting with that debt and assigning it to another, defeat his engagement; but that the assignee will stand in his place, and be bound as an acceding creditor, or barred by such personal exceptions as are pleadable against the cedent.³ Neither will an acceding creditor be allowed to escape from the personal exception thence arising, merely by having purchased another debt, the creditor in which has not acceded. But, 2. Where a creditor has fortuitously acquired, by succession or other unforeseen means, the right to a debt in relation to which there has been as yet no accession, it does not seem that the assent which he had formerly given as creditor in another obligation shall bar the exercise of his *jus crediti* in circumstances which may be very different.

2. OF THE DEED OF ACCESSION, AND CHIEF POINTS TO WHICH IT IS COMMONLY DIRECTED.

The great purpose of the deed of accession is to settle a plan of management, disposal, and distribution of the estate; and to grant directly, or by the instrumentality of the trustee or others, that discharge to the bankrupt which is the fair counterpart of an honest and full surrender.

This deed is a mutual contract, by which no creditor can be bound without his own consent, nor even by his subscription, until all the other creditors have also assented. This last point of the contract is commonly expressed as a special condition; but whether expressed or not, it is an implied and essential condition of such a contract, that all shall be bound or none.⁴

¹ See this doctrine fully illustrated in *Arrol v Wight's Crs.*, 29 May 1810; and in *Gordon Mack v Jenkins & Smith*, 25 Nov. 1814, 15 Fac. Coll. 47. Below, p. 399, note 3.

² *Watson v Fede*, 1724, M. 6397. See *supra*, p. 390. [See

Jopp v Hay, 1844, 7 D. 260, as to accession not barring a sequestration.]

³ [*Dick v Muirson*, 1845, 8 D. 1.]

⁴ See above, the case of *Watson v Fede* p. 390, note 5.

The arrangements necessary for regulating the management, disposal, and distribution of a bankrupt estate, seem to be reducible to these heads :—

1. A power of arbitration, either to the trustee, or to some one chosen by the creditors separately from the trustee, to determine their claims and preferences, and so to accomplish by private convention what is provided for by the statutory power of the trustee in sequestration. Without this arrangement, judicial proceedings are scarcely to be avoided ; and the deed of accession with this view contains a proper submission, by which the creditors mutually bind themselves to submit to the final sentence and decree-arbitral of the trustee, or whoever shall be chosen ; to which the clause of registration, being a consent to the registration also of the submission and of the decree-arbitral, gives the full efficacy and execututorial force of a judgment by a court of law.¹

2. The powers of management and sale vested in the trustee are generally regulated by the deed of accession ; and a committee of advice is named to act along with the trustee, if that be thought necessary.

3. In respect to the dividends, there is sometimes a provision that they shall be made within a determinate time ; and a power is given to call upon the trustee at the elapse of that period to renounce his trust, if a dividend shall appear to have been unduly delayed.

4. The creditors generally consent to a *supersedere* of diligence, and delegate their power over the debtor's person to the trustee or to the arbiter.

[502] 5. Sometimes the creditors agree that after a fixed period, provided a certain proportion of the debts shall then be paid up, the debtor shall be entitled to a discharge of his person and future acquisitions ; or that he shall be discharged of all his debts, by the assent of a certain proportion of the creditors. And there can be no doubt that such an agreement will be effectual.²

6. Sometimes the deed of accession confers on the trustee all the powers of a trustee in sequestration, and binds the creditors to observe all the rules of the Sequestration Act.

CHAPTER III.

OF THE ADMINISTRATION OF TRUSTEES.

LOOKING back to the different character of a trust for the creditors of an insolvent debtor, as contrasted with that of a trust for family purposes and arrangements by a solvent proprietor,³ the ground of the distinction will be obvious between the powers of the trustee in the two cases : 1. In a trust-deed of the former description the trustee is entitled to proceed in his administration uninterruptedly, where no diligence has been used by creditors ; and his payments to creditors, or others having demands against the truster, as they may apply, or it may be found most convenient, will be effectual to discharge him in accounting under the trust.⁴ 2. In a trust for creditors, on the other hand, the responsibility is direct by the

¹ The Court has held a party bound, as by accession to a common deed of submission, by appearing and claiming, and showing evidence under it. *Brown v Gardner*, 1739, M. 5659.

² See *Gibson v M'Donald*, 1824, 3 S. 374, N. E. 263.

³ See *supra*, p. 383.

⁴ *Rankin v Gardner*, 1741, M. 16201. Found, that where a disposition was granted to a trustee, with power to dispose of the subject, and to apply the price to the disponent's creditors, such trustee may lawfully pay *primo venienti*, the same being done *bona fide*.

Alison v E. of Dundonald's Crs., 1793, M. 16211. Here a trust-deed was granted by Lord Dundonald for the purpose of paying his debts and providing for his family. The trustees borrowed money and paid debts, after repeated demands on the part of a creditor, who, having afterwards adjudged, objected to the preference for the money so employed. The Lord Ordinary refused to sustain the payments as effectual, but the Court held the trustees to be preferable for the money so paid to the adjudging creditor.

Pagan v Campbell's Trs., 1823, 2 S. 125, N. E. 117. This

trustees to the creditors; not merely in consequence of diligence used by them, but in the character of holders of the radical right.

Difficulties may arise in the administration of a trust where the trustee does not accomplish with due diligence the purposes of the trust; and yet, from that want of unanimity among the creditors which every trustee may easily contrive to raise, it may be very difficult to obtain redress. The only resource is an application to the Court of Session; but that is a matter of difficult discussion, and where it is easy to create delay and unsatisfactory litigation. And this is one of the great evils of private trusts for creditors, for which the contract ought to provide.

But there are other difficulties of some importance. And,

1. It should be distinctly settled, as in sequestrations, that the money of the estate should be lodged in bank, or on an account opened for the estate in the name of the [503] trustee. This will provide against the very distressing calamity of a trustee's bankruptcy with the funds undistinguishable in his hands, or in those of his banker.

2. Where this is not provided for, or the stipulation not observed, it sometimes happens that a trustee fails after a dividend has been advertised, and part of it has been paid; and the question arises, whether the loss in such a case must fall on the creditors, who might have drawn their dividend, or whether they shall be allowed to demand their payment from funds subsequently collected by another trustee? It appears that in such a case the trustee is the holder of the several dividends declared in the scheme of division at the risk of the respective creditors, and that they must look for indemnification to him and his securities, not to the future effects.

CHAPTER IV.

DISCHARGE OF THE BANKRUPT, AND EXONERATION OF THE TRUSTEE.

SECTION I.

OF SUPERSEDERE AND DISCHARGE OF THE BANKRUPT.

ARRANGEMENTS relative to the person of the debtor are of some importance and interest. They are either temporary, for intermediate protection, or conclusive, for the discharge of the debtor's person.

1. DEEDS OF SUPERSEDERE OR PROTECTION.—Where a debtor feels himself in circumstances so embarrassed that he cannot continue his payments regularly, without running into inextricable confusion, while yet he has funds which, if allowed to have their full operation, would entirely relieve him, he is sometimes by his creditors permitted to make a pause. On having a satisfactory statement of his funds laid before them, or on receiving the obligation of sureties, to whom he may have disclosed his situation, and given conviction privately of their safety, his creditors may sign a licence, or temporary discharge, called in technical language a SUPERSEDERE, by which they agree to postpone their demands, either

was a trust, with power to sell for the purpose of raising money for a certain use, of paying debts, and of paying over to the truster the balance. The granter was found to be insolvent; and in an action of count and reckoning and multiplepinding, the question arose, whether the trustees were entitled to credit for certain bills paid. The Court held,

that as the creditors had not acceded to the trust, which was intended not so much for their behoof as for a private purpose, no interest was vested in them under it; and that the holders of the bills having threatened diligence against the truster, the trustees were not only entitled, but bound to pay them.

to a particular day, or until the elapse of a specified time from the day of payment in their several contracts.

There is nothing very peculiar in the form of such deeds. They are sometimes in the form of letters by each creditor; sometimes in the form of a general deed of consent; sometimes they express an obligation to supersede all diligence till a particular day, or for a certain time; sometimes they are subscribed by cautioners or sureties, binding themselves to pay by instalments. By their very nature they are suspensions rather than final settlements and discharges; and although in critical moments of mercantile distress, or on occasion of ill-founded or malicious rumours causing a run on a particular bank, they are often attended with the most happy consequences, they in ordinary cases end in total failure.

2. DISCHARGE OF THE DEBTOR'S PERSON.—In treating of deeds of *supersedere*, the usual covenants relative to *supersedere* and discharge have been mentioned. To give effect to the discharge, when it is agreed to be given on certain conditions, or by a certain concurrence, and to save the debtor from the disgrace and inconvenience of an arrest and disagreeable question, it will in general be necessary, either to have the condition specifically complied with, and proved by writing, or by the attestation of the trustee or otherwise; or to have a decree of declarator, should any dispute arise as to the debtor's compliance with the terms of the agreement.

SECTION II.

EXONERATION OF THE TRUSTEE.

[504] The trustee is most effectually exonerated by the written discharge of all the creditors, and concurrence of the bankrupt. If there be any difficulty in this, an action of multiplepounding and exoneration ought to be raised, in which the creditors being called for their interests, the trustee, producing his accounts, vouchers, and discharges, has the whole matter satisfactorily investigated, and a decree of exoneration pronounced.

SECTION III.

OF PRIVATE COMPOSITIONS.

A COMPOSITION is an agreement between a debtor and his creditor, that the debtor shall at a particular time pay part of his debt, and that the creditor, on condition of its being so paid, shall discharge the debt. Such a contract may be entered into with an individual creditor, or generally with all the creditors. In the former case the contract will be valid, whatever may be the consideration agreed upon between the creditor and the debtor. The latter is a mutual contract, proceeding on two implied conditions: one is, that all the creditors shall be dealt with equally; the other, that all shall concur, and that no one shall be bound unless all are bound.

1. EVIDENCE OF THE CONTRACT.—This properly ought to consist of a deed, on stamped paper, regularly subscribed by both parties. But less formal evidence may bind the parties, and ground an action for enforcing the contract. 1. An offer by a holograph letter on the part of the bankrupt, accepted by a minute subscribed by the creditors at a meeting, will be sufficient to bind the contract. 2. If the creditors sign the agreement, not while assembled, but separately, it ought to be done formally before witnesses, and regularly attested. But, 3. This more solemn way of signing deeds or consents, to be executed by a great number of persons, is so much neglected in practice among mercantile men, who generally think their subscription alone sufficient to bind them in the most important

transactions, that the Court would probably not sustain the objection on the statutes relative to the authentication of deeds, unless the party should deny his subscription.¹ The case would probably be held to fall under the rule of mercantile and privileged writs. 4. At all events, if any payments were made, or irretrievable consequence had followed on the agreement thus informally subscribed, the parties would be held bound. And, 5. If the offer were proposed to a meeting, and accepted at that meeting, without dissent by one who was present, it would probably be held as an agreement to which he had assented. On this subject enough has perhaps been said already.²

2. OF CONDITIONS IMPLIED IN SUCH CONTRACTS.—One essential condition implied is, that there shall be perfect equality among the creditors, or such difference only as their legal preferences entitle them to claim. It is an agreement by all to accept of a fair proportion of so much per pound of their debts, in place of payment of the whole; and although not specially expressed, it is necessarily implied (if not otherwise agreed), that the creditors are all to be upon the same footing, and that no creditor shall receive a higher composition, or any gratification of which the rest do not participate.

This has been rested on the fair ground of equality which ought to be observed towards all creditors, not only in the division of an estate in bankruptcy, but also in what they agree to accept instead of a dividend.³ On this ground, a creditor who discovers the [505] fraud, although he may receive the full proportion which from the first he expected, may take exception to the unfair execution of the contract, or may reduce it after it has taken effect. This seems to be a necessary consequence of what has always been judicially regarded as a fraud upon the creditors, as it does not appear that they would have agreed to the composition contract at all, had they been aware that, under cover of a fair and equal agreement, preferences to particular creditors were intended.

It has been said, that where the debtor privately agrees to pay to a particular creditor subsequently out of his future acquisitions, a certain CONSIDERATION for his assent, the creditors can have no right to complain of unfair distribution of the common fund. But here one great object of the creditors in such a contract is defeated, by continuing the obligations of the debtor after he ought, according to the true spirit of the contract, to be discharged of his debts.⁴

¹ See *Glass v M'Intosh*, 1825, 4 S. 1.

² *Supra*, vol. ii. p. 393, etc.

³ *Arrol v Wight's Crs.*, 29 May 1810. The creditor here was not allowed to make his unfair stipulation effectual. Wight was debtor to Arrol in £59 for goods, and £100 for money lent. Arrol agreed to take a composition on the former, but not on the latter. Ostensibly, however, he took the composition on both for eight shillings in the pound, and signed a minute of discharge. He, at the same time, got a bill from Wight for £60, which was retired, and that and the composition bills would have paid the full debt. The cautioners hearing of the £60 bill, insisted, when called on for the payment of the composition bills, that the £60 should go so far in payment of them. Lord Newton held, that a contract on the footing of perfect equality was entered into with the whole creditors, the bankrupt, and the cautioners, from which none of them are at liberty to depart to the prejudice of the rest; and that as Arrol had received out of the funds which should have gone to pay the composition the sum in question, he was to that extent barred from demanding payment of the composition. To this judgment the Court adhered.

W. Gordon Mack v Jenkins & Smith, 25 Nov. 1814, 16 Fac. Coll. 47. There was here a composition settled by private contract for fourteen shillings in the pound, payable by three

instalments. The creditors agreed to take the debtor's own bills for the composition, without any other precaution than the control of a committee of creditors upon the debtor's transactions. The first instalment was paid. Some months before the bills for the second were due, the debtor saw he could not pay them, and he anticipated to favourite creditors payment of that composition by endorsing bills to them. The debtor became bankrupt a second time, and sequestration was awarded, and the trustee challenged the endorsements. The Court 'found the attempt made by the said D. Hill, the bankrupt, to anticipate the payment to the defenders of the second instalment of the composition, was in breach and violation of the contract to which the creditors at large were parties,' and thereafter sustained the reasons of reduction.

The doctrine is well established in English law. See *Eastbrook v Scott*, 3 Ves. jun. 456; *Cockshott v Bennett*, 2 Term. Rep. 763.

⁴ In *Cockshott v Bennett*, Lord Kenyon said: 'The creditors undertook, and mutually contracted with each other, that the defendants should be discharged from these debts after the execution of the deed. Here these plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that situation which was the inducement to the other creditors to sign the deed and

It is another condition, equally implied and equally essential in all such contracts, that all the creditors, without exception, shall concur. Without this they are not on EQUALITY, and the very object of the contract is entirely defeated. The consequence is, to give a right of challenge to the creditors who have subscribed, or to the cautioners who have interposed their guarantee, if all the creditors shall not have concurred.¹

It has sometimes been maintained as an implied condition of such contracts, that the creditors shall not interfere with the cautioners, by DILIGENCE or sequestration, to enforce from the debtor's estate the stipulated composition. Where the cautioners are bound for the whole composition, and, on failure of the debtor in paying any of the instalments, are [506] ready to pay for him, and to take the creditor's place, this may be true. But it certainly is not true where the cautioners are not thus ready to pay, or where they are not bound for the whole, but only for some of the instalments of the composition; and the stipulation of bills for the instalments is, in the nature of the thing, a full provision for proceeding with diligence.²

3. OF THE EFFECTS OF COMPOSITION CONTRACTS.—If notes or bills are to be given for the composition, the refusal³ or the not proffering of them⁴ will entitle the creditors to proceed with their former demands.

The discharge included in the composition contract will acquit the debtor of all the debts of those who have assented and received their composition. But the debtor ought, on giving composition bills, to get up the former documents of debt; on paying the composition, to get up the composition bills, and also the original documents, if not before delivered; and if no bills have been granted, to take a receipt or discharge from the creditor. Without such evidence, the debtor is in danger of a demand which he may want the means of opposing.

If the composition shall not be paid, the condition of forbearance is broken, and by an implied reservation the original debt revives;⁵ much more so if the condition be expressed.⁶ See above, for the contrast between this and the same question under the Sequestration Act, p. 356.

If the discharge be absolute, without any proviso to avoid it for default of payment, and the debtor becomes bankrupt after paying some of the instalments, but not the whole, the creditor is held entitled in England to prove only the amount of the instalment not yet paid.⁷ This question has not yet been decided in Scotland, but it would probably be decided in the same way.

If the cautioner pay the composition, he does not seem to be entitled to demand a ranking for the original debt. But if the debtor fail, and have paid instalments, it would appear that the cautioner would be entitled to proffer the balance, and so prevent the creditor from resorting to his original debt.

If the composition contract fail after some creditors have received part of the composition, while others have got none, it is not a settled point whether the latter will be

to relinquish a part of their demands. If a bankrupt or an insolvent, after becoming free from his engagements, having no restraint on his mind, voluntarily give security for a former demand which is only due in conscience, such a security may be enforced in a court of law. But the contract in the present case affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt, in compounding for their debts.' 2 Term. Rep. 765. [*Robertson v Ainslie's Trs.*, 1837, 15 S. 1299; *Macfarlane v Nicoll*, 1864, 3 Macph. 237.]

¹ *Johnson v Carson*, 20 Feb. 1823, 2 S. 229, N. E. 203. See also *Freeland's case*, below, note 2. [*Brown v Macintyre*, 1830, 8 S. 847.]

² *Freeland & Co. v Finlayson*, 1823, 2 S. 389, N. E. 344.

³ *Boothby v Lowden*, 3 Camp. 176.

⁴ *Cranby v Hillary*, 2 Maule 120.

⁵ 1 Montagu 221, 223, note (e); *Sewell v Musson*, 1 Eq. Al. 28; *Rose v Rose*, 1 Vern. 210; *ex parte Bennett*, 2 Atk. 527. See before, vol. ii. p. 394. [*Horsfall v Virtue & Co.*, 1826, 5 S. 33; *Blincoe's Tr. v Allan & Co.*, 1828, 7 S. 124, aff. 7 W. and S. 26.]

⁶ *Ex parte Vere*, 1 Rose 281; *ex parte Richardson*, 14 Ves. 86.

⁷ *Ex parte Goodsir*, 2 Montagu 222, note (c). But no opposition. *Ex parte Peele*, 1 Rose 435.

allowed to draw in any new proceedings for what will be sufficient to equalize the payment. There is something like a plea in equity, that they should be allowed thus to equalize what has been drawn by the others under the mutual contract to which they were all parties; but no such plea can be stated against non-acceding or subsequent creditors, who equally suffer by the payments to account of the composition.

PART IV.

OF THE DIVISION OF THE FUNDS AMONG THE CREDITORS.

IN whatever form the division of the bankrupt's funds may be accomplished, the great [507] principles of ranking and distribution are the same. The estate is to be converted into a divisible shape, and to be divided among those who have demands against the debtor, either equally or according to such rules of preference as the law may recognise. Those principles and rules it shall be the business of this part of the sixth book to explain.

CHAPTER I.

OF THE FUND OF DIVISION.

THE property belonging to the bankrupt having been converted into money, and brought into a divisible form, the amount of it, with the previous rents, interest of debts, interests on the price of subjects sold, etc., and under deduction of the necessary expenses, form the fund on which the creditors are to be ranked. This ranking is to be settled on different footings with relation to each part of the fund, so far as it is covered by securities, and in so far as it is unburdened, equally among the general creditors. It is therefore necessary, 1. To distinguish correctly the amount of each separate estate, and of the expenses which form deductions from it, that it may be applied in the first place to the payment of the creditors holding securities over it, leaving the balance as a fund equally divisible among the general creditors; and, 2. After having seen the rules of ranking duly applied in exhausting the several estates over which preferences may be claimed, it may be proper to inquire what right the creditors so preferred on the price of particular estates have to be regarded as claimants on the general fund of division.

It is not necessary here to go into any detail illustrative either of the principle or method of those statements. But it may be proper to take notice of the general question, Upon whom the defalcation of particular funds falls? A creditor holding a security and entitled to a preference over any particular subject is to be considered, in the first place, as a creditor of that subject, and as having right either to full payment of his debt from it, or at least to payment to the extent of the value of the subject: it is the balance only of such value that can go to the general body of creditors. Until the creditor holding a security shall receive his payment, or at least until a dividend shall be set apart for him, substituted in place of his original claim, and placed at his sole and individual risk, any accidental diminution of the general residuary fund must fall on the personal creditors.

Till that moment the right of the preferable creditors is general over the whole subject of their security; and while any part of it remains, their security must attach to it.

It is not by the operation of making up a scheme of division, however, that the purchaser's general obligation for the payment of the price is converted into a special debt to the creditors preferred, or the creditor's right is changed into a claim for a specific dividend. If anything short of actual payment can place the share of each creditor at his own risk, [508] it can only be accomplished by a decree of division approving of the appropriation of the price, and authorizing it to be so paid. From that moment the creditors may be held as creditors only for a special dividend, henceforward to lie in bank at their own risk.¹

Although the expense of the general proceedings, sequestration, decree of sale, and ranking or multiplepointing, form deductions from the common fund, the expense of an interim warrant to a particular creditor is a burden only on himself.²

In explaining generally the rules according to which debts are to be ranked as preferable, it may be proper to take, *first*, The case of single securities, extending over one subject or class of subjects; and, *secondly*, The case of a creditor holding more than one security for his debt.

CHAPTER II.

ORDER OF RANKING OF CREDITORS HOLDING SINGLE SECURITIES.

To keep this subject clear, it may be proper to discuss the effect in ranking, 1. Of securities over the feudal subjects; 2. Of securities over the heritable estate not feudal; 3. Of securities over the moveable estate; and, 4. Of securities by exclusion.

SECTION I.

ORDER OF RANKING OF CREDITORS HOLDING SECURITIES OVER THE FEUDAL ESTATE NOT DISTURBED BY EXCLUDING DILIGENCES OR CONSENTS.

Taking the case of a single indivisible feudal subject, with competing creditors holding only one security each, two classes of competitions may be distinguished: one in which no creditors are in the field but those of the bankrupt himself; and another in which creditors of the ancestor come into competition with those of the bankrupt. But as the latter of these has been already so amply discussed in the Commentary on the Act 1661,³ the discussion at present may be confined to the case in which the competitors are creditors of the bankrupt himself.

ORDER OF RANKING.—The feudal estate, then, being a single indivisible subject, and the competing creditors holding only one security each, the order of ranking is this:—

¹ *Murray and Rae's Crs. v Blair*, 1793, M. 13343. Here, after a scheme of division was made up, the purchaser having failed, and the judicial factor also, a defalcation arose both of the rents and also of the price, in consequence of a fall in the price upon a new sale. The Court found that the creditors standing ranked preferably 'are entitled to draw

their payment *in suo ordine* on these funds, and that any loss which has arisen thereon falls upon the postponed creditors.'

² *Dickson's Tr. v Rae's Crs.*, 1795, M. 13345; *Sir H. Inglis v Goldie*, 1825, 3 S. 435, N. E. 305.

³ See vol. i. p. 766.

1. The superior for his feu-duties.

2. Securities, whether voluntary or judicial, completed by sasine, to be ranked according to the date of recording the infetment; all adjudgers within year and day from the date of the first effectual adjudication being entitled to take benefit under the infetment proceeding on that first effectual adjudication.

3. The holder of a burden by reservation ranks preferably to all the creditors of the disponee. The creditors of the disponer (by whom the burden by reservation is [509] constituted) rank according to the dates of the completion of their diligence.

4. The bankrupt's widow has her terce out of the estate vested in the husband by sasine; subject to the interest of debts secured by infetment during the husband's life,¹ but preferably to all other creditors, and even to adjudgers with a charge.²

5. The husband's courtesy, extending over all subjects in which the wife was infet, gives a right burdened with the real securities constituted by sasine, and also burdened with the yearly interest of the wife's debts.

6. If there be no sasine produced, or after the creditors who hold sasines, adjudications, completed by a signature or charge in terms of the statutes, are next to be ranked. The adjudgers in competition with each other rank thus:—1. An adjudication in implement, with a charge against the superior, is preferable to posterior adjudgers who have not obtained sasine.³ 2. The first effectual adjudication, and all adjudgers for personal debts whose adjudications are within year and day of the first effectual; and all the creditors appearing in a ranking and sale, where the first calling of the process of sale before the Lord Ordinary is within the year and day;⁴ and all the creditors in a sequestration, of which the first deliverance shall be dated within the year and day—are to be ranked *pari passu*; the first adjudger being entitled, however, to the expense of making his adjudication effectual. 3. Those who are beyond the year and day are to be ranked according to the dates of their decrees of adjudication, provided no decree of judicial sale has been pronounced, which stops individual adjudications.

7. If a voluntary security followed by sasine should intervene between the completion of a first adjudication by sasine and the leading of posterior adjudications, which yet are led within year and day of the first, it is not at first obvious how the contending interests are to be reconciled, so as to give to each precisely what he is by law entitled to. When this case first occurred, it was deemed not a little perplexing, and the Court thought the most just rule was, to consider the voluntary security as an adjudication, and to give it a place in the *pari passu* ranking.⁵ Lord Stair was not satisfied with this, but contended for a determination which has not been finally adopted. He maintains a right on the part of all the adjudging creditors to exclude the holder of the voluntary security.⁶ Several cases which occurred in the end of the seventeenth and beginning of the eighteenth century, relative to the effect of inhibitions, as striking at some debts in a competition while they

¹ Belschier v Moffat, 1779, M. 15863, Hailes 838.

² Carlyle v Crs. of Lyon of Easterogle, 1725, M. 147.

³ See above, vol. i. pp. 782-3. [Wood v Scott, 1833, 11 S. 355. An adjudger in implement of an ancestor's obligation, whose diligence is not led until after sequestration, cannot compete with the trustee infet. Bages v Laurie, 1854, 16 D. 860.]

⁴ 54 Geo. III. c. 137, sec. 10.

⁵ Brown v Nicholas, 1678, M. 2821. The difficulties in deciding the question were these: 1. If the statute ordering all apprizings within year and day of the first effectual to be ranked *pari passu* were to be strictly and rigorously applied to the case, the voluntary security would be useless, and excluded even by posterior creditors, who not only had not dreamt of appricing, but whose debts were not in existence

at the date of the security. 2. If, on the other hand, the intervention of the voluntary security were to be held a mid-impediment to prevent the rule of the statute from having effect to injure the holder of it, and entitling him to draw, preferably to them, all that they would draw in competition with the first effectual, the holder of the voluntary security would thus in many cases draw a greater proportion of the fund than the first adjudger; for the posterior apprizers would, in ranking with the first, leave him a small dividend, and then the voluntary securities would step in and take these dividends from the posterior apprizers. To relieve themselves from these difficulties, the Court brought all in *pari passu*, which was obviously as unjust in another way.

⁶ Stair iv. 25. 30.

reached not others, contributed not a little to clear up the principles of this doctrine. In those cases, a rule came in practice to be fixed, which gives to each creditor the precise [510] right to which by law he is entitled.¹ The principles upon which this rule is grounded are these: 1. That the statute 1661 subjected the first effectual adjudger to the necessity of communicating to succeeding adjudgers within year and day the benefit of his diligence, as if one adjudication had been led for all. 2. That this benefit was not to be communicated to the holders of voluntary securities; the consequence of which is, that the holder of an heritable bond cannot infringe upon or hurt a prior adjudger's right, if secured by infestment. 3. That an adjudger, posterior to the heritable bond, must be postponed to that heritable bond, having by his delay forfeited the benefit of the statute, so far as it may be injurious to the heritable creditor. And, 4. That the posterior adjudger's interest under the statute is no further injured than as it interferes with the heritable bond. The conclusion is, that to give effect to these several rights, the true method is to make a double operation: first to rank the preferable adjudgers *primo loco*; the holder of the voluntary security *secundo loco*; and the posterior adjudgers *ultimo loco*; and then to allow the postponed adjudgers to draw back from the preferable adjudgers all that the preferable adjudgers would have been obliged to yield to the posterior adjudgers, had the heritable bond been out of the field, and the adjudgers the only competitors. Or, what comes to the same thing, first to rank the whole adjudgers *pari passu*; then hypothetically to rank the first adjudication *primo loco*, and the voluntary security *secundo loco*; and to form the final result by giving to the holder of the voluntary security, by way of drawback from the postponed adjudgers, all that he would be entitled to draw in ranking only with the first adjudger, while the first adjudger retains his full dividend.²

8. The same rule must be applied where the first effectual adjudication is followed by an adjudication in implement; after which come simple adjudgers within year and day. The first adjudger being preferred to the adjudger in implement, the posterior adjudgers will receive only what the adjudger in implement leaves, and such a share of what the first adjudger draws, as he would not have drawn had the adjudication in implement been out of the field.

¹ This rule is well laid down by Erskine (ii. 12. 32). The frequent and interesting discussions of the question in several important rankings seem to have suggested it to Lord Kames as a fit subject for one of those essays which he published in his early youth. He calls this essay '*Vinco vincentem*.' It is crudely conceived, and even in its improved state (Elucidations, art. 31) is far from being clearly reasoned. His illustration, in particular, of the case at present more particularly under review is not luminous (pp. 206, 207, and p. 211), and he makes a capital mistake in law in setting down his hypothetical case.

² In a former edition I illustrated the method of ranking by an appendix, containing some remarks on 'An Arithmetical Essay on the Competition of Creditors on a Bankrupt Estate.' But on looking again into that essay, the methods proposed are so entirely destitute of principle, that it seems unnecessary to criticise them, and I have omitted the appendix.

I subjoin a short and clear statement of the several modes of ranking, according to the rules contended for or finally established, for which I am indebted to an accountant of the first eminence.

Effect of the different Modes of Ranking Two Pari Passu Adjudgers, and an Heritable Bond intervening between the Adjudications.

1st, Upon the principle contended for by Lord Stair, that

all adjudications within year and day of the first effectual are to be held as led of the date of the first effectual, and so exclude the heritable bond.

2d, Upon the principle contended for in the case *Brown v Nicholas*, 1673, that the *pari passu* adjudgers are to be ranked in the first place, and a dividend set apart to the first adjudication; and then the heritable bond is to be ranked, and draw preferably to the posterior adjudger.

3d, Upon the principle adopted by the Court in that case, ranking the whole three creditors *pari passu*.

4th, Upon the principle contended for in the ranking of the *Cra. of Langton*, 1697, as to the then analogous case of the effect of an intervening inhibition, viz.: First, That the first adjudication is ranked *primo loco*, and the heritable bond *secundo loco*, and draws accordingly. Secondly, That the draft of the heritable bond is taken out of the whole fund, and the remainder divided between the adjudgers in proportion to their debts.

5th, Upon the principle laid down by Erskine, and which is analogous to the rule finally adopted as to the ranking of inhibiting creditors, viz.: First, By ranking the first adjudication *primo loco*, the heritable bond *secundo loco*, and the posterior adjudication *tertio loco*, and setting apart drafts accordingly. Secondly, By ranking the adjudications *pari passu*, and allowing the postponed adjudger to draw back

9. If the first effectual adjudication be prior in date to the voluntary security, [511] though not completed by sasine till after the sasine on the voluntary security, it would appear that the holder of the voluntary security would not be preferred, unless the adjudger were *in mora* in completing his diligence.¹

SECTION II.

OF THE RANKING OF CREDITORS CLAIMING PREFERENCE OVER THE HERITABLE PROPERTY UNFEUDALIZED.

The rules of ranking applicable to securities on this part of the estate are comparatively few and simple. They scarcely, indeed, require any formal detail; and the principles of preference already laid down in a preceding book² will fully supply the place of any lengthened enumeration.

SECTION III.

OF THE RANKING OF CREDITORS HOLDING SECURITIES OVER THE MOVEABLE FUND.

It may be proper to distinguish into classes the vast variety of subjects included under this description.

from the first adjudger the difference between his draft upon this division, and his draft upon the first division. (see the sentence in the text to which this is a note) brings out the reason of the rule, and appears to be the more correct formula.]

Fund, £10,000.

	Debts.	First Mode.	Second Mode.	Third Mode.	Fourth Mode.	Fifth or Correct Mode.
First adjudger,	£4,000	£4,000	£6,666 $\frac{2}{3}$	£3,333 $\frac{1}{3}$	£2,666 $\frac{2}{3}$	£4,000
Heritable bond,	6,000	4,000	3,333 $\frac{1}{3}$	5,000	6,000	6,000
Second adjudger,	2,000	2,000	...	1,666 $\frac{2}{3}$	1,333 $\frac{1}{3}$	...
	£12,000	£10,000	£10,000	£10,000	£10,000	£10,000
First adjudger,	£3,000	£3,000	£5,000	£2,500	£2,000	£3,000
Heritable bond,	6,000	4,000	5,000	5,000	6,000	6,000
Second adjudger,	3,000	3,000	...	2,500	2,000	1,000
	£12,000	£10,000	£10,000	£10,000	£10,000	£10,000
First adjudger,	£6,000	£5,000	£5,000	£3,333 $\frac{1}{3}$	£3,000	£5,000
Heritable bond,	6,000	...	5,000	3,333 $\frac{1}{3}$	4,000	4,000
Second adjudger,	6,000	5,000	...	3,333 $\frac{1}{3}$	3,000	1,000
	£18,000	£10,000	£10,000	£10,000	£10,000	£10,000
First adjudger,	£10,000	£6,666 $\frac{2}{3}$	£6,666 $\frac{2}{3}$	£5,000	£6,666 $\frac{2}{3}$	£6,666 $\frac{2}{3}$
Heritable bond,	5,000	...	3,333 $\frac{1}{3}$	2,500	...	...
Second adjudger,	5,000	3,333 $\frac{1}{3}$	...	2,500	3,333 $\frac{1}{3}$	3,333 $\frac{1}{3}$
	£20,000	£10,000	£10,000	£10,000	£10,000	£10,000

¹ *Binnings v Crs. of Auchinbreck*, 1749; *Duchess of Douglas v Walter Scott*, 1764.

² See above, vol. i. p. 791 et seq.

1. GOODS IN GENERAL.

[512] THE ORDER OF RANKING IS: 1. Privileged debts.¹ But it has not yet been determined whether such debts be preferable to the Crown. 2. King's duties, when the goods are in the king's cellar under bond for duties; and in certain manufactures, a hypothec for excise duties. 3. Real securities over moveables by assignation and possession, or by pledge, retention, or landlord's hypothec, followed by sequestration and a warrant to sell.² 4. Crown's extent, according to the rules already laid down.³ 5. Creditors who have done diligence by poinding,⁴ or by arrestment, or by confirmation, according to the criteria of preferences already laid down⁵ of their several rights, effect always being given to the laws for equalizing their diligences. Where a competition arises between the creditors of the ancestor and those of the next of kin, the rules applicable to it are delivered above,⁶ in commenting on the Act 1695, c. 41.

2. DEBTS IN GENERAL.

THE ORDER OF RANKING IS: 1. Privileged creditors. 2. The debtor entitled to compensation or set-off. 3. Crown's extent. 4. Assignees, whose right is completed by intimation, according to the completion of their diligences. 5. Creditors doing diligence.

3. SPECIALTIES RESPECTING MOVEABLES AND DEBTS OF PARTICULAR KINDS.

1. SHIP.—The order of preference, so far as peculiar, seems to be: 1. Lien to ship-carpenter.⁷ 2. Privilege to mate and seamen for the wages of the voyage.⁸ 3. Bottomry creditors, preferred in the inverse order of the date of their advances, and furnishers in a foreign port of the repairs and necessities for the last voyage.⁹ 4. Freighters, for their goods which have been sold or lost, and for average loss.¹⁰ 5. Shipshusband entrusted with the direction and management of the ship, or law agent, provided they hold the muniments of the ship; by lien on those muniments, the one for his advances and engagements, the other for his professional account. 6. Mortgagers, or those holding venditions in security, according to the completion of their securities. 7. Other creditors (including the master) *pari passu*, unless a preference has been established by diligence. Such preference may be either to the Crown by extent, or to creditors by privilege, poinding, arrestment, or confirmation as executor-creditor, according to the rules of competition.

2. FREIGHT.—The freight is liable to a preference for the security of the shipmaster and seamen. The shipmaster's security is of the nature of a lien, that of the seamen of the nature of hypothec. Both seem to be preferable to the merchant's right of compensation or retention.

The order will be: 1. Seamen; 2. Shipmaster; 3. The merchant's right of set-off or retention; 4. Assignees or creditors doing diligence according to the date of their diligence or intimation; the Crown preferable by extent.

[513] 3. CARGO.—1. Shipowner and master for freight, average, etc., by lien. 2. Factor by lien. 3. Assignees, including all those who, either by special engagement or by draft on the consignee, may have a legal right to the fund in his hands;¹¹ and, in competition with their creditors doing diligence according to the rules of preference already explained, the Crown by extent, other creditors by the order of the completion of their rights or diligence.

¹ See vol. ii. pp. 147–150.

² See vol. ii. pp. 51–55.

³ Vol. ii. p. 52.

⁴ [*Sangster v Barness*, 1857, 20 D. 355.]

⁵ See vol. ii. pp. 61, 69, 83.

⁶ See vol. ii. p. 85.

⁷ See vol. ii. p. 93 et seq.

⁸ Vol. i. p. 562, and ii. p. 99.

⁹ See vol. ii. pp. 580–1. Observe also the doubt as to necessities (p. 584).

¹⁰ See vol. ii. p. 99.

¹¹ See above, vol. ii. p. 12 et seq.

4. SUBJECTS OF AN ACTION.—The only peculiarity here is the law agent's claim to a hypothec for costs.¹

5. CORN STACKS.—1. Privileged debts; 2. The miller for the multure; 3. The heritor for his hypothec. Yet a purchaser would be liable for the hypothec, not for multures, because this is not considered as a real public burden to affect purchasers.²

6. RENTS.—1. The landlord's right of hypothec for the principal rent, where the bankrupt is a tenant. 2. The Crown by extent, other creditors by rights or diligences according to completion. It may be observed that in ranking arrestors of rents, the effect of the diligence, as not attaching the rents of a subsequent term, is to be studied; and how to dispose of prior and posterior arrestments, whether the prior operate in the way of payment, to be deducted from the *claim* in competition with the subsequent arrestments, or merely as securities to be deducted from the *draft*.³

7. PROFITS.—This subject of attachment and division is peculiar, as it accresces from day to day, and cannot be attached by anticipation. It may thus sometimes happen that a preference may arise to a posterior arrestor. Thus, one creditor in January arrests the profits due to his debtor from a concern; the debtor fails in March, and another creditor arrests in July. The latter arrestor will, by the operation of the bankrupt law, be entitled to a *pari passu* preference with the first; but the first will not be entitled to any of the profits accruing after the month of January.

SECTION IV.

OF THE RANKING OF CREDITORS ENTITLED TO PREFERENCES BY EXCLUSION.

The effect of an inhibition, or of any other exclusive preference operating against a single competitor, presents no difficulty, the rules and principles which determine it being well settled.⁴ But in a competition in which there are various grounds of preference, variously affected by rights of exclusion, the consequences which sometimes arise in the application of those exclusive rights are so grotesque, and apparently so unjust, that one is apt to admit a departure from the settled rule in order to attain what may appear to be the substantial equity of the case.

The rule to be followed in ranking creditors who hold preference by exclusion is this: 'That the holder of the excluding right shall have the full benefit of his preference against those on whom it legally operates, and that this preference shall not, on the one hand, be suffered to affect creditors not legally subject to its influence, nor, on the other, to give advantage to those who have no right to take benefit under it.'⁵ To accomplish these objects, which are equally acknowledged by all parties, three methods of ranking have been proposed. In order to explain these, and to simplify the matter, let it be supposed that on a fund of £12,000 three creditors claim for £5000 each,—one of them a creditor by heritable bond, the others co-adjudgers posterior to the heritable security, of whom one had [514] previously used an inhibition, which affects the heritable bond, but not the debt of the other adjudging creditor.

1. The first method of ranking proceeds on the brocard—*Vinco vincentem vinco te*. If I hold a ground of exclusion against one who is himself preferable on the footing of real

¹ See above, vol. ii. p. 34.

² 6 Nov. 1750, Pitfour ms. p. 63.

³ [As to the supposed preference of landlords for money due in respect of dilapidations or other breaches of contract, see *Munro v Fraser*, 1858, 21 D. 103.]

⁴ [The law agent's lien is preferable to an inhibition used prior to the contraction of debt to the agent. *Menzies v Murdoch*, 1841, 4 D. 257.]

⁵ *Res inter alios acta, vel iudicata, aliis nec nocet nec prodest*. And a similar maxim confines the operation of statutes to those subject to their influence. [In *Ewing v M'Lelland*, 1860, 22 D. 1347, a creditor using inhibition against a company and partners was held entitled to a preference over the share of the proceeds of heritable estate effeiring to the partner inhibited for the sum claimed, and the expenses of the action.]

right, this brocard is said to have its true and legitimate application. On this idea it was proposed that, in the first place, the inhibitor co-adjudger should be ranked before the creditor by heritable bond, as if his posterior real diligence of adjudication drew back to the date of the inhibition, that then the heritable bond should be ranked preferably on the balance of the fund, and that the adjudger should take the residue.

In support of this mode of ranking, it was urged, 1. That the inhibiting creditor is entitled to exclude entirely the heritable bond, and of course also to exclude the co-adjudger, so far as relates to the sum which he thus, in consequence of his inhibition, draws from the heritable creditor; for as the co-adjudger is not also a co-inhibitor, to give him any share of the draft under the inhibition were to outrage the maxim—*Res inter alios acta, vel judicata, aliis nec nocet nec prodest*. 2. That the heritable bond is entitled to a decided preference over the simple adjudication, which has no protection by inhibition against its effect.

The obvious defect of this mode of ranking, however, is, that the inhibition is made to operate, *not against the heritable creditor*, whom it ought truly to affect, but *against the adjudger*, whose debt ought not to be touched or affected by it in the smallest degree.

2. In another scheme professing to remedy this injustice, it was proposed, in the first place, to set aside a sum equal to the inhibitor's debt, as entitled to full payment in competition with the heritable bond; then to rank the heritable bond upon the remaining fund as a real security preferable to the adjudger; and, finally, to rank the inhibitor-adjudger and the co-adjudger, according to their respective rights, upon the whole of the fund unoccupied by the heritable bond, dividing that fund between them as co-adjudgers.

In support of this scheme, it was maintained, 1. That it gave to the inhibitor the full effect of his diligence against the heritable creditor. 2. That the only thing against which he could object was the operation of the public statute establishing the *pari passu* preference; and from which, of course, there can arise no right of redress against the heritable creditor, since he is not entitled to the benefit of that statute, and '*Res inter alios acta, aliis nec nocet nec prodest*.'

While by this scheme of ranking the fault of the other is corrected (the co-adjudger *not suffering* by the inhibition), in principle it is just as bad, as the co-adjudger *gains* more than he ought. For it is plain, 1. That the inhibition has effect, not in favour of the inhibitor alone, but also in favour of the co-adjudger; which, though it may not be apparent in figures upon the above state of the debts and fund, would plainly show itself upon another supposition. If, for example, the inhibitor had not adjudged at all, the adjudger would have been preferable to him, and would have taken the whole benefit of his inhibition. And, 2. It is obvious that the creditor against whom the inhibition ought to strike, is not in the smallest degree affected by it.

3. But all these deviations from principle are corrected by the third mode of ranking, which is that finally adopted by the Court of Session after much contest. By this mode of ranking, the creditors holding real preferences are made to draw in the first place; and then, by a subsequent operation, the holders of exclusive rights receive back from those creditors whose preferences are affected by their rights, the difference between the sums to which they would have been entitled on a division, had the claims affected by their right of exclusion not existed, and the sums drawn by them upon the first division; so that, upon the whole, the excluding creditors draw precisely what they would have been entitled to, had the rights affected by their diligence been out of the field.¹

In the other two modes of ranking, one great maxim of the law of ranking was duly

¹ [See an illustration of the principle in *Campbell v Gordon*, 1841, 3 D. 629. Competition between (1) an inhibiting creditor; (2) a posterior adjudging creditor; and (3) arresting creditors of the proprietor's ancestor who had not taken measures to secure a preference under the Act 1661, c. 24.

In a ranking and sale, the heritable creditor was preferred *primo loco*, but the inhibiting creditor was allowed to draw from the holder of it the amount of the debt on which the inhibition proceeded.]

observed, and said to justify the conclusion. But it is only in this last mode of [515] ranking that the nature and effect of each security is kept steadily in view; its full operation given to each; and that operation qualified by the effect allowed to the personal and exclusive preferences against those who are subject to their influence, without suffering the rights of others to be either benefited or injured.¹

A view of the contest maintained for the pre-eminence of these modes of ranking, and of the judgments by which it was settled in favour of the last, may be useful.

1. In the great bankruptcy of Cockburn of Langton, the Court was called upon to fix the rule for ranking creditors holding real rights, variously affected by exclusive preferences. They took up the subject as matter of abstract discussion, and determined, 'without the name of parties.' The case which gave rise to the discussion was of this complexion: inhibitions had been used by some of Langton's creditors; bonds of corroboration were afterwards granted in favour of others, on which infetment followed; and, subsequently to the infetment, all the creditors adjudged, of whom some were creditors before inhibition, others not till after.

As in a simple competition, these points were held indisputable: 1. That a creditor infet on an heritable bond of corroboration is preferable to adjudging creditors. 2. That inhibiting creditors must be satisfied before the creditors in posterior voluntary securities can draw. And, 3. That creditors who had adjudged on debts prior to the inhibitions, could not be hurt by the inhibitions.

The difficulty was to give precisely these effects in the competition as it stood; the rights of the parties being in some degree incongruous, and destructive of each other. 'The Lords, after many hearings *in presentia*, and very mature deliberation among themselves,' came to establish as a rule for this and all future cases, these positions: 1. 'That an inhibitor-adjudger did not simply reduce posterior annualrenters, but only in so far as those annualrenters were prejudicial to the inhibitor; and that they could draw only such a share as would have belonged to them, if no posterior voluntary rights had been granted.' 2. 'That anterior creditors adjudging within year and day of the inhibitor could not be prejudiced by the inhibition, but would draw the same share of the common debtor's estate as if there had been no inhibition used.'²

¹ Sketch of the effect of these several modes of ranking, supposing the debts £15,000, the fund £12,000:—

	Debts. £	First Mode. £	Second Mode. £	Third Mode. £
Heritable bond, . . .	5000 draws	5000	5000	3500
Inhibitor and adjudger, .	5000 draws	5000	3500	5000
Simple adjudger, . . .	5000 draws	2000	3500	3500
		12,000	12,000	12,000

² Of this determination there is no report, except in the introductory view which President Dalrymple presents of the state of this question prior to the subsequent case of competition in the same bankruptcy. 19 Jan. 1709, Dalrymple 120.

The effect of the rules above settled may thus be represented:—

	Amount of the divisible fund, £12,000
Annualrenter,	£6000 draws £4000
Inhibiting adjudger,	5000 draws 4000
First simple adjudger,	5000 draws 2000
Second simple adjudger,	5000 draws 2000
	£12,000

This effect is produced thus: 1. If no inhibition had been used, the annualrenter would have drawn £6000, in preference to all the adjudgers; and the remaining £6000, divided

among the three adjudgers, would have given each £2000. This fixes what the simple adjudgers have to draw, for the inhibition is neither of benefit nor detriment to them. 2. As the inhibition gives right to the inhibitor to draw only that sum which he would have drawn had the voluntary security not existed, this is to be discovered by dividing the fund of £12,000 among the three adjudgers, which gives to each of them £4000. The inhibition then entitles the inhibitor-adjudger to draw back from the annualrenter the difference between the sum which, as annualrenter, he would be entitled to draw, and the share to which he is entitled merely as a co-adjudger. Hence the inhibitor's draft is increased from £2000 to £4000, and the annualrenter's reduced from £6000 to £4000.

The same competition would be very differently determined by either of the other modes of ranking above stated.

First Mode of Ranking, as above.

	Divisible fund, £12,000
Annualrenter,	£6000 draws £6000
Inhibiting adjudger,	5000 draws 5000
First simple adjudger,	5000 draws 500
Second simple adjudger,	5000 draws 500
	£12,000

The effect is produced thus: 1. By ranking the inhibitor

[516] President Dalrymple says: 'According to this rule, the Lords did uniformly determine in all subsequent rankings and sales for several years; and the rules were found practicable in all the variety of cases that did occur in the several processes of sale, which have been very frequent since that time.'¹

2. But in the year 1697 doubts came to be again entertained of the correctness of this rule, in the course of ranking the creditors of Sir William Nicholson of Cockburnspath. In that case there was a peculiarity; for the inhibiting creditor, though he had also adjudged, had proceeded so irregularly as to expose his adjudication to a fatal objection. By this objection he was excluded from the *pari passu* preference (the year having expired), while the other creditors were entitled to rank *pari passu*, some of them being affected by his inhibition, but those who were not having real diligence to a greater amount than the whole of the price. The difficulty was, to determine the effect of this inhibition; whether it could give a right to take the dividends, which would otherwise accrue to the adjudgers affected by it? or whether, in the circumstances of the case, those dividends should not go to the posterior adjudgers, just as if the inhibition had no effect at all? By adhering to the rule of Langton's case, already explained, the last of these would be the judgment, while the former would be the result of ranking the inhibition in the first place, leaving to the creditors whom it comprehended the effect of their real right only over the balance. But in estimating these two modes of ranking, it is obvious that, by ranking the inhibition first, and afterwards the posterior adjudgers on the balance, a consequence is produced which does not logically flow from the nature of an inhibition: the inhibitor receives an advantage which would not have belonged to him had there been no posterior adjudgers, for in that case the whole price would have been exhausted by those of the adjudgers who were not within the reach of the inhibition. The other mode of ranking gives to each creditor his true right, and to the inhibition that effect which truly belongs to it as a mere personal prohibition. The Court found, 1. That an inhibitor cannot be prejudiced by posterior debts; 2. That anterior creditors cannot be prejudiced by an inhibition; and, 3. That subsequent debts cannot be beneficial to an inhibitor, nor can the diligence done upon them accrue to him: and accordingly they decided that the inhibitor, not having a valid adjudication, could draw no share of the price.²

preferably to the annualrenter, he draws his full debt, £5000. 2. By ranking the annualrenter in competition with the adjudgers on the balance, he gets his £6000, leaving £1000 of balance, which, divided between the co-adjudgers, gives each £500. Or the same effect is produced thus: 1. By setting aside £6000 for the annualrenter. 2. By dividing the balance among the simple and inhibiting adjudgers, each £2000. 3. By preferring the inhibitor upon the draft of the annualrenter for £3000, the balance of this debt unpaid. And, 4. By giving relief to the annualrenter as preferable over the adjudgers for £1500 on each.

Second Mode of Ranking, as on p. 409.

	Divisible fund,	£12,000
Annualrenter,	£6000 draws	£6000
Inhibiting adjudger,	5000 draws	2000
First simple co-adjudger, . .	5000 draws	2000
Second simple co-adjudger, . .	5000 draws	2000
	—	£12,000

This is accomplished, 1. By setting aside the inhibitor's £5000. 2. Preferring the annualrenter for his £6000. 3. Ranking the co-adjudgers on the whole fund left unoccupied by the annualrent right.

¹ Dalrymple, p. 121.

² *Miln of Carriden v Nicholson's Crs.*, 1698, M. 2876. Lord

Fountainhall gives a report of this case, in which he seems to have misapprehended the judgment; or perhaps he only reports an early judgment, and not the final decision. He represents it as a case in which the inhibition having been held to cut off the posterior adjudgers, the question came to be, To whom these shares of the dividend devolved? The inhibitor contended that they opened to him alone, and that he might now adjudge for them: the prior adjudgers, that as their debts exceeded the funds, these dividends must, when they open, fall to them. 'The Lords,' says Fountainhall, 'found the share accresced to the anterior adjudgers, and could not belong to the inhibitor unless there was a surplus more than paid the first adjudgers, whose debts were contracted before the inhibition.' But in the decision as thus stated, there is a misapprehension of the effect of an inhibition. It is made to operate in favour of creditors who have no right to take benefit under it, while it gives no advantage to the inhibitor himself. The true decision was expressed in what Fountainhall represents as the opinion of the minority: 'Some urged that, seeing the inhibitor could not draw their shares, and that the posterior adjudgers had it by concurrence and communication with the first adjudgers, therefore that the inhibition should not reach them, as being a part of the first adjudication, and the inhibitor not

3. This confirmation of the rule settled in Langton's case, put the question to [517] rest for some years; but again the whole was set afloat, and again the Court tried the point in a very deliberate manner, on occasion of a subsequent competition in Cockburn of Langton's bankruptcy. The case was precisely what has already been stated as having given birth to the original discussion.¹ The Court determined, that 'in a competition of simple and inhibiting adjudgers and annualrenters, the inhibiting adjudger could only reduce the posterior annualrent, in so far as he was thereby prejudged, and that he could not claim full payment of the sums in his inhibition before the annualrenter could draw any share in the said competition, but could only draw such a share of the annualrents or price as he would have drawn if there had been no posterior annualrent or voluntary right.'²

4. The general question seems to have been held as well settled; but, in particular cases, doubts came to be entertained respecting parts of the doctrine, and we have to regret the want of a steady perception of and strict adherence to the principle, at least in the minds of those engaged in practice. In 1736 a case occurred in which it was questioned whether an heritable creditor, excluded by an inhibition, could claim indemnification against posterior adjudgers not struck at by the inhibition? The Court decided that he could not claim such indemnification, otherwise the inhibition would be made to operate against persons not legally affected by it.³

being better by reducing them.' 9 Dec. 1697, 1 Fount. 800, 801.

¹ Ranking of the Crs. of Cockburn of Langton. The general course of the argument was this:—The inhibitor contended that inhibition is not simply a prohibitory diligence, but also preparatory, operating completely in security of the inhibitor's debt, and entitling him to the unchallenged benefit of any subsequent diligence he may raise to render it a real burden. That the inhibitor is entitled, first, To exclude the heritable creditor; and, secondly, To exclude the *pari passu* ranking of the posterior adjudgers, so far as it may affect what he gains from the heritable creditor on the brocard, *Vinco vincentem vinco te*; the effect of the Act 1661 being only to introduce, in such case, a *pari passu* preference as to the reversion left untouched by the preferable right; and that the right of the annualrenters being real, must be preferable in recourse against the posterior adjudgers who are not saved by inhibition.

The annualrenters and adjudgers maintained that the rule had been deliberately fixed, and long followed, and should not be altered. That it is sound and consistent with legal principle: for, first, An inhibitor cannot be injured by posterior debts; and, secondly, A prior creditor cannot be hurt by inhibition. That, by the rule proposed, an inhibition would strike against prior creditors, but not against the posterior annualrenter, since they are allowed to have recourse against the prior creditors, transferring the effect of the inhibition from himself to them. That an inhibition is not a ground of reduction further than as a preventative of harm to the inhibitor, and as saving him from being placed in a worse situation than if the creditors against whom it strikes had not existed. 1709, M. 2877, 2883.

Besides the very ample discussion which took place at the bar and on the bench, a gratuitous memorial was put into the hands of the judges by an unknown author, illustrative of a scheme of ranking differing from both the above. M. 2878.

² [It seems that an inhibition does not strike at a disposition of subsequent date, but granted in implement of a previously executed agreement to sell. *Livingstone v M'Farlane*, 1842, 5 D. 1. It follows that an adjudication in implement

is preferable to an inhibition of prior date, provided the minute of sale is anterior in date to the inhibition.]

³ *Campbell v Drummond*, 1730, M. 2891. The competing creditors were,—

1. Susannah Belshes, upon an inhibition in 1672, followed by adjudication in 1685.

2. Kippenross, upon an inhibition in 1673, and an infetment of annualrent in 1679.

3. Certain other creditors on infetments of annualrents, subsequent to Kippenross' infetment.

4. Certain adjudgers within year and day of Susannah Belshes, upon debts prior to both inhibitions.

Thus Kippenross' infetment was struck at by Susannah Belshes' inhibition. He, again, by his inhibition, excluded the other annualrenters. The adjudgers were preferable *pari passu* with Susannah Belshes.

The accountant arranged his scheme thus:—1. He set aside a sum for Kippenross' debt. 2. He ranked the other annualrenters. 3. Those debts having exhausted the funds, nothing remained for the adjudger. 4. He ranked Susannah Belshes upon Kippenross' dividend for what she would have drawn had the annualrenters not been in the field. But, 5. He gave no effect to Kippenross' inhibition over the other annualrenters. This last was the part of his ranking objected to; and the accountant thus justified himself:—'Though Kippenross ought to draw as if the debts of these posterior annualrenters had not been contracted, yet, as it must have happened that, if they had not been contracted, the adjudgers (preferred *pari passu*), against the grounds of whose debts Kippenross' inhibition does not strike, would have drawn the sum allotted to the annualrenters, and as Kippenross could have had no recourse against the adjudgers, so the above posterior debts do him no harm; and therefore his inhibition takes no effect.' This justification proceeding on the principle that an inhibitor has no interest to object *ex capite inhibitionis* where a preferable right to his would exhaust the fund, even were the objectionable debts cut down, the question in law came finally to this: Whether, on the supposition of the posterior annualrenters not being in the field, Kippenross could,

[518] 5. One other point was still thought questionable, and accordingly came to discussion, viz. Where there are several heritable bonds or annualrent-rights to be ranked, not like adjudications *pari passu*, but preferably, according to their dates; and they are all affected by an inhibition, the user of which also adjudges: upon whom is the defalcation to fall? upon all of them proportionally, or upon the last in date? The practice had been to make the defalcation fall equally on all the creditors in this situation; and this practice had proceeded on the idea that they were all equally affected by the inhibition, and all equally bound, therefore, to suffer the loss accruing from it. But the event of a discussion which arose in the ranking of the creditors of Whitehaugh settled this matter on a different and on a sounder principle, viz., that as an inhibition does not annul a conveyance, or render void a debt, but merely excludes it, so far as it may be prejudicial to the inhibitor; so the exclusion attaches to the creditors affected by the inhibition, inversely in the order of their preferences,—the creditor standing *in ultimo loco* being first burdened with the defalcation, and so back, till the inhibitor receives all that he would have drawn had they not been in the field.¹

in so far as Susannah Belshes excluded him by her inhibition, have insisted for a preference or claim of exclusion against the adjudgers? If he could not, the accountant's mode of ranking was just; if he could, then Kippenross had an interest to insist upon his inhibition, to the exclusion of the posterior annualrenters. Much learned and ingenious argument was used. The Court in their final judgment decided, 'That, according to the established rules in ranking, Kippenross' infetment and inhibition would indeed be preferable to all the other annualrenters if the competition were singly among the annualrenters, and him as inhibitor; but that this does not apply to the present case, because there are adjudgers for sums exceeding the value of the subjects adjudged, and proceeding upon debts anterior to both the inhibitions (at Susannah Belshes' and Kippenross' instance), and which are therefore preferable to them as inhibitors: And, in respect that the whole annualrenters are in date prior to the adjudications, find that Kippenross, as the preferable annualrenter, by virtue of the inhibition, draws the whole debt due to him from the adjudgers proportionally, except so much as falls to the share of Susannah Belshes, who used inhibition: And find, that the annualrenters posterior to Kippenross' inhibition will in the same manner, according to their dates, draw their annualrents from the adjudgers, except from Susannah Belshes as aforesaid: And find, that Kippenross has no title to recur on the annualrenters posterior to his inhibition for so much of his debts as he wants in respect of Susannah Belshes' inhibition, notwithstanding that these posterior annualrenters draw their annualrents in part from the adjudgers, in respect that as Kippenross, by reason of his inhibition, cannot be prejudged by the posterior annualrents, so neither can he be profited by his debtor's contracting posterior debts; and though no annualrent had been contracted after Kippenross' inhibition, the debts in the adjudication would have exhausted the whole subject adjudged; and consequently Kippenross could have drawn no more than a proportional share from the adjudgers who had not inhibited, which is allowed to him by the above scheme; and ordains the scheme to be drawn out accordingly.'

This judgment appears to have been drawn up by Lord President Dalrymple, who reports so fully the case of Langton.

¹ *Lithgow v Crs. of Armstrong* of Whitehaugh, 1747. This case is well reported by Lord Kilkerran (M. 2896); and the report deserves to be studied.

Lord Elchies, in his Notes, *voce* Competition, p. 106, says: 'The question was: Where there are several different classes of annualrenters or adjudgers, after an inhibitor, but whose class of preference upon his adjudication is after them, whether the inhibitor's payment must be taken proportionally out of all the posterior annualrents or adjudications (which has been the practice hitherto, ever since the creditors of Nicholson), or if the whole loss must fall upon the last? The papers are very full both as to the precedents, and as to the reason of the thing, and principles of law. This case was argued yesterday (9th January 1747) at the bar very well, and this day very fully argued upon the bench. Kilkerran first spoke short for Lithgow, the preferable heritable creditor; next Dun, against; also Drummorie, very long and full; then Tinwald for him, pretty long; next Murkle, short; then I spoke short against him, for the other creditors; last of all the President (Duncan Forbes), for Lithgow. My reasons were chiefly because of the decision in Nicholson, and fifty years' custom of the Court upon it, that it was not true that an infetment cannot be prejudged by subsequent contractions: for if the debtor die, his heir's debts will not be affected by inhibitions against the predecessor, and therefore these inhibitions must affect the infetments of annualrents granted by him, and not those by his heir; and it was admitted that debts contracted before the inhibition, but less preferable than the annualrent, would have the same effect. 2. If we alter the rule in this case, I see no reason why we should not alter the rule likewise in the case of infetments in different subjects; for the reason of the thing, the equity of the case, is the same in both. 3. There is no necessity for altering the rule, because a creditor lending money to a person already inhibited, and taking infetment of annualrent, etc., can secure himself against subsequent contractions by inhibition. Next, They can secure themselves against both prior and posterior debts, who had not a prior infetment, by particular infetment or warrandice. By the President's casting vote it carried, that the infetment must not be burdened proportionally, but the last must be burdened. *Pro*, were Millar, Kilkerran, Monzie, Tinwald, Shewalton. *Con*. were

The following canons seem to express the true result of this investigation :— [519]

1st CANON.—That the first operation in the ranking and division is, to set aside, for each of the creditors who hold real securities, the dividend to which his real right entitles him, without regard to the exclusive preferences.

2d CANON.—That the rights of exclusion are then to be applied in the way of drawback, from the dividends of those creditors whose real securities are affected by them; taking care that they do not encroach on the dividends of other creditors.

3d CANON.—That the holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division, and what he would have drawn had the claim struck at by the inhibition not existed.

4th CANON.—That if the exclusive preference affects more than one real security, it is to be applied against those creditors only by whose ranking on their real right the holder of it suffers prejudice: against the last, for example, of the postponed creditors affected by it, in the first place; and so back, till the holder of the exclusion draws all that he would have been entitled to draw had the excluded claims not been ranked. If it affects a number of creditors entitled to rank *pari passu*, it will affect them proportionally to the amount of their several debts.

5th CANON.—That where there are secondary consents and exclusions among those holding exclusive preferences, they are to have effect only against, and in favour of the parties by and to whom they are granted, without benefiting or hurting other creditors. This is to be accomplished by applying the original exclusion in the first place, and then giving to the person in whose favour the secondary consent is granted, a right to draw back, from him who grants it, a share of his dividend, equivalent to the sum which would have fallen to the person favoured, had the first exclusion not been in existence.¹

These canons of ranking, for personal and exclusive securities, seem to compre- [520] hend the whole principles of this operation. Their application is not easy, perhaps; but, from the examples given, their adequacy to all the purposes of practice, and their soundness in bringing out the fair application of the rights of the competitors, in all the variety of cases, will sufficiently appear.

Drummore, Strichen, Dun, Murkle, et Ego. 24th November, adhered; and Arniston was for, though, as he observed, a second or third, or last annualrenter purchasing the inhibition, would have been safe.'

See also *Crs. of Sir A. Hope of Kerse*, 1750, Elch. Inhibition, No. 12, Notes, p. 208.

¹ As an illustration, I subjoin a view of such a ranking, calculated on the true principle:—

Fund,	£18,000
1. Three annualrenters, each for £4000, all infeft before any adjudication, but posterior to inhibition.	
2. Inhibiting adjudger for £8000, consenting to the third annualrenter's debt, and also to the third adjudger's debt.	
3. Three simple adjudgers for £4000 each. The <i>first</i> before the inhibitor, the <i>second</i> and <i>third</i> after it; and all three, year and day before the inhibitor adjudges.	

The ranking is to be accomplished by three divisions. Thus:

<i>First Division.</i>	
Order.	Fund, . . . £18,000
1mo, First annualrenter, . . .	£4000
2do, Second annualrenter, . . .	4000

Carry forward, £8000 £18,000

Brought forward,	£8000	£18,000
3tio, Third annualrenter, . . .	4000	
	<hr/>	12,000
Remains,		£6,000
<i>Draws</i>		
4to, et <i>pari passu</i> , First adjudger, £4000	£2000	
Second adjudger, 4000	2000	
Third adjudger, 4000	2000	
	<hr/>	6,000
Remains,		0
5to, Inhibiting adjudger, £8000,		0

Second Division, giving effect to the Inhibition.

The inhibition strikes against all the annualrenters, and against the second and third adjudgers, and is therefore entitled to draw as if all these were out of the field. *Inde*:

Order.	Fund,	£18,000
1mo, First adjudger, . . .	£4000	
2do, Inhibiting creditor, . . .	8000	
	<hr/>	12,000
Remains,		£6,000

So the inhibitor, in this view, draws full payment, which

CHAPTER III.

ORDER OF THE RANKING OF CREDITORS HOLDING DOUBLE SECURITIES.

HITHERTO of the ranking of single securities. The next question is, How a creditor is to be ranked who holds more than one security for his debt?

The ranking of a creditor who holds double securities may be considered in two aspects: 1. As it respects the general interest of the whole creditors in competition, and the extent of the claim to be made on the several estates; and, 2. As it may affect particular creditors, or classes of creditors, holding secondary securities on one of the portions of the estates, and not on the other.

SECTION I.

EFFECT OF DOUBLE SECURITIES, WHERE THERE ARE NONE SECONDARY.

It may be proper to distinguish several cases with a view to making the explanation more simple.

1. ONE INDIVISIBLE ESTATE BELONGING TO THE DEBTOR OVER WHICH THE CREDITOR HOLDS DOUBLE SECURITIES.

[521] A creditor who holds an heritable bond or other voluntary security for debt over his debtor's estate, is entitled also to adjudge on the personal obligation in further security or satisfaction of his debt, the personal obligation not being extinguished by the security held over the estate, and losing no part of its efficacy unless in so far as that security shall afford actual payment of the debt.

Such adjudication may be used either against estates of the debtor over which the creditor holds no security, or even against that estate which is affected by the security already constituted. In the former case a double security is created, the effects of which will immediately be explained: in the latter case, an adjudication of the same estate, over which the creditor already holds a security, may be useful to accumulate the interest into a capital; or where there are several competitors, some of whose securities or diligence may limit and restrict the voluntary security, while they leave the estate open to adjudication, it may supply deficiencies in the voluntary security, or aid it in its operations; and as an auxiliary, it may be effectual so far as there is a balance of the debt remaining due after the voluntary security has produced its operation.

An heritable bond of corroboration may be affected by inhibition while the debt itself

must be paid back out of the former drafts of the creditors, whose debts are struck at in the inverse order of ranking, Thus:

4to, <i>et pari passu</i> , Second adjudger, . . .	£2000
Third adjudger, . . .	2000
3tio, Third annualrenter, . . .	4000
Making up . . .	£8000

Third Division, giving effect to the Consent.

The inhibitor having consented to the debts of the third annualrenter and third adjudger, their drafts remain as in

the first division, and so he only draws back the draft of the second adjudger, £2000.

The result of the whole is therefore as follows:—

	Fund,	Debt.	Drafts.	
				£18,000
First annualrenter, . . .	£4000		£4000	
Second annualrenter, . . .	4000		4000	
Third annualrenter, . . .	4000		4000	
First adjudger, . . .	4000		2000	
Second adjudger, . . .	4000		0	
Third adjudger, . . .	4000		2000	
Inhibiting adjudger, . . .	8000		2000	
				£18,000

is prior to the inhibition, and there may be adjudgers whose debts are not affected by the inhibition, after whom little will remain for the holder of the heritable bond. It may also happen that even a creditor holding a posterior adjudication may by inhibition be entitled to take precedence of the voluntary security, while inhibition does not affect the personal debt in the bonds. In such cases, the holder of the voluntary security adjudging on his personal debt will come in for a dividend along with other adjudgers, and so aid or supply the defects of his voluntary security. If he were not allowed to adjudge, he might be totally excluded from a share of the funds, or entitled only to a very inconsiderable dividend.¹

It was a matter of doubt, about half a century ago, for what sum a creditor thus adjudging the very same estate in aid of his voluntary security should be allowed, in competition with other adjudgers, to rank. In several cases, to be more particularly explained hereafter, the Court had established that, in ranking on two separate estates belonging to the same debtor, the creditor is entitled to consider an adjudication as a lien upon each estate till the whole is paid; and this was held to be law when the question now proposed came first to be decided. But the Court determined that the creditors who, holding heritable bonds, claimed to be ranked a second time as adjudgers of the same estate, were entitled to be ranked only for the balance, after deducting what they had drawn upon their heritable bonds.² In a subsequent case, the Court pronounced a judgment in conformity with this decision, and drawing the distinction precisely between the case of adjudication affecting an estate already secured to the adjudger, and one not covered by his security. The Court found the claimants entitled to rank along with the other adjudgers only for the balance of their debts, after deduction of what they should draw in virtue of their heritable securities on the same estate, but to rank for their full debts, without deduction, upon those subjects which were not covered by the heritable bonds, to the effect of drawing full payment, and no more.³

A creditor is not entitled to adjudge the same estate a second time for the same debt; or (what is nearly the same thing in effect) a second adjudication is to be ranked, not for the balance after deduction of what is actually drawn under the first adjudication, but for the balance after deducting the whole sum ranked upon the first diligence. Thus the sole use of repeated adjudications is to accumulate interest in principal sums.⁴

2. WHERE THERE ARE TWO OR MORE DISTINCT SUBJECTS BELONGING TO THE BANKRUPT OVER EACH OF WHICH THERE ARE SECURITIES FOR THE SAME DEBT.

But although, where double securities are held over the same estate, there can be no ranking on the one posterior in date, except for the balance, after applying the produce of the other towards the extinction of the debt, it is otherwise with separate estates. They are considered as distinct debtors, each liable for the whole debt, and every part of the debt,

¹ Suppose a fund of £4000: a creditor adjudging and completing his right by sasine, £3000; a posterior heritable creditor by bond, £3000; and a second adjudger within year and day, £3000. The heritable creditor would, without adjudging, draw only £1000; while each adjudger drew £1500.

The first ranking would give this result:

Rank 1. The preferable adjudger for	£3000
2. The heritable bond for the balance,	1000
3. The second adjudger.	

But, secondly, the operation of the statute of *pari passu* preference, as between the two adjudgers, would entitle the second adjudger to one-half of the draft of the first, or £1500.

By adjudging, the heritable creditor would, after drawing his £1000 as before, rank for £2000 (the balance) as an

adjudger entitled to a *pari passu* preference, and so draw on the whole a larger dividend than the other adjudgers. While the other adjudgers drew something more than £1100, he would draw something more than £1600.

² *Ranking of Auchinbreck's Crs.*, 1769, M. 14139.

³ *Douglas, Heron, & Co. v the Bank of England*. See below, p. 416, note 2.

[Postponed heritable creditors were found not entitled to rank as implied assignees of prior heritable creditors, who had received payment out of the proceeds of a sale, in a question with personal creditors. *Boswell v Ayrshire Banking Co.*, 1841, 3 D. 352. See *Cuninghame's Trs. v Hatton*, 1847, 10 D. 307.]

⁴ [*Samson v Nasmyth*, 1785, 3 Pat. 9.]

as if it were secured over the whole of each subject, without any other security. There is a lien over each for the whole debt, and the creditor claims and is *ranked* on each for the whole, to the effect of *drawing* ultimately the true amount of his debt. The case of Douglas, Heron, & Co. v the Bank of England is the leading precedent on this point;¹ and a few years afterwards, in the case of Grant of Artamford v Grant of Carron, the same doctrine was followed.²

The principles of the doctrine thus established are easily applied to all the other cases of the kind which can occur in the course of a ranking and division of bankrupt funds.

3. WHERE THE CREDITOR HOLDS COLLATERAL SECURITIES BY CAUTION, OR OVER PROPERTY NOT BELONGING TO THE BANKRUPT.

[523] The ranking of a creditor on the estate of his debtor cannot be lessened on pretence of his being entitled to rank on another debtor's estate for the same debt. What the effect of payment from such estate shall be, is another question, to be considered hereafter;³ but while the whole debt remains due, the creditor is unquestionably entitled to rank for the whole upon the estate of each co-obligant, whose obligation extends to the whole.⁴

The same principle extends to any one coming into the creditor's situation; as, if a third party pay the debt and take an assignation. It has been doubted, however, whether this is allowable where the person so coming in place of the creditor has been induced to interfere on account of one of the co-obligants, since the co-obligant himself, had he made payment, could have ranked only for a proportion of the debt, deducting his own share. But the Court has distinguished between the case where such payment is made with the money of the co-obligant,⁵ and that in which the third party has paid from his own funds, giving the full effect of the security in the latter case.⁶

¹ Douglas, Heron, & Co. v the Bank of England, 1781, M. 14139. But the report given there is imperfect, containing only the first half of the judgment pronounced.

Douglas, Heron, & Co. held an heritable security for £30,000 on certain subjects belonging to the bankrupt. Afterwards they adjudged for their debt the whole subjects of the bankrupt, including not only those over which their heritable security did not reach, but also those included in that security. The question was, Whether, in ranking as adjudgers, they were entitled to be regarded as creditors for the full amount of their debt, or as creditors only for the balance, after deducting the actual or probable draft to be made under the heritable bond? The Court drew a distinction: 1. On the principles of the case of Auchinbreck, 12 July 1769, they found the adjudication ineffectual, so far as the debt was covered and exhausted by the prior security, and good only for the balance; and, 2. They found, that as each distinct estate is burdened with a lien for the whole debt, the adjudication is effectual to entitle the creditor to rank for the whole debt on the subjects not affected by the prior security. The judgment is in these terms: 'Find, that Douglas, Heron, & Co. are entitled to be ranked in their proper place, in virtue of their adjudication, upon the lands and other subjects contained in their infeftments, for such part of the accumulate sums as shall remain, after deducting from the same what they shall be entitled to draw in virtue of their infeftments; and find, that they ought to be ranked in their proper place, on the other subjects under sale contained in their adjudication, for the full accumulate sums for which the said adjudication was led, to the effect of drawing once and single payment of the same.'

² Ranking of the Crs. of Grant of Carron, 1791. Grant of

Artamford was cautioner for Grant of Carron, and held an heritable bond of relief over Carron's lands of Allochie. Being doubtful of his security, he adjudged the estate of Carron along with the other creditors; and (as in the above case of Douglas, Heron, & Co.) a question arose, whether the draft under the heritable security was not to have the effect of diminishing the right to rank as an adjudger? This question was decided in the negative, as Douglas, Heron, & Co's case had been.

³ See below, p. 424 et seq.

⁴ See, however, below, p. 424.

⁵ [Johnstone v Boone's Tr., 1843, 5 D. 1396.]

⁶ I have a note of such a case having occurred in the ranking of Bertram, Gardner, & Co.'s estate some years ago, where the debt was paid by the nephew of one of the co-obligants; and the Court would not listen to the plea that this was the same thing as if the co-obligant himself had paid, but sustained the claim to the full extent. Lord President Campbell, however, strongly dissented.

In Irvine & M'Beth v Lawson, trustee for Aird's creditors, 10 Dec. 1814, n. r., the same decision was pronounced. Here Cross, Reid, & Young granted a joint bond to the incorporation of weavers of Glasgow for £250. Cross became bankrupt, and the creditor made a demand against Young and Reid. They could not conveniently pay, and Irvine and M'Beth paid the debt, and took an assignation to the bond. They then claimed the whole sum against Cross' estate; and the question was, Whether, having interfered on account of Young, one of the other obligants, they were entitled to claim the whole, or bound to deduct Young's share? Lord Meadowbank laid it down as law, that if there was no collusion, the claimants were clearly entitled to rank for the whole sum,

SECTION II.

RANKING OF CATHOLIC AND SECONDARY CREDITORS.

It is necessary here to distinguish carefully the several cases:—

1. Where a person or an estate is bound as surety for a debt, another person or estate being principally and primarily liable, the creditor ought to follow the true nature of the contract, in not demanding his payment from the surety till the principal shall have failed;¹ or if, for his own convenience, he enforce payment from the surety, he must assign his right, that relief may be obtained by the cautioner against the principal. These, in truth, are two different operations of the same great principle. That this is the true principle on which the assignment is demandable, is proved by reversing the case: if the payment were to be enforced and obtained out of the principal debtor's estate, no assignment could be demanded of the security against the cautioner's estate.²

2. Where two persons are bound jointly as principals, the creditor ought to demand his debt equally from them, each being in part principal, and in part only surety; or if he enforce payment from one, he must assign the claim against the other for the half which he should have paid.³

3. Where two estates of the same debtor are covered by a security for the debt, [524] and there is no third party interested in either of the estates, the operation of the principle is obscured by the identity of interest in the proprietor: the creditor may, of course, take his payment from either estate, and there can be no room for assignation, the debt being to all purposes extinguished. But if a separation of interest in the two estates take place (*ex. gr.* if the debtor die, and is succeeded by two heirs in different lines of succession), the same rule must, of course, be applied as if the estates had belonged originally to two several debtors. They must pay the debt rateably, in proportion to the value of the estates;⁴ and if the proprietor of one pay the whole, he is entitled to an assignation, that he may recover the share belonging to the other.

4. Where there are secondary creditors on the two estates, the right of the catholic creditor to demand his debt must suffer the same qualification as if the estates belonged to several proprietors. Thus, if A have an heritable bond over two estates belonging to B, and C have an heritable security over the one estate, and D an heritable security over the other, A cannot capriciously prefer the one to the other, by claiming his debt from one of the estates, leaving the other free, but must in equity assign his security.⁵

and the Court concurred. The claim was sustained to the full extent. [See *M'Gillivray v M'Arthur*, 1826, 4 S. 903; *Gilmour v Ferrier*, 1832, 11 S. 193.]

¹ [Consider the effect of the right of discussion being abolished by the Mercantile Law Amendment Act.]

² *Stewart v Maxwell*, 11 Jan. 1814, Fac. Coll. See below, p. 418, note 2. [See *Sligo v Menzies*, 1840, 2 D. 1478.]

³ [*Dickson v Moncrieff*, 1833, 16 D. 24.]

⁴ *Rose v Rose of Kilravock*, 1786, M. 5229. Hugh Rose died, leaving several estates, which descended partly to the male heir, partly to the heir of line. Certain debts had been secured heritably over them all indiscriminately; and a question arose, Whether, in the case of a person, possessed of two estates, granting a security for money upon both, in such a way that the creditor may levy upon the one or the other, or both, at pleasure; and the succession to those estates, upon the death of the granter, dividing, so that his heir-general, or of line, takes one, and his heir-male the other; those heirs

are obliged, as between themselves, to contribute towards the discharge of the debt proportionally, according to the value of the estates by them severally taken? or if the heir-general is obliged to pay the whole, in case the estate he takes be sufficient, and so relieve the estate taken by the heir-male completely? Judgment was pronounced twice in favour of the heir-male, finding him entitled to a total relief from the heir of line. See Hailes 1010.

But the judgment was reversed in the House of Lords; and 'it was declared that the heir-male and the heir of line must pay the debts charged on both these estates rateably, according to their value.' 2 April 1787. 3 Pat. 66. [See *Moncrieff v Skene*, 1825, 2 W. and S. 672; *Coventry v Coventry*, 1834, 12 S. 895; *Mackenzie v Mackenzie*, 1847, 9 D. 836.]

⁵ See Kames' Principles of Equity, vol. i. pp. 125, 126. [See *Kemp's Trs. v Ure*, 1822, 1 S. 223.]

5. But if there be a secondary security over one estate only, and no interest in opposition upon the other estate but that of the debtor, the rule uniformly laid down is, that the catholic creditor is not capriciously to injure the secondary creditor, by claiming his debt from the estate over which his security extends, leaving the other unburdened to the debtor; but that he must claim from the unburdened estate, or must assign his security.¹ But if the estates belong to different obligants, and one is the primary creditor while the other is only cautioner, a secondary creditor on the principal's estate will not be entitled to an assignment against the cautioner.²

6. The difficult problem which Lord Kames in the passages above referred to has not touched, is, What sort of interest in the separate estate will entitle a third party to insist that the catholic creditor shall restrict himself to the precise share which, under his security, such estate ought to bear, or (which is the same thing) assign in relief? Suppose this case, for example: A is an heritable creditor for £1000 over the estates of D and E, value £1000 each; B an heritable creditor for £1000 over D; C a postponed creditor, adjudger of both [525] estates, for £1000. If B is entitled to insist (which he would be if there were no other creditors in the field) that A should take his payment out of E, leaving D to him as holding a secondary security, the postponed creditor would get nothing, although he by adjudging has become truly a secondary creditor on E; whereas, if A is bound only to divide his claim in fair proportion on the two estates over which it is secured, or, what is the same thing, only to assign one-half of his security to B, the adjudger will get £500. Now, it is not easy to perceive on what principle any other arrangement than this last can be justified, since the right of the catholic creditor, when analyzed, attaches rateably on the two estates, and it requires only a secondary interest in those estates to give force to the right of relief against the other. If the case be supposed of an heritable bond, instead of an adjudication, on E, there can be no doubt that the holder of such bond would be a proper secondary creditor on E, and that he would have a legal interest to maintain against the catholic creditor, or, against the secondary creditor on the other estate, a right to be proportionally relieved. But an adjudging creditor stands vested with a real security as much as a creditor by heritable bond.

7. The same reasoning seems to be applicable to diligences against moveables, where the competition of voluntary and judicial securities may also occur. In the case quoted below,³ the Court expressly proceeded on the ground that no part of the crop or stocking had been affected by the diligence of other creditors. It would appear that the same principles should be followed in all other cases of catholic securities over the moveable estate, as well as over the heritable. A writ of extent, for example, should, in competition with a secondary creditor holding an assignation, or arrestment of a particular fund, be confined entirely to the moveables unaffected by diligence (if sufficient to answer the king's debt), and in which the debtors alone, or the personal creditors having a mere possibility of attaching those funds, are interested; but a rateable effect should be given to the writ, or

¹ See Kames' Principles of Equity, vol. i. p. 124.

² *Stewart v Maxwell*, 11 Jan. 1814, Fac. Coll. Here a loan of £4000 to Hall was secured over Hagtonhill, belonging to Hall, and over Bogton, belonging to his wife. Hall afterwards borrowed from Stewart £5000 on Hagtonhill. He failed, and the price of Hagtonhill was not equal to the debts secured on it. Stewart insisted that the wife should relieve him of one-half of the £4000, so as to free her husband's estate for his secondary security. The Court first held the wife to be a cautioner merely; and next, that the debt being paid from the estate of the principal, there was no relief against the cautioner, and no assignation could be demanded.

³ *Butter v Sir James Riddell*, 1790-92, Bell's Oct. Ca. 154. Butter arrested part of a crop and stocking belonging to Campbell, a tenant on the estate of Ardnamurchan; and having pursued a forthcoming, he intimated his diligence by protest to Sir James Riddell, the landlord, when about to make his catholic right by hypothec effectual. The question was, Whether the catholic creditor could take his payment out of the arrested fund without assigning? The Court found the arrestor entitled to the full benefit of his arrested fund, and to an assignation to the landlord's hypothec, to the extent of what he, as catholic creditor, had carried off with him.

an assignation ordered, where the other creditors have actually done diligence, though posterior to the secondary creditor.

8. But although the rule is quite established, in the case of two secondary creditors, that the catholic creditor must rank rateably, yet a distinction has been admitted where the catholic creditor himself has an interest. A creditor who held a catholic security over two estates, on each of which there was a secondary security, having *bona fide* purchased one of the secondary securities himself, was found entitled to exclude the other by means of his catholic right, without being bound to assign in prejudice of his own claim.¹ But the same effect has been refused where the secondary creditor purchased the catholic debt, which seems very questionable, for these rules are not quite reconcilable.²

It has been decided that a catholic creditor may, before the bankruptcy of his [526] debtor, renounce his security over part of the estate, to the effect of limiting his security to the rest, although it should turn out that the portion thus included were subject to a secondary security, which of course suffers by the restriction.³

CHAPTER IV.

OF THE RIGHT OF CREDITORS HOLDING SECURITIES TO RANK ON THE GENERAL FUND.

It is of some consequence to determine what shall be the effect in bankruptcy of a creditor secured over a particular estate drawing or being entitled to draw a large part of his debt out of that estate, preferably to the personal creditor, when he comes to demand payment of what remains still due.

It is the right of a creditor, by the common law of Scotland, to demand payment of his whole debt under the obligation of his debtor; and this right does not bar him from claiming the full benefit of any pledge or security which he may hold, provided from both sources he does not derive more than full payment of his debt.

In the discussions which took place on the second renewal of the statute relative to sequestration, this disposition of the common law was represented as inconsistent with the true spirit of bankrupt law; and the example of England was urged, where a creditor was denied access to the general fund, while he retained the benefit of a pledge or collateral security, and held bound to deduct the value of his security before being admitted as a claimant.⁴ In conformity with this principle, and with the practice in England, it was provided by the statute of the 33 Geo. III. sec. 39, that where any creditor holds a preferable security or lien on the bankrupt's estate, the value should be deducted from his claim, and the ranking should take place only for the balance; and that to ascertain the value, the trustee and commissioners should affix a sum, leaving it to the creditor to take this value

¹ *Miln v Hay*, 1678, M. 1341; *Scotland v Bairdner*, 1696, M. 3367; *Brigadier Preston v Colonel Erskine*, 1715, M. 3376.

I confess that I cannot help entertaining some doubt of the soundness of these judgments. If the obligation to assign is to be considered merely as a moral duty of humanity, they may be justifiable on the ground that the catholic creditor may refuse performance, as hurtful to himself; but if the right to an assignation be a consequence of the person claiming it, or the estate, being merely a surety, and secondarily liable, the obligation to assign is somewhat stronger, and is not to be discharged by the subsequent purchase of a right which, in the person of another, could have had no preference.

[See *E. of Moray v Mansfield*, 1836, 14 S. 886.]

² *Ersk. ii.* 12. 66.

³ *Edie & Laird v Robertson*, 1793, M. 3403.

⁴ [As to whether a creditor claiming a preference by virtue of an arrestment requires to state in his affidavit and deduct from his claim the value of that security, see *Brown v Blaikie*, 1849, 11 D. 474; *Gibson v Greig*, 1853, 16 D. 233. A collateral heritable security by partners of a mercantile company, for cash advances to the company, is not a security which the banker is bound to deduct as a condition of claiming on the company estate. *M'Lelland v Bank of Scotland*, 1857, 19 D. 574.]

or not as he pleased. If he chose to take it, the security was annihilated, and the fund over which it extended went into the general division. If he refused the value and held by the security, he deducted from his claim the ascertained sum, ranking only for the balance, and making the most he could of his security.

The principle of this rule, as being consistent with equity, ought to lead to its extension to other cases of bankruptcy. But as the law stands, the rule is different in an ordinary ranking and in a sequestration; and it is somewhat mortifying to find in a code of jurisprudence so much advanced as ours, a different rule in cases exactly parallel for regulating the rights of contending creditors.

The rule for valuing the security under the Sequestration Act has been much improved. Formerly the trustee and commissioners set the value on the security, and the creditor made his election. In the Act 54 Geo. III. this is reversed. The creditor values his security on oath, and the trustee and commissioners have the option to pay that value, and take the security for the benefit of the creditors at large, or to let the creditor take the full benefit of the security, and rank on the general fund for the balance only.¹

CHAPTER V.

OF THE RANKING OF PRINCIPALS AND SURETIES, AND OF ACCOMMODATION AND CROSS BILLS.

[527] THE principle upon which the ranking of principal and sureties, and of the various parties to accommodation bills, is regulated, is that there can be no double demand on a bankrupt estate for the same debt. The application of this principle is not always easy, and the cases which transactions of this nature present are necessarily abstract and complicated; but much greater intricacy has been introduced into the doctrine in English practice than belongs to the practice of Scotland, from the peculiarity at one time of refusing admission to all demands of a contingent nature.²

In Scotland, contingent creditors have always been held entitled to claim in bankruptcy, to the effect of having a dividend set apart to answer their demand, when the contingency should be cleared.³ And it is a part of this rule, that a surety, whether by bond, bill, note, or otherwise, has a right to claim in bankruptcy to the effect of having a dividend set apart for the debt should the creditor not have proved, and of entitling the surety, if the creditor have proved, to stand in the creditor's place, and have the benefit of his proof on paying the debt.

The general doctrine of the ranking of accommodation and cross bills seems reducible to the following propositions:—

1. There can be no double claim, directly or indirectly, grounded on the same debt.

It is a corollary from this rule, that one who engages as surety for the bankrupt can be ranked no otherwise, by direct or indirect means, than to the effect of having a dividend set apart to answer the debt when he shall have paid it.

2. Mutual accommodation bills exchanged are good considerations for each other.

3. The dividend which is paid by a bankrupt estate is payment by that estate of all that can be demanded in respect of that debt.

It is a corollary from this principle, that the balance between two bankrupt estates,

¹ 54 Geo. III. c. 137, sec. 50. [See 19 and 20 Vict. c. 79, sec. 65; *Greig v Crichton*, 1853, 15 D. 742.]

² See Christian's Origin, Progress, and Present State of the Bankrupt Laws, vol. ii. p. 587; Chitty on Bills 580; Eden's

B. L. 140 et seq.; 49 Geo. III. c. 121, sec. 8; 6 Geo. IV. c. 16, sec. 52. *Ex parte Read*, 1 Glyn and Jameson 224.

³ See above, p. 308.

where cross bills have passed between the bankrupts, can in no degree depend on a difference in the amount of dividend paid by the estates respectively.

4. A distinction is to be observed between the bankrupt estate and the bankrupt himself, the bankrupt continuing bound to indemnify his sureties where he has not obtained his discharge.

These propositions seem to comprise the doctrine of cross bills; and the further explanation of the subject will consist only of a commentary on the several cases by which those points are settled.

1. That there can be no double proof on the same debt, is settled both in England and Scotland as a radical principle in bankrupt law.¹ It does not, indeed, seem to require any authority to prove this principle; for it is a necessary consequence of the conveyance under the commission or sequestration, transferring to the creditors, in proportion to the [528] true amount of their several debts, the estate and effects of the bankrupt. And accordingly, in the simple case, no doubt ever seems to have been entertained; as, where £100 has been borrowed by one person from another, and a third has interposed as surety, it never has been permitted to the surety to make a demand on the principal debtor's estate, while the creditor in chief had entered his claim.

In perusing the English cases it will be found that the difficulty at first was not in relation to the surety's right to prove directly on the estate of the debtor, but as to what should be the effect of his not being so allowed to prove, on the certificate of the bankrupt? The difficulty arose in cases where there was a secondary undertaking by the debtor to the surety. As to such cases it was held, *first*, That a mere indemnity or engagement to pay the surety, unless there was either payment or a charge in execution, did not alter the case, so as either to entitle the surety to prove, or to make the certificate effectual as a discharge of his debt;² and, *secondly*, Where a bill, or note, or bond was given to the surety, he was at one time found entitled to prove upon such document as an absolute creditor for the amount;³ but afterwards this was restrained, by ordering the dividends to be suspended until it should appear what the surety actually pays, and how far he exonerates the bankrupt's estate from his own bill.⁴ This gave the effect circuitously, which by the law of Scotland is given directly, and without the intervention of any separate document.

In Scotland, a surety is at least a contingent creditor, and may claim as such where the creditor in chief has not claimed, to the effect of having a dividend set apart till he shall have paid the debt.⁵ But a surety who receives a separate note or bill, the sole consideration of which is his engagement as surety, is nothing more than a contingent creditor; and no other effect can correctly be given to such separate note or bill in Scotland than is in England allowed in the same circumstances. On this ground, it would appear that a case decided in Scotland may be doubted.⁶ Forrester and Laidlaw had accepted mutually bills drawn on each other to the same amount. Forrester negotiated Laidlaw's, but Laidlaw kept Forrester's undiscounted, and they both failed. The holders of the *discounted* bills

¹ See *Cowie v Dunlop*, 7 Term. Rep. 565.

² *Vanderhyden v De Paiba*, 1774, 3 Wils. 458; *Heskuyson v Woodbridge*, 1782, Doug. 166; *Chilton v Whiffin*, 3 Wils. 13; *Taylor v Mills*, Cowp. 525; and other cases in Cook's B. L. 203 et seq.

³ Cook's B. L. p. 159, and the cases of *Toussaint*, *Maydwell*, *Rolfe*, and others there cited. Cullen's B. L. 133.

⁴ Cook and Cullen, as above. See the observations of Mr. Cullen in his note (48), p. 134. *Whitmarsh's B. L.* 185.

⁵ [Where the surety's estate is insolvent, and pays only a dividend, the trustee has no *jus cedendarum actionem* against the creditor. The cession of action in such a case would simply have the effect of depriving the creditor of his right to proceed against the estate of the principal obligant for the

balance. *Ewart v Latta*, 1865, 4 Macq. 983, 3 Macph. H. L. 36, reversing 1 Macph. 905.]

⁶ In former editions of this work, I ventured to suggest these doubts; and amidst the great difficulties of the subject, I feel infinitely relieved by the view which some eminent judges took of this case, in the recent case of *Newbigging & Co.'s Trs. v Heywood, Collins, & Co.'s Trs.* See below, p. 422, note 3.

[Where a surety had made a partial payment to the creditor, and afterwards recovered a dividend from the principal's sequestrated estate, it was held that the creditor was entitled to claim the sum paid as dividend from him, to the effect of operating full performance of the cautionary obligation. *Houston's Exrs. v Speirs*, 1835, 13 S. 945.]

claimed on both estates, and were of course ranked for the full amount of those bills on the estate of Laidlaw, the acceptor, and on that of Forrester, the endorser. Laidlaw's creditors then entered a claim on Forrester's estate for the amount of the cross bills *still in Laidlaw's hands*, and Forrester's estate claimed retention till relieved of the claim of recourse against their funds by the holders of the negotiated notes. Now, it is difficult to deny, 1: That to allow Laidlaw's claim, without supporting the plea of retention, was just to allow a double ranking on Forrester's estate for the same debt, since the one set of bills had already ranked on that estate, and the other set of bills was in Laidlaw's hands merely as an indemnity; and, 2. That the only effect of allowing retention would have been very nearly or precisely the same with that of the English judgments, suspending the dividend on the cross paper till it should be seen how far the estate was exonerated of the negotiated bills. The Court [529] of Session, however, refused to allow retention, and ordered Laidlaw to be ranked for the full sum in the bills.¹

It seems to have weighed much with the Court, that in such cases the object should be to preserve, as far as possible, equality between the parties. This principle is entitled to regard between solvent parties; but bankruptcy reduces all personal creditors to a level; and, laying aside all views of hardship, and all accidental differences in the value of obligations, requires a Court of law to apply, without reluctance or exception, the same rules to all cases, viz. that no debt is to rank for more than it has produced to the estate; and that no two parties are to rank at once for the same debt. It is no longer the one of the original parties that contends with the other, but the creditors of the one with the creditors of the other; each being entitled to claim the whole personal funds of their debtor, and to exclude double ranking for the same sum.² In a recent case a similar question was determined, but without any intention either to confirm or deny the above determination. The question there turned on the competency of rearing up certain bills, taken from the repositories of one of the parties, and which in their origin were not counterparts of each other, as instruments by which to obtain full payment of the amount of bills paid for the bankrupt; and this the Court refused to authorize.³

2. Mutual accommodation bills are good considerations for each other.

This, in England, entitles one of the parties who has not discounted the other's bill to

¹ *Nairn v Cranston*, 1796, M. 2597.

² Before leaving this case, it may be remarked that there seems to have been an error in the reasoning used in discussing it, as if the principle were to be affected by the different amount of the dividend, which undoubtedly it cannot justly be. It was strongly urged that the estate of the discounter of the bills was benefited to the full amount of 20s. per pound by that discount; that the billholders had only drawn a small dividend of 2s. 6d.; that Laidlaw's trustee claiming for indemnification would draw only another small dividend of 2s. 6d., amounting together only to 5s.; and that thus the clear gain to the estate, on the discount, would be 15s. The conclusion deduced was, that even the refusal of retention to Forrester's creditors—or, in other words, allowing the claim of Laidlaw's trustee to a dividend—left the estate of the discounter still highly benefited, while the estate of Laidlaw was not reimbursed. This view would indeed be quite correct if both parties were solvent; but in bankruptcy every other personal creditor is to be held as having equally benefited the bankrupt's estate to the amount of 20s. per pound, while yet he has drawn no larger a dividend than the creditors in the discounted bills. But how should the mere circumstance of more than one party being engaged in these bills give a double advantage, without transgressing the plain rule, that

no one debt can rank more than once? The radical principle here finds application, that in so far as concerns the bankrupt estate, the payment of dividends on a debt is full payment of the debt.

³ *Newbigging & Co. v Dalgleish, Tr. for Heywood, Collins, & Co.*, 1823, 2 S. 481, N. E. 427. Here both the bankrupts had accepted accommodation bills, and to nearly the same amount; but the bills were not counterparts, nor exchanged with each other, nor corresponding in dates and sums, or time of payment. One party became bankrupt while all the bills were in the circle, and the other was obliged to pay both sets of bills. On the bills accepted by the other party, the retirers of these bills were ranked on the estate of the acceptors, and drew a small dividend. And the question was, Whether a claim could also be made on their own acceptances to the effect of giving full indemnification for what had been paid in retiring the other set of bills? The decision in the case of *Nairn* was much questioned, and on the bench great doubts entertained of the soundness of that determination. But professing not to touch that decision, as entirely different from that in question, the Court held that here the bills were not counterparts, and that it would be attended with very dangerous consequences to sanction the taking of retired bills from the repositories of a party, to serve as counter securities for enlarging a dividend.

claim as a creditor on his bankruptcy, if his own counter acceptance has been discounted; but still to no other effect than that of having a dividend set apart, till it shall be seen how far he exonerates the other estate of his own acceptance.¹ 1. If the counter acceptances or cross bills remain still undiscounted by both parties, they mutually extinguish each other; and if the one estate pay a smaller dividend, and the other a larger, the former cannot be entitled to draw the difference. 2. If one party has discounted his bill, the [530] other not, and the third party holding the discounted bill ranks on both estates, there ought not to be a second ranking for the relief and benefit of the estate of the acceptor of the discounted bill, grounded upon the undiscounted bill, since it was a mere indemnity in the hands of the acceptor of the discounted bill.² 3. If both parties have discounted or endorsed away their bills, both bills will rank on both estates, and there can be no separate ranking by the estates on each other.

But if the bills thus in the hands of the two several estates have come into their possession, not as the considerations for each other, but by means of other separate transactions with third parties, a different principle may rule the case. Such appears to have been the case of *Curtis v Chippendale*.

In that case the Scottish house of M'Alpin & Co. exchanged paper with the English house of Livesay, Hargrave, & Co. They received from the English company acceptances of Gibson & Johnson of London, endorsed. They gave in return their own acceptances; and many of those found their way into Gibson & Johnson's hands. In this situation all parties became bankrupts. The Scottish house had discounted the bills received from Livesay, Hargrave, & Co., while Gibson & Johnson had the Scottish acceptances in their hands on their bankruptcy. Under Gibson & Johnson's acceptances, endorsed by the Scottish house, the holders had claimed on Gibson & Johnson's estate (as acceptors), and (for recourse) on the Scottish house's estate as endorsers. On the other hand, Gibson & Johnson made a claim on the funds of the Scottish house, under their acceptances still unnegotiated; and were opposed by a plea of retention in relief of the claim of recourse, which had been entered on the Scottish estate, under the acceptances of Gibson & Johnson, endorsed by the Scottish house. The Court of Session sustained the claim of retention.³ It is not explained what was the ground on which this judgment proceeded, but it is of some importance to observe: 1. That there were not here two parties merely, but three parties in the transaction, so that the bills were not (in the hands of the Scottish and of the English companies) the considerations for each other: the consideration, on the contrary, existed only in account with Livesay, Hargrave, & Co. 2. It should be observed that there was no foundation for lien between the two houses; for the transaction which placed the English bills in the hands of the Scottish company, and theirs in those of Gibson & Johnson, took place not between themselves, but only by the accidental connection of Livesay, Hargrave, & Co. with Gibson & Johnson. Now, when the Court allowed the Scottish company to retain against Gibson & Johnson the dividends due on their own acceptances in Gibson & Johnson's hands by endorsement from Livesay, Hargrave, & Co., this could be allowed only in security of an indemnification to the Scottish house for the claim already made against their funds by the holders of Gibson & Johnson's acceptances, which the Scottish house had endorsed, for the Scottish house had no other claim against Gibson & Johnson. But the holders of those bills had not only claimed from the Scottish house, but from Gibson & Johnson, and therefore the very debt had already been directly ranked on Gibson & Johnson's estate, which the Scottish house was now to rank for a second time on the dividend in their hands belonging to Gibson & Johnson, and forming a part of their personal estate. The House of Lords appears to have placed the matter on its true footing;

¹ See above, p. 421. [*Gibb v Brock*, 1838, 16 S. 1002.]

³ *Curtis v Chippendale*, 1794, M. 2589, Bell's Fol. Ca. 119;

² But see the case of *Nairn v Cranston*, above, p. 422, House of Lords, 23 Feb. 1797, 3 Pat. 540.
note 1.

for as on the one hand there was no room for the plea of retention, so on the other there was no room for objecting that the sustaining of the claim of Gibson & Johnson would give [531] a double ranking on the Scottish estate, since the bills already ranked in recourse on the Scottish estate were not the consideration which Gibson & Johnson had given for the bills on which they claimed; but these bills had come into their hands from a third party—Livesay, Hargrave, & Co.—in the course of trade with them. Had the Scottish and English companies made just an exchange of cross paper, as in Forrester's case, it is probable that the decision of the House of Lords would have followed the principle adopted in the other English cases already quoted, and that in ordering a ranking they would have accompanied the order with directions to suspend payment of the dividend till the true amount of the indemnification should appear.

3. In so far as relates to a bankrupt estate, the payment of the dividends upon any debt stands as full payment of that debt; reserving to the creditors directly or indirectly concerned in that debt their remedy against the person of the bankrupt.¹

4. The claim against the bankrupt may still in some cases be made effectual in England, notwithstanding the certificate; although, partly by judicial determinations, and principally by the operation of Sir Samuel Romilly's Act, and the new Bankrupt Act of 6 Geo. iv. c. 16, those cases are now reduced within a very narrow compass. In Scotland, it is only where the bankrupt has not obtained his discharge, that claims rejected from the ranking on the footing of double claims may be made effectual against the person of the bankrupt.

CHAPTER VI.

OF THE EFFECT OF PAYMENTS AND INTROMISSIONS ON THE CLAIMS OF CREDITORS HOLDING SECURITIES.

THE general rule of law is, that as payment extinguishes the obligation, with all its accessories, and frees those who are indebted,² so the payment of a part extinguishes the debt to that extent.³ But this rule admits of exceptions; and an important class of them is to be found in those cases where, in addition to the personal obligation of the bankrupt, the creditor holds the bond of co-obligants, or the real securities of a pledge or lien. In those cases, it may be of importance to preserve the claim undiminished against all the obligants, or the real right undischarged, while any part of the debt remains due, that thereby the creditor may be secured in payment of the balance. And it is important to observe when partial payments or intromissions form deductions from the claim; and in what cases, on the other hand, the creditor is still entitled, notwithstanding such payment, to be ranked for his full original debt, to the effect of drawing the balance.

Independently of any peculiarity arising from bankruptcy, the rules seem to be,—

1. That a personal obligation by a single debtor is extinguished by total, and diminished by partial payment; and, of course, that the claim of the creditor receiving such payment from his debtor is, in ranking on his bankrupt estate, limited to the balance.

2. That where two or more are jointly bound, although the creditor is entitled to demand the whole debt from each, to the effect of receiving full payment,⁴ the obligation of the one is discharged by payment from the other, or is diminished by partial payment.⁵

¹ This principle is well illustrated in the judgment of Lord Rosslyn in *ex parte Walker*, 4 Ves. 373.

² Dig. Lib. 46, tit. de Solution, l. 43.

³ *Ib.* l. 9, sec. 1.

⁴ [Farquharson v Thomson, 1832, 10 S. 526; Fergusson v Smith, 1836, 15 S. 25.]

⁵ See *Common Agent in Ederline v Macleod*, 1801, M. App. Adjudication, No. 29. [Hamilton v Cuthbertson, 1841, 3 D. 434.]

3. That where the creditor receives a pledge for his debt, he is entitled to retain [532] it in full force, until the last farthing of his debt is paid; full payment being the condition on which alone the subject is to be restored. This equally applies to heritable and to moveable pledges. The old wadset, the modern absolute disposition and backbond, the pledge of moveables, and the lien or right of retention; all of them give an absolute security to the debtor for the last farthing of his debt. Neither the debtor nor his creditors can claim restitution, or take any benefit from the subject of the security, till the debt be entirely paid up. The payment of a part may diminish the *debt*, but not the *security*.

4. That where diligence is done for recovering or securing the debt, its effect and operation must be measured by the amount of the debt due at the time of the completion of the security.

Such appear to be the general rules relative to the effect of payments on debts secured collaterally by co-obligants, by real securities, or by diligence. But there are two kinds of security which have been thought peculiar, and to admit of much doubt, viz. apprising or adjudication, and the modern heritable bond. The former was till lately regarded as so much of the nature of a sale under reversion; and the latter, in some points, comes so near in character to the wadset, while it departs so widely from it in others, that it is not surprising these doubts should have been entertained.

1. An apprising originally, and afterwards an adjudication, were considered in the same light with a sale under reversion. The apprising which, in the thirteenth and fourteenth centuries, was truly a sale or transference of land to the creditor, in payment of his debt, was by statute 1469, c. 37, qualified by a power to the debtor of redeeming his lands within seven years, by 'payand to the buyer the money it was sauld for, and the expenses made on the over-lord for charter, seising, and infeftment.' And while the apprising continued in use, the right of the creditor-appriزر was that of a proprietor entitled to hold the property as his own, defeasible on one condition only, viz. the repayment of the whole money advanced, with expenses, etc. The consequence of this was, that although the *debt* might be diminished by payment of part of what was due, still the *real right* in *security* continued undefeated and unlimited; that if the legal term of redemption was allowed to expire, while any part of the debt remained unpaid, the right to the whole lands became absolute; and that, in competition, the appriزر had his security as complete for the last shilling as for the whole original advance.¹

Under the statute 1672, c. 19, the special adjudication was strictly and properly a sale under reversion, as completely as the old apprising; being an adjudication of a portion of land precisely commensurate to the debt, with a fifth part more as a consideration for taking land instead of money; the rents to go in payment of the interest; the intromissions not to be accounted for; but the right of the creditor not defeasible otherwise than by payment of the whole debt. The general adjudication was a security extending over the whole of the debtor's estate, however large, for a debt however small; and was less entitled to be considered as a right of property defeasible, than as a judicial security for debt. And the opinions of our lawyers were not well settled concerning its nature and effect; sometimes it was regarded as a sale under reversion, sometimes as a *pignus prætorium*.

In the first case relative to the effect of partial payments on adjudication, the Court at first restricted the ranking on the adjudication 'to the sum that remains unpaid after [533] deduction of what had been recovered out of the other estate.' But after a great deal of

¹ *Craig v Wilson*, 1623, M. 293. This was a competition in which it was objected to an apprising, 'That it was become extinct, in so far as, since the deducing thereof, and since the sasine past thereupon, he had received a part of the sum for which the apprising was deduced. But this allegiance was

repelled, because the Lords found that the receiving payment of a part of the sum was not enough to make the comprizing to fall, except the whole had been paid; but that the comprizing stood until the whole debt was satisfied.'

very ingenious discussion, in which the distinction was strongly insisted on between a common accessory heritable security and an adjudication as a sale under redemption, the Court altered their opinion, and determined that the adjudgers 'ought to be ranked for the whole sums contained in their adjudication, *pari passu* with the other creditors, in order to recover payment of what remains due after the payment received by them out of the price of the other lands.'¹ In a subsequent case, with the professed design of keeping uniformly to the former precedent, which was held to be the rule in practice, a similar decision was pronounced.² The doctrine on which this case was decided is delivered in absolute terms by Erskine: 'The security acquired by the adjudger,' he says, 'remains entire and undiminished, so as to entitle him to a preference on the whole sums contained in it, in security of the balance still due to him after the separate payment, as if no such payment had been made. The security is as broad for the last shilling as for the whole sum, because it is the nature of the security which entitles him to the preference, and not the amount of the sum which is secured.'³

In 1794, the conception hitherto entertained of the nature of an adjudication, and on which the determinations in the above-mentioned cases rested, was, after a very ample discussion of the nature of judicial securities, given up;⁴ and the effect of this on the doctrine grounded on the former opinion became a matter of some doubt, for the change of opinion came to lead to a decision very different with regard to penalties from that which, under the influence of the former notion, would have been pronounced.⁵

But although it has been questioned whether the different character now ascribed to the diligence of adjudication ought to be held to alter the rule adopted in the case of the Earls of Loudon and Glasgow, and in that of Auchinbreck's creditors, and to entitle an adjudger who has received a partial payment on account of his debt to rank for the undiminished amount of his original claim, the Court in a recent case held the rule of these cases to be fixed.⁶

[534] 2. The security of a common heritable bond is not of the nature of a sale under reversion. It is a mere accessory to the debt, and is diminished as the debt decreases by intromission or by payments. It was on this very account that the heritable bond proved unfit for the purpose of securing a cash account. Every payment or intromission by which the debt is diminished lessens the security, and must be deducted from the creditor's claims in ranking under the heritable bond.

¹ *E. of Loudon and Glasgow v L. Ross*, in ranking of Galston's Crs., 1734, Elch. Ranking and Sale, No. 3, M. 14114. The Earls of Loudon and Glasgow having, as sureties for Ross of Galston, paid debts, obtained an heritable security from him over part of the estate of Galston. Under this security the Earls were ranked, and a large dividend appropriated to them; but a balance still remained due. At this time it was discovered that a part of the debtor's estate had not been attached by creditors, and adjudications were forthwith led by the two Earls for their whole debt. Some time after the dividends formerly appropriated were paid; and when the subject adjudged came to be divided, an objection was taken to the adjudication of the Earls, as entitled to rank only for the balance.

² *Ranking of Auchinbreck's Crs.*, 1758, M. 14127, 5 Br. Sup. 363. Lockwood was adjudger for £1360: he, in consequence of arrestment of moveables, recovered a partial payment of £340 about a year after leading the adjudication. The question was simply, Whether in ranking Lockwood under his adjudication, he should be taken as a creditor for the whole debt, or only for the balance? The Court determined, 'that the partial payment does not restrict the ad-

judication; but that the same must be ranked for the whole accumulated sums therein contained.'

³ Ersk. ii. 12. 67.

⁴ *Campbell v Scotland & Jack*, 1794, M. 321. The question was, Whether a general adjudication, not extinguished by payment or intromission within the legal, was to be considered as irredeemable after the expiration of the legal, but without a decree of declarator of expiry? And here the opinion was very strongly delivered from the bench, that a general adjudication is not a sale under reversion, but merely a *pignus prætorium*; an accompanying and accessory security prior to the decree of declarator of the expiry of the legal; when it becomes indeed a sale.

⁵ *Buchanan v Purdon Gray*, 1800, 1801, M. App. Adjud. No. 12. In that case the question was, Whether the claim under an adjudication should be restricted to the actual expense, or should extend to the whole penalty? The Court at first found it not restrictible; but afterwards, on the ground that an adjudication is a *pignus prætorium* merely, they altered that judgment, and restricted it to the actual expense.

⁶ *Colonel Dalrymple's Children v Cuthbertson*, 1825, 4 S. 16.

It is next to be observed, what effect will be produced on the operation of the general principle by bankruptcy.

1. Bankruptcy does not necessarily limit the right of the creditor who holds a collateral obligation from a third party, since the general body of the creditors takes the estate exactly as it stands in their debtor, and cannot insist for an assignment in relief against a co-obligant while any part of the debt remains unextinguished. This is admitted to be law when, at the time of making the claim, no payment has been received. It has been held in England, however, that one cannot correctly swear the oath required in bankruptcy as creditor for the entire debt, if in fact it has been diminished by a partial payment; and so the claim is limited to the balance in cases where the payment has not only been received, but even where a dividend in bankruptcy has been declared. But the rule is different in Scotland, as already explained.¹

2. Bankruptcy does not appear to have, independently of statute, any effect whatever in restricting the right of the holder of a security to insist on its operation for the last part of the balance, undiminished by partial payments. But at one time it was held expedient that legislative provision should be made for such a case. Between the sequestration statutes of the 12 Geo. III. and of the 23 Geo. III. a good deal of discussion took place on the question how payment should operate.² A provision was introduced by which, 1. Payments previous to the sequestration, either from the estates of co-obligants or from preferable securities over the bankrupt's funds, were deducted from the total amount of the debt; and, 2. Payments so received after sequestration were not deducted, but the creditor was ranked for his whole debt, to the effect of drawing full payment and no more. In the subsequent statute of 33 Geo. III. this provision was omitted, and the claims of creditors holding securities or receiving payments left to the disposal of the common law, with the following two special provisions:—

1. That the holder of a security should not be entitled to rank on the personal funds, except for the balance of his debt after deducting the value of his security.

And, 2. That all creditors should communicate to the rest the benefit of any [535] preference or payments received abroad out of the bankrupt's estate or effects. This also is the rule of the subsisting Act.³

Thus the effect of securities, and the claim against co-obligants, is left by the Legislature to the disposition of the common law; while the claim against the *universitas* of the personal estate is regulated by a very equitable rule, requiring deduction of the value of such securities as the creditor holds over any particular estate or fund of the bankrupt.

Before closing this subject of Partial Payments, it may be proper to clear the doctrine of Indefinite Payments from certain doubts which attend it.

¹ See above, vol. ii. p. 305. [*Houston's Exrs. v Speirs' Trs.*, 1835, 13 S. 945.]

² In some observations, printed and distributed preparatory to certain proposed alterations on the original provisions of the sequestration law, there is the following passage:—'It seems not an agreed point in what manner debts should be ranked on a common fund, in cases where a part of these debts happen to be previously paid from some collateral security before the general ranking takes place; whether for the whole of the debt as it stood at the time of the sequestration, or only for the balance, deducting the partial payment. In cases of this kind, much stress has been laid upon the period when the debts have been proved according to law; so that two debts which stand in circumstances precisely similar, both with regard to sequestration and partial payments from collateral securities, before being ranked on the common fund, have been considered as not entitled to equal

preference afterwards, merely on the score of the one debt being proved before the partial payment was obtained, and the other afterwards. In the instance now alluded to, the debt first proved was ranked for the full sum, and the other only for the balance, after deducting the partial payment. This is a distinction so intricate and nice as to be scarce intelligible, and must be productive of much inconvenience, if not rendered more simple and clear in the proposed law. In order to obviate in some measure the danger of such distinctions, it is submitted how far it might not be proper to statute, that all debts on a bankrupt estate shall be ranked according to their amount at the time of sequestration, without regard to the period of proving, or of subsequent payments from collateral securities, but so as to preclude the creditor from ever drawing more than twenty shillings in the pound.'

³ 33 Geo. III. c. 74, secs. 39, 40; 54 Geo. III. c. 137, secs. 50 and 51. [19 and 20 Vict. c. 79, secs. 59, 65.]

In the application of payments made by one who stands indebted to another in more than one obligation, the rules are,—

1. That the creditor must receive, as appropriate to one of these debts, a payment made by the debtor for the purpose of extinguishing that debt.¹

2. That the receipt given by the creditor for the money will fix its appropriation.²

3. That where the payment is made indefinitely, and no appropriation expressed in the receipt, the creditor has the right to ascribe it to which debt he may see fit;³ and it will be construed accordingly, that he has followed his own advantage.⁴ This seems to proceed on the ground of a power in the creditor, to the exercise of which the debtor could not fairly or reasonably have objected, and which, therefore, may be taken to have been their combined act. But it is a rule which suffers, on the principle whereon it rests, certain limitations. These are: 1. That the appropriation shall not be made so as to leave the debtor exposed to any penal consequence, to which it cannot be presumed he could consent.⁵ 2. It has been held that, where the debtor is bankrupt or notoriously insolvent, and a third party is interested as cautioner, the appropriation shall not be made so as to throw the burden entirely on the cautioner.⁶ This doctrine, however, seems to require further consideration. The very purpose of taking a collateral obligation is to secure the creditor; and when the principal becomes insolvent, any payment which the creditor receives, or any intromissions which he may have with the debtor's funds, ought in justice to be imputed to what is not otherwise secure. It is very true that a cautioner is entitled to insist that the creditor shall apply any fund of the debtor in his hands to liquidation of the debt; but that is a rule which (like a similar rule in the case of a catholic creditor) does not hold good where the creditor himself has an adverse interest.⁷

PART V.

OF PROCEEDINGS AGAINST THE PERSON OF THE DEBTOR.

[536] IMPRISONMENT, that last miserable resource for enforcing the payment of debt—at once perhaps the most revolting and absurd in theory, and the most effectual in practice—is accompanied in the law of Scotland by a remedy which, in giving freedom to the honest debtor, affords to creditors the means of obtaining an equal share in the distribution of his funds. The laws relative to this matter form, therefore, a natural part in our inquiry concerning the proceedings by which the person and estate of the debtor are placed under the

¹ [Allan v Allan & Co., 1831, 9 S. 519.]

² [Bennie v Mack, 1832, 10 S. 255.]

³ Forbes v Innes, 1739, Elch. Indefinite Payment, M. 6813.

⁴ As, for example, it will be held that he has taken the payment towards articles of an account just about to prescribe (Good v Smith, 1779, M. 6816); that he has taken it towards payment of interest, or of debt not bearing interest (Reid v Maxwell, 1782, M. 6818; Hall v Brand, 1693, M. 6802; Duck v Maxwell, 1717, M. 6804; [Bremner v Mabon, 1837, 16 S. 213]); that he has received it to account of a debt unsecured, leaving the secure debt undiminished (Smith v Oswald, 1687, M. 6802; Bannatyne v Brown, 1825, 3 S. 593, N. E. 407; Paterson v Crs. of Harwood, 1742, Pitfour's ms. *voce* Indefinite Payment); '*Electio est creditoris*, and therefore he was allowed to save his whole debt by inhibition, and to impute

his intromissions in extinction of other debts not so secured.' [Mackenzie v Gordon, 1839, M'L. and Rob. App. Ca. 117; Watt v Barnett's Trs., 1839, 2 D. 132.]

⁵ Ersk. iii. 4. 2.

⁶ Duchess of Buccleuch v Dougl, 1725, M. 6807, Ersk. iii. 4. 2. In Pitfour's ms. I find another case to the same effect: Forbes v Russell, in competition of Thoir's Crs., 1740. 'Indefinite payment made by James Paterson, for whom Russell was bound cautioner, imputed proportionally to the debt in which Russell was bound, and to the other debts in which Paterson alone was bound.'

⁷ [As to the rule that payment into an account-current is to be applied in extinction of its earliest items and its exceptions, see Lang v Brown, 1859, 22 D. 113; Pollock v Murray, 1863, 2 Macph. 14.]

control of his creditors. In entering upon this subject, it may be proper, in the first place, to take a general survey of the whole doctrine of Imprisonment, and then to treat successively of Imprisonment, Personal Protection, and *Cessio Bonorum*.

If, in the complicated state of society in which we live, imprisonment for debt be at all justifiable, it is in Scotland established on principles against which no reasonable exception can be taken. In the condition of our prisons, indeed, a reformation is absolutely necessary; and even since the first publication of this work, the most gratifying improvement in this respect has taken place. But this imperfect state of our prisons has arisen from accidental and local circumstances. The prisons of Scotland have in general been constructed in the heart of towns, and were formerly unhealthy and miserable dungeons, unfit even for felons, and disgraceful to the country as places of confinement for debt. The chief cause of this has been, that the custody of prisoners was entrusted to magistrates of burghs, while the burghs of Scotland were in great poverty, unable to afford the expense of large or spacious prisons, and under the necessity of having their prisons within their own walls, that they might be secure.

But in the misery which arises from this cause, the spirit of the law has no blame; and that law deserves approbation of which the ruling principle is, that imprisonment, though necessarily left in the power of the creditor to a certain extent, is not a satisfaction for debt, nor a punishment which he may continue according to the dictates of his discretion, his revenge, or his offended pride. In Scotland, after a month's duration, the question whether the imprisonment shall be prolonged may be brought under the cognizance of a court of law and equity, empowered, on the debtor giving up to his creditors all his estates and effects, to liberate him from confinement, with no other condition than that of paying from his future acquisitions what may remain unsatisfied, and of being again exposed to the constraint of a prison, if he should acquire the means of paying his creditors without doing so.

In contrasting the laws of England and of Scotland regarding imprisonment, the comparison will be found honourable to Scotland. But there is a better purpose to be obtained by this contrast than the indulgence of any gratification on this account: it will make more intelligible the true state of the law, and tend to enlarge our views of its spirit and tendency.

In the English law of imprisonment, one principle seems to be admitted which [537] has led to very unhappy consequences, namely, that imprisonment is a satisfaction for the debt; and with this, in some degree, is mingled the impression that imprisonment is also a punishment which the creditor is entitled to inflict upon the debtor. It seems to follow as a necessary consequence, that the creditor may come suddenly upon his debtor, and seize him as a criminal who means to escape; and that when he has seized him, he is entitled to keep him in prison till his debt be paid,—payment being the sole condition on which the creditor can be deprived of the satisfaction of holding his debtor in confinement. Of this right of the creditor, the only qualification which at the time when this work was first published, had been permitted in the way of a general law, was to be found in the provisions of the Bankrupt Statute. In cases without the range of those Acts, the sole remedy against the evils of imprisonment was by occasional Acts of Parliament passed for the relief of insolvent debtors. Since that time a great and most desirable reformation has been accomplished by the statute introduced by Lord Redesdale,¹ and since improved from the result of experience; and which, amidst all the opposition natural on occasion of so great a change, and all the difficulties of reforming a system so faulty and so inveterately established, seems already to have produced the most happy effects.

In Scotland, the notion of imprisonment being itself a satisfaction for the debt is not

¹ [53 Geo. III. c. 102. See the English statute 32 and 33 Vict. c. 62, which abolishes imprisonment for ordinary civil debts.]

recognised;¹ while, as a punishment, the right to imprison is placed under judicial control.

The mild spirit of the Scottish law is chiefly manifest in the delicacy with which the creditor must proceed in the imprisonment of his debtor; and in the provisions which are made for the debtor's regaining his liberty, after confinement for such a time as the law has deemed sufficient for the purposes of justice and a fair discovery. The arrest is not, like that of the English law, sudden, as in the case of a criminal; but slow, and as it were reluctantly permitted by the law. The debtor against whom a judgment of a competent court has been pronounced, or who is indebted by a written obligation containing a clause of registration (analogous to the English warrants to confess judgment), or who is a party to a bill of exchange protested and registered for execution, must be charged, that is, commanded by a legal citation, to pay the debt within a certain number of days before he can be arrested. And the warrant for caption cannot be issued till after the expiration of that term. Proper provision is, at the same time, made to prevent an escape from the country. When the debtor is seized and confined, if he be a merchant, he has the remedies already explained, similar to those of the English bankrupt law. If of any other condition, provision is made for indulgence in sickness, and for subsistence if in extreme poverty; and he is entitled, after a month's confinement,² to be restored to liberty, on showing to the Court of Session a fair statement of his funds, his losses, and his debts; justifying the honesty of his conduct in the face of his creditors, and giving up all his estates and effects for distribution among them.

CHAPTER I.

OF IMPRISONMENT FOR CIVIL DEBT.

[538] ALTHOUGH imprisonment was from the earliest times, both in England and in Scotland, established as a mode of punishment for crimes, the person was not attachable for civil debt. This, indeed, was wholly inconsistent with the duties of warlike service, to which every man was bound; and execution for debt was restricted to the property of the debtor. In tracing the steps of that progress by which civil imprisonment was introduced, it will be found that the first step in both countries was precisely similar, having been bestowed as a privilege upon merchants for an encouragement to commerce, and in consideration of their having to deal with strangers engaged in trade.

I. Some English writers have represented the STATUTE-MERCHANT as part of the peculiar policy of Edward I., while in reality it was but a step in the rise of cities and towns, which, by a gradual progression from the fall of the Empire to the full establishment of the commercial policy of modern Europe, became the asylum of trade and manufactures, and the bulwark between the Crown and the feudal lords.³ The English statute of merchants

¹ At one time, however, there was some likelihood of this being established as the principle of the Scottish law. In several cases in the Dictionary, *voce* Prisoner (particularly *Darbell v Bruce*, 13 Dec. 1694), are to be found attempts to have this held as the law of Scotland. See also the Act 1672, c. 19, by which a creditor in possession of the debtor's lands was prohibited from proceeding with other diligence. But this never has been established as a part of the law of Scotland. On the contrary, execution against the person, and against the property, have been declared by statute to be

without prejudice of each other. 1584, c. 139; 1606, c. 10.

² This is not necessary, and the debtor may apply for *cessio bonorum* even before imprisonment, if a warrant is issued to imprison him. 6 and 7 Will. IV. c. 56.

³ We find, accordingly, that similar privileges were granted to the cities and towns of Germany and the Low Countries. The privilege of arresting strangers for debt, bestowed upon certain cities in the Low Countries and in France, gained them the distinction of the name of *Villes d'Arret*.

was made first in 1283, at Acton Burnel, and renewed in 1285.¹ This last statute proceeds on a preamble of the poverty that had fallen upon merchants from the want of a speedy remedy for recovering debts, and of the consequent desertion of the realm by merchants with their merchandise. It recites the statute made two years before, which, although misinterpreted and ill executed, had produced some benefit; and therefore enacts, that a merchant who wished to deal securely, should cause his debtor to come before the Mayor of London, or some chief warden of a city, or of another good town where the king should appoint, or before certain persons appointed to attend when the mayor and wardens could not, and in their presence acknowledge the debt and day of payment; and that the recognizance should be enrolled, and an obligation written by the clerk, and sealed with the debtor's seal and the king's, and, failing payment, that the creditor should come with the obligation; and if the debt was found acknowledged, and the day passed, the mayor or chief warden should cause the body of the debtor to be taken, if a layman, whensoever he happened to come within their power, and commit it to the prison of the Tower, there to remain at his cost till he had paid the debt. The debtor was to remain in prison for a quarter of a year, during which time he was to have it in his power to sell his property in order to pay the debt; and if he did not, his lands and goods were then to be delivered to the creditor, by a reasonable extent, his person being still kept in prison till payment of the debt by means of his estate, the creditor finding him bread and water for his subsistence.

The warrant for imprisonment for debt in Scotland, analogous to that under the English statute-merchant, is called an ACT OF WARDING. It proceeds from the magistrates of a royal burgh, and authorizes the town-officers, after due search for goods of the debtor to be applied in payment of the debt, to take his person, and keep him in sure ward until he shall make payment of the debt. This peculiar warrant and mode of imprisonment is referred back to the reign of Robert I.; and the 19th chapter of his second Parliament is said to have been the first authority under which it proceeded.² That statute does [539] not, however, appear to be genuine. It is too like a copy of the English Act to have been adopted at that time, and rather appears to be one of those spurious laws which (with the *Regiam Majestatem*, and the 24th Act of the same Parliament of Robert I., relative to confirmations) are to be rejected from the genuine collection of Scottish statutes. In relation to the matter now in question, it is a strong confirmation of this suspicion of the genuineness of the statute of Robert I. as the origin of an Act of Warding,³ that the order of diligence is entirely reversed in the statute, and in practice. By the Act, the person is first to be taken, and afterwards the goods and land. By the Act of Warding, as established in the consuetudinary law and practice, the warrant to imprison is to be executed only on failing to find goods to answer the debt.

The execution against the person under the Act of Warding is, as observed by Mr. Ross,⁴ the only direct and regular execution against the person for debt; for it will be seen immediately, that the imprisonment under letters of horning is an indirect method of attaining the object of the creditors.

II. The same Parliament in England which allowed to merchants the power of imprisoning their debtor, gave to barons the power of imprisoning their stewards, etc., not only when they refused to account to them, but even for payment of the balance which should stand against them. Whether the true motive for enacting this statute was, as some

¹ 13 Edward I. stat. 3.

² The mayor, etc., is ordered to apprehend the person of the debtor, upon legal proof of the debt, wherever he can be found within the jurisdiction, and to imprison him upon his own expense till the debt be paid. If the debtor do not pay, the magistrate is to certify, under seal, to the king's chancellor, the amount and proof of the debt, within a quarter of a year, when his moveables and land are to be taken, com-

prized, and given over to the creditor for payment. If the debt was paid, or satisfied by the execution against the property, the debtor was to be liberated; if not, his person was to remain in prison till the debt was paid, the creditor, as in England, furnishing him with bread and water for subsistence.

³ Lord Kames (*Law Tracts*, p. 345) supposes it to be so, and Mr. Ross approves of his conjecture. 1 Ross 254.

⁴ 1 Ross 255.

have supposed, to prevent the jealous opposition of the barons to that encouragement of merchants which the infant commerce of the country required, it is not necessary to inquire. But the chief extension of the right of imprisonment subsequent to these two laws, was first effected in England by gradual encroachment, and under the cover of legal fiction.

The Courts of Westminster Hall have exercised their jurisdiction on the ground of an arrest *ad respondendam*. And that jurisdiction has been extended by means of the practice of 'declaring by the by,' as it is termed by the English lawyers; that is, of charging the defendant, after he has come into court for one cause of action, with another altogether different.¹ It was not unnatural that this power of arresting the defendant, thus communicated to every civil action, should be accompanied by imprisonment for execution, [540] or *ad satisfaciendum*; and gradually the Legislature, following rather than directing the practice of the courts, extended the power of imprisonment first to actions of debt and detainue,² then to actions upon the case,³ then to actions of annuity and covenant.⁴ When a debtor was taken in execution in these actions, he was confined till he paid the debt; and the exercise of this personal execution was held to exhaust the power of the Court. They could not afterwards restore freedom to the debtor. Their power over him was at an end, and they could authorize no execution against his estate. His imprisonment was held as a full satisfaction; and until the debt should be paid, the debtor remained for life the prisoner of his creditor.

The progress of imprisonment in Scotland was different, nothing having occurred to disturb the genuine principle on which the imprisonment of the old law was placed. The power of imprisonment was long confined to merchants, and to the punishment of crimes. There was, indeed, one kind of debt, in which by practice imprisonment came to be introduced, —namely, obligations to perform an act within the debtor's own power. But the analogy of the imprisonment of criminals as a punishment was fairly applicable to that case; since a debtor who should refuse performance of an obligation which he had undertaken, and was able to perform, was not only guilty of dishonesty very nearly approaching to a crime, but of a punishable contempt of the judicial power of the country. It was in this way that the power arose of imprisoning such a debtor, and of declaring him, by the regular forms of charge and denunciation, an outlaw, and a rebel, if he fled from punishment.⁵

But although, in this peculiar case, imprisonment was not as a punishment deemed unfit to be applied, the general spirit of the law was not so harsh, nor the necessity hitherto deemed so urgent, as to admit of the idea of imprisonment for common debts. The im-

¹ 'As at common law,' says Crompton, 'the charge must have been a trespass to have authorized an arrest, process was sued out upon a charge of trespass, on which the party was taken into custody, and then this fictitious charge was suspended or abandoned, and a declaration delivered "by the by," charging him with common debt, or breach of promise; for it was held, by the practice of the Court, that when once the party was in custody of the Court, he was to be detained there till he had answered every charge which might be brought against him, pending the investigation of the original charge. Such was the mode adopted both in the King's Bench and Common Pleas; and the Court of Exchequer also availed themselves of the same kind of fiction, by charging a person with being a supposed debtor to the king, getting him into their custody, and declaring in any common civil action.'

'The Practice of the Courts of King's Bench and Common Pleas,' originally compiled by George Crompton, Esq., revised, corrected, and arranged by B. J. Sellon, serjeant-at-law.

² 25 Edward III. c. 17.

³ 19 Henry VII. c. 9.

⁴ 5 Rich. c. 2.

⁵ The forms of the denunciation of outlawry it is needless to detail here, since my aim is merely to express the general course and spirit of the law of imprisonment. It will be sufficient to observe that the denunciation at first proceeded upon different warrants, called letters of four forms, charging in the king's name the person against whom they were directed to do what was required of him, or to enter his person in ward, each charge increasing in earnestness of requisition to the last, after which rebellion was denounced against him; that these letters were at last concentrated into one warrant, upon which the four charges still continued to be given; and that first in criminal matters, and afterwards in civil, letters of horning on a single charge, bearing, as a penalty of disobedience, denunciation by the king's horn as a rebel, succeeded ultimately as the legal form of this diligence.

prisonment of the law-merchant was a stretch beyond the common law, justified by necessity; but the jurisprudence of Scotland did not regard imprisonment as a common instrument of civil execution. The estate of the debtor was open to diligence; and there being, in an early age, less possibility of concealing funds, the idea of using imprisonment as a method of forcing the discovery of the debtor's estate was not natural, while it was thought unjust to confine a man for not paying what he was unable to pay.

Imprisonment for debt, however, was at last introduced; not amidst contests for jurisdiction as in England, but by the management and under the influence of the clergy, upon the extinction of whose power it was assumed as a part of the civil code.

The clergy in Scotland, as elsewhere, soon found means to give to their decrees, and to the deeds which were made before them, a force and effect far beyond the reach of the civil judge. He could operate only by attachment and distress of the property. But the clergy added to those deeds which their notaries wrote the sanction of an oath. The persons, too, who came before their tribunals, were made to bind themselves before sentence, by the same sacred bond, to fulfil whatever sentence the Court should pronounce; and as there could [541] be no failure in such cases without a breach of oath, the person guilty became in this way subject to punishment and the thunders of the church. By degrees, however, the indiscriminate application of so great a power destroyed its effect, and the force of it was at last so much relaxed, that the clergy were induced to apply for the aid of temporal authority to second their sentences. They soon contrived to obtain this support to their jurisdiction, and letters of caption came to be issued under the royal authority, authorizing imprisonment of the excommunicated person, the despiser of the censures of the church. They also acquired, not long after, in further aid of their sentences, the power of real execution against moveables and land.¹ But even here they did not rest, for at last their sentences of excommunication were consummated by the still more effectual sanction of outlawry,² which till then had been confined to the jurisdiction of the King and Council.³

Thus the right of imprisonment was established as the means of enforcing the decrees of the ecclesiastical courts, as the punishment of disobedience, and of rebellion against God and the church. The people had long been accustomed to these methods of enforcing ecclesiastical judgments, and had been taught to rely upon imprisonment and outlawry as a speedy and effectual method of recovering debt, when the Reformation extinguished the excommunicating and judicial powers of the church.

The sudden loss of a powerful remedy against injustice leads to great disorder, and creditors were now left, comparatively, without effectual means of enforcing payment. With a view to give relief in this respect, and to re-establish an effectual diligence against the persons of debtors, the Commissary Court was established in 1563. The charter of its constitution⁴ proceeds upon a preamble of the inconveniency arising from the surcease of the ecclesiastical courts; and this new Court was invested with the power of registering bonds and contracts, and of interposing their decree for performance within fifteen days, to be followed by such execution as formerly was competent against debtors who had remained the limited time under a sentence of excommunication. By successive statutes this system was at last established: that decrees, either of registration or upon discussion, pronounced by the Court of Session, or decrees of commissaries, sheriffs, or magistrates, provided they were presented to the Court of Session, and the authority of that Court interposed in confirmation of them, should be executed by letters of horning and poinding. The warrant of poinding authorized execution against the property. The warrant of horning was that upon which the personal execution proceeded. It authorized a charge in the name of the king to make payment of the debt, and failure was construed as civil rebellion, which authorized or required the punishment of imprisonment on the king's warrant of caption. It was

¹ Statute 1449, c. 1; 1535, c. 1.

² Statute 1449, c. 1.

³ Statute 1449, c. 29.

⁴ Balfour's Practices, p. 670.

expressly declared that these executions against the person and against the property should be without prejudice of each other.¹

The ancient exemption from personal execution on account of civil debt was thus finally extinguished; rebellion against the king, and disobedience to his commands, being substituted as the ground of the imprisonment, instead of the rebellion against God and the church, by which this encroachment had been first begun. But it was not merely imprisonment that followed as the consequence of the rebellion which insolvency might thus occasion. All the effects of actual rebellion accompanied the misfortune; the moveable goods were forfeited to the Crown, and ordered to be thenceforth 'inventoried, and in-brought to the king's use;' and this continued down to the middle of the eighteenth [542] century. How it should have happened, that in a country where the general spirit of the law is mild, and where the most humane provisions have been adopted against the evils of imprisonment, these harsh consequences of insolvency should have continued so long, it is perhaps needless to inquire. There may be some ground for believing that the daily falling of escheats formed the great source of royal influence in those days, the means by which the adherents of the Court were gratified at a time when there were not many lucrative posts, and but a narrow revenue, and that the united interest of the Crown, and of the men of power in the state, continued the practice, contrary to the general spirit of the law. The harsh proceedings, of which the words of our executive writs still preserve the picture after the substance is gone, the resistance to which they led, the infamous trade of forfeitures, which were purchased even by anticipation, the terrible letters of fire and sword by which they were enforced, the authorized civil wars and legal bloodshed, the feuds, the confusions, the enormities under colour of law which harassed those unhappy times, present a melancholy view of the state of the country. But on this subject it is painful to dwell. It is enough to say, that rebellion and imprisonment were the legal consequences of insolvency, and that this interposition of the executive authority became the common mode of execution for the most trifling debt, the gift of the escheat being burdened with payment of the debt for which the denunciation proceeded.

Happily, in the middle of the last century, the Legislature interposed to abolish at once the heritable jurisdictions and the penal consequences of civil rebellion, and the Scottish law of imprisonment was thus freed from one of the last severities which deformed it.

III. Besides the two modes of imprisonment already explained, there is a power given by the Small Debt Acts to justices of peace, by 6 Geo. IV. c. 48, to grant warrant of imprisonment for civil debt under £5; and to sheriffs, by 6 Geo. IV. c. 24, to give a warrant for imprisonment for debt under £8.²

In reviewing and comparing the history of the law of imprisonment in England and in Scotland, it is curious, as well as of importance, to observe the difference of principle upon which imprisonment was admitted, and the consequence of that difference upon the nature and spirit of the law.

In England, imprisonment was introduced as a common measure of execution, and as a satisfaction for the debt; in Scotland, it was introduced as a punishment of disobedience to the command, first of the church, and afterwards of the sovereign.

In England, the efficacy of the sentence was exhausted by the imprisonment of the debtor: when the person was imprisoned, the highest execution was done, and the property

¹ 1584, c. 139; 1606, c. 10.

² [By 5 and 6 Will. IV. c. 78, imprisonment for civil debts of the amount of £100 Scots (£8, 6s. 8d.) and under is in every case abolished. *M'Naughtan v Halbert*, 1843, 6 D. 392. But this statute does not apply to fines imposed by statute by way of punishment, even where the offence for which they are imposed is not strictly a crime (*Lawson v Jopp*, 1853, 15 D. 392); nor to alimentary debts (sec. 5) (*Cheyne v M'Gungle*,

1860, 22 D. 1490), obligations *ad facta præstanda*, taxes or penalties due to the revenue or imposed by law, poor-rates, or local taxes (sec. 5).

The Personal Diligence Act, 1 and 2 Vict. c. 114, secs. 9-15, authorizes the insertion of a warrant to charge the debtor, on which imprisonment may follow, in all extracts of decrees of sheriffs.]

was free; the office of the judge was at an end, and he could give no liberation. In Scotland, not only was imprisonment under the Act of Warding susceptible of relief, as intended merely to force the disclosure of the property, and as losing its object when all was given up; but even the imprisonment which was introduced by the clergy left room for liberation, the *cessio bonorum* being a full refutation of the charge of disobedience.

Imprisonment with us, in short, was the auxiliary of the common execution for debt, not the substitute for it. It was not a satisfaction, but a measure of constraint. It admitted of limitation, and was recalled upon a proof of the best compliance with the requisition which circumstances would allow.

In commenting further on the law of imprisonment, it may be proper to direct attention, 1. To the warrant and its execution; and, 2. To the custody of the prisoners, and their maintenance.

SECTION I.

OF THE WARRANT FOR IMPRISONMENT, AND OF ITS EXECUTION.

1. The Act of Warding is issued by the magistrate of a royal burgh either upon [543] judgment pronounced in a cause tried before them, or upon a decree of registration for enforcing an obligation recorded in their books; but a decree of registration can proceed only by special consent to registration in the books of the magistrates. The warrant has no force beyond the territory of the burgh. The authority to imprison is only on failure to find goods of the debtor, and the execution against the person is always¹ preceded by an execution of search for goods.

2. The warrant under the Small Debt Acts proceeds from the sheriff, under the 6 Geo. iv. c. 24,² in the terms of the schedule annexed to the Act, 'decerning and ordaining instant execution by arrestment, and also execution to pass by poinding and imprisonment after free days.' In the same way, the justice's warrant under the Small Debt Act of 6 Geo. iv. c. 48 proceeds according to a similar schedule annexed to the Act.

3. Imprisonment by caption cannot proceed without a decree or warrant from the Court of Session.³ The warrant may be of these three kinds: 1. A decree in an action; 2. A decree interposed to a bill of exchange regularly protested, or to a deed registered by consent for the purpose of execution; 3. A decree in supplement of the judgment of an inferior court. Upon these warrants letters of horning are issued, under the king's signet, commanding His Majesty's officers at arms to charge the debtor to pay the debt⁴ within a certain number of days,⁵ under the pain of being denounced rebel. The horning contains also a warrant for arrestment of moveables, and for poinding. When the days of charge are expired, the debtor is denounced a rebel,⁶—a ceremony which, though once of most formidable efficacy, is now but a form and prelude to the issuing of the caption. The horning, with the messenger's return of the charge and of the denunciation, is recorded in a register, which once was useful as the register of escheats, but which now can serve little purpose, except to furnish evidence of diligence in questions of bankruptcy. A horning,

¹ [But not necessarily. *Marshall v Lamont*, 1803, M. App. Burgh Royal, 14.]

² [1 Vict. c. 41, sec. 13.]

³ In revenue cases, horning may be issued on a writ of extent or fiat of Exchequer. [It may now proceed on an extract decree of a sheriff. 1 and 2 Vict. c. 114, sec. 9 sqq.]

⁴ [The warrant on which the imprisonment proceeds must not be for a larger sum than that truly due, and the illegality

cannot be corrected by lodging an amended state of debt with the jailor. *Lesly v Pringle*, 1761, M. 11749; *Wilson v Stronach*, 1862, 24 D. 271.]

⁵ The days of charge, or of law, are fifteen upon ordinary judgments, six upon bills of exchange, and any number that may be fixed by the deed, generally six, in decrees of registration.

⁶ This must be done within year and day of the date of the charge.

returned with a docquet of the registration upon it, is the ground of a new application to the Court of Session for letters of caption, which are granted of course. The caption is also a writ in the king's name, and passing under the signet, charging messengers-at-arms to apprehend and imprison the debtor's person, and to call upon magistrates for assistance in doing so.¹

All magistrates and sheriffs, and messengers-at-arms, may be charged to assist in apprehending the debtor, according to the warrant in the letters of caption; and this charge they are bound to obey, under the pain of being made responsible for the debt,² provided the messenger give a probable account of the debtor's lurking-place, and offer himself to attend.³ The messenger himself is liable, and his cautioners along with him, if he neglect or delay to put a caption in execution; and in several cases of this kind the Court have given the amount of the debt 'as the proper reparation to the employer for the damage occasioned by the neglect of duty.'⁴

[544] If the debtor is not to be found on due search being made for him, the messenger returns an execution of search, which, if accompanied with insolvency, establishes the bankruptcy.⁵

If the debtor should be found, the messenger is to apprehend him in the way pointed out by the law and practice of the country. 1. He must have his blazon displayed, otherwise he may be resisted; 2. He must show his warrant of incarceration; and, 3. He must touch the debtor with his wand of peace. If the debtor were to escape from the messenger while any of these solemnities had been left unperformed, and to take refuge in the sanctuary, he could not be demanded as a prisoner. If he were to be liberated without having been actually in jail, these ceremonies not having been observed, it would not amount to the description of imprisonment necessary to bankruptcy.⁶ It is only by actual incarceration, or by the touch of the wand, joined with the showing of the warrant and displaying of the blazon, that the debtor is legally made a prisoner.

A messenger is not bound to carry the debtor instantly to prison, but may grant him the indulgence of some little delay, taking him for some hours to a private house or tavern, that he may have an opportunity of making one last effort for the payment of the debt

¹ [The forms here explained are still competent (*Dick & Sons v Murison*, 1845, 8 D. 1; *Brown v Blaikie*, 1849, 11 D. 474; *Moyes v Whinney*, 1864, 3 Macph. 183; *Smyth v Walker*, 1867, 5 Macph. 552; *Pollok v University of Glasgow*, 1865, 3 Macph. 968); but a new and simpler procedure was introduced by the Personal Diligence Act, 1 and 2 Vict. c. 114, and is usually adopted. The debtor is not liable for the expense of the old form of diligence (sec. 8). The extract of a decree pronounced by the Court of Session, Teind Court, or Justiciary Court, or of a decree of registration, contains a warrant to charge the debtor to pay within a certain number of days, under pain of poinding and imprisonment. Such extracts are equivalent to extracts followed by letters of horning, or of horning and poinding in the older form, and authorize messengers to charge the debtor precisely in terms of the decree. Extracts of decrees of sheriffs contain a similar warrant to sheriffs' officers. Within year and day after expiration of the days of charge, the execution may be registered in the General Register of Hornings, or in the case of a sheriff's warrant, in the Particular Register of Hornings, to the effect of denunciation under the older form, and of accumulating interest (sec. 5, and A. of S. Dec. 24, 1838, sec. 1). The creditor may then apply for warrant to imprison the debtor, by a minute in the Bill Chamber signed by a writer to the Signet, or in the Sheriff Court by minute signed by the creditor as a procurator. The Clerk of the Bills, or sheriff-

clerk, subjoins to this, if all be in proper form, the words '*Fiat ut petitur*,' the date, and his signature, which authorizes the apprehension and detention of the debtor. The minute must bear place and date. *Sim v Yuile*, 1845, 8 D. 8; *Jameson v Wilson*, 1853, 15 D. 414.]

² The legal evidence upon which such a claim can proceed is an execution of the charge against the magistrates. *Haswell*, 1714, M. 11733.

³ *Ersk.* iv. 3. 13. [The warrant to imprison has now no direction except to messengers-at-arms and officers of Court. 1 Vict. c. 114.]

⁴ *Atkinson*, 3 Dec. 1756, M. 8891, 13965, and several cases since; *Chatto & Co. v Marshall*, 17 Jan. 1811, 16 F. C. 121. [*Glen v Black*, 1841, 4 D. 36; *Cullen v Smith*, 1847, 9 D. 606; *Cullen v Thomson*, 9 D. 613. As to liability for errors in the execution of charge, see *Brock v Kemp*, 1844, 6 D. 709; *Potter v Muirhead*, 1847, 9 D. 519; *Struthers v Dykes*, 1847, 9 D. 1437, aff. 1850, 7 Bell 390; *Cullen v Dykes*, 1852, 24 Jur. 177, 1 Stu. 327.]

⁵ See above, vol. ii. pp. 161-2.

⁶ See above, vol. ii. p. 161. [The doctrine of the text is corrected by *Scott v North of Scotland Banking Co.*, 1855, 17 D. 292, where it was held that the use of the wand of peace is not an essential. It appears sufficient, if the character of the messenger be admitted, that 'the diligence be used to the full effect which in the circumstances is possible.']

before his imprisonment. He will indeed be liable if he suffer him to escape between the apprehension and the actual imprisonment. He must not, however, carry him anywhere but to prison, except at his own request.¹ In England, it is provided by law that twenty-four hours shall elapse before the debtor shall be taken to prison against his will. Where a debtor, in Scotland, is taken by magistrates charged to concur in the apprehension, they never grant the indulgence, but instantly carry him to jail.

If the debt should not be settled, and it should be necessary to carry the debtor to prison, he is entitled to insist on being carried to the next sufficient prison. Lord Stair² has said that custom had introduced a right in the creditor to imprison his debtor in any lawful prison, so as further to increase the hardship of debtors, and to operate as a more complete execution. But this is not the law of the present day; on the contrary, the established practice at present is, that if the debtor desire to be carried to any particular prison, equally secure and equally convenient for the creditor with that of the jurisdiction where he is apprehended, he is to be indulged. To this, however, the debtor is not entitled as a right.

The messenger must produce the caption to the clerk of the prison or the jailor, as the warrant for receiving the prisoner; and he must leave it, or a charge given upon it, with the jailor. Without these there is no imprisonment to the effect of subjecting the magistrates for escape.³ The magistrates of burghs are charged with the keeping of prisons by the statute 1597, c. 273. The question of sufficiency of prisons will be discussed hereafter; but when a prisoner is once lodged in jail, the magistrates are responsible for safe custody, or for the debt.

To show the extent of the responsibility, the debt and the prisoner's name are entered in a register at his imprisonment, and the jailor receives a certain fee for the recording. These records were originally introduced by the magistrates themselves, to inform them of the extent of the obligations under which they lay. It is therefore the business of the jailor to see the debtor booked; and the magistrates can rest no defence against an action for escape upon the omission of the booking.⁴ At present, the whole sum of debt is commonly entered, and a proportional fee paid for it to the jailor; though formerly [545] the practice was to enter only a small part, and arrest the debtor in prison for the remainder, should he take measures for obtaining his liberation. At present, if the debtor can pay his debt as it stands in the prison record, he is free; but formerly no debtor could be liberated without obtaining letters of relaxation and liberation from the king, after intimation to the creditor-incarcerator, and a charge to the magistrates to set him at liberty. To relieve poor debtors from the oppression of proceedings so expensive, a practice had arisen among jailors of setting debtors at liberty without letters of liberation, upon production of the discharge only. The jailors of Edinburgh applied to the Court of Session to know whether they might follow the common practice of other jails; upon which the Lords allowed them to set debtors at liberty upon production of the discharge alone, 'bearing a consent to the debtor's liberation, and duly registrate, if the sum do not exceed 200 merks Scots, and the prisoner be not arrested at the instance of other parties;' and they prohibited liberation without a charge to set at liberty, where the debt exceeded that sum.⁵ In a case reported by Lord Fountainhall, there is some curious information respecting the change which was produced upon the practice by this rule. Instead of entering the debt at a trifle as formerly, a creditor

¹ *Garden v M'Coll*, 1826, 5 S. 123, N. E. 113.

² [Stair iv. 47. 16.]

³ On this ground, magistrates who had received a prisoner, and put him in jail, were found not liable for the debt on his escape. *Stevenson v Manson*, 1685, M. 11727. [Since 2 Vict. c. 42, the corporate responsibility of magistrates of burghs for the custody of prisoners has ceased. *Lamb v Mags. of*

Jedburgh, 1865, 3 Macph. 1105. The administration and management of prisons is now in a county board, no member of which is personally liable for anything done by him under the Act 23 and 24 Vict. c. 105.]

⁴ *Shaw v Vance*, 1683, M. 9354. [See *Wardrop v Potter*, 1846, 8 D. 526.]

⁵ Act of Sederunt, 5 Feb. 1675.

was not now safe to enter it at less than the 200 merks; 'therefore, marking the sum *above* that whenever they got the charge on the prisoner's application, they arrested the debtor upon the remanent debt in the caption, and so hindered the liberation.' But in all cases of escape, the creditor in such a case has a claim against the magistrates and jailor only for the debt entered.¹

When the debtor has been regularly lodged in jail, the magistrates and their jailor are bound to keep him safely. The statute 1597, c. 273, orders 'sufficient and sure jails and warehouses' to be built and upheld and maintained, 'for the sure imprisonment, warding, keeping, and detaining of prisoners.' The general expressions of this Act have been held to import an obligation correlative to the state of society at the time the question arises. Security in ancient days would be absolute insecurity now, when the arts by which the strength of bars and bolts may be overcome are known to every prisoner. Every question of this sort is truly a jury question, to be determined on the circumstances; and all that in the way of general doctrine can be laid down seems to be this: That magistrates and jailors, being the keepers of prisons for the public benefit, are liable in extreme diligence, as at once superseding private custody, and above the control of private superintendence; that their prison must be *sufficient* to keep a prisoner, at least for one night, in spite of all the arts or force he can exert; and their jailor and servants so *vigilant* as to detect any operation which may during the night have been carried on preparatory to a subsequent attempt. The *onus probandi*, it is agreed, lies on the magistrates; and unless they can make out a case of combined security and vigilance which may give fair assurance to the public for the safety of prisoners, they are liable. As to the physical strength and state of the prison, there is a particular Act of Sederunt, which has required in the prisons of burghs that the doors shall be secured with catbands, and be locked nightly;² and there are several cases of older date which may be taken to illustrate the rule that there must be no manifest insufficiency in the prison.³ But the cases of difficulty are those in which ordinary means [546] would fail were they not aided by force or the use of instruments, and where the charge of want of vigilance makes part of the ground of responsibility. Two cases have occurred of late years on this question, the result of which seems to be, that the magistrates must make out a clear case of strength and of vigilance, so combined as to leave no room for attributing the escape to any failure of duty.⁴

¹ Blair v Mags. of Edinburgh, 1704, 2 Fount. 238, M. 3468.

² Act of Sederunt, 11 Feb. 1571.

³ Henderson v Mags. of Irvine, 1733, M. 11736, Elch. Burgh Royal, No. 1; Chalmer v Mags. of Tain, 1757, M. 11746. See also Lord Kilkerran's notes in Parker & Mitchell v Mags. of New Galloway, 1751, Kilk. 432, M. 11740.

⁴ Dean v Mags. of Ayr, 1803, M. 11765. The first decision in the case was on the peculiar nature of the proceeding. On a reclaiming petition the Court pronounced judgment on the question of the duty of the magistrates. The charge of want of vigilance rested chiefly on this, that the prisoner was furnished with instruments with which to make his escape (among others, a saw of eight or ten inches long) by people who, unexamined, had access to him at all times; that the windows were not regularly examined; that the bars were cut at intervals, and the window filled up with water-pails and lumber, so as to prevent this operation from being observed. Some of the Court expressed an opinion that, without guards on the outside, there could be no security, though they admitted that the want of them could not justify any penal consequences. But the greater part of the judges thought there was here a degree of negligence which made the prison quite insecure.

Affleck v Mags. of Kirkcudbright, 1803. Herries was confined as a debtor in the prison of Kirkcudbright, on the diligence of Affleck. The jail was very old. The room in which Herries was confined was strong in every point but that which the prisoner attempted. There was above that room an open garret communicating with the common stair of the prison. Of this stair the outer door was secured only by a common stock-lock; and a window in it had only one bar, sunk about half an inch deep in a sandstone. The windows of the prisoner's apartment had iron bars, but no shutters to prevent communication with the street; and the prisoner's brother, by whom he was supplied with instruments, had free access to him. No search of his person was made; but what is of more importance, no search of the apartment, etc. of the prisoner ever took place. There was no ceiling in the roof of the apartment, but the floor of the garret and the beams it was laid upon were exposed, and the height was only seven feet. The prisoner, with great labour and by successive borings with a gimlet, marked out a square of the flooring, including one of the beams, and to prevent detection, filled up the holes he made with chewed bread. When his preparations were complete he furnished himself with a small saw and a strong iron crank; and having without noise cut the

But the magistrates will not be liable, where by superior external force the prison is opened and the debtor escapes. Thus, when in 1687, a troop of horse of the celebrated Graham of Claverhouse having been quartered at Haddington, the men in a frolic opened the prison to make the prisoners drink the king's health, and one confined for debt escaped, the magistrates were not made liable.¹

If the magistrates be negligent in searching for the debtor after his escape, they will be liable; as in the case of the magistrates of New Galloway, from whose prison a debtor having escaped on Sunday night, no search was made for him till Tuesday morning; and 'the Court were all agreed that the magistrates were liable on this ground, that they [547] had not early enough sent in quest of the prisoner.'²

SECTION II.

OF THE CUSTODY OF PRISONERS.

It is not sufficient that the debtor's escape from prison be prevented: he must strictly be kept a PRISONER; and the creditor has a legal right thus to enforce his payment.

It is this part of the Scottish law which has acquired the name of *squalor carceris*, so shocking to the humanity of English writers. There was, indeed, a time when the name might have been in some degree applicable; but that is long past. The notion of *squalor carceris* as a punishment seems originally to have been clerical,—a term of the ancient church discipline; and to have been adopted by our lawyers at a time when they were chiefly ecclesiastics. To enforce obedience to the commands of the church in matters of faith, confinement between narrow walls, or in a deep and loathsome dungeon, was no unusual expedient. But those were practices at which our civil institutions revolted. In secular law there was nothing akin to them; but, unfortunately, our law of imprisonment for debt came through an impure channel, and was imbued with some taint of the passage through which it flowed. The name of *squalor carceris*, familiar to the churchmen, was without scruple applied to imprisonment for civil debt; and perhaps, while imprisonment for debt continued in the hands of the clergy, they might gradually endeavour to increase the force of the remedy, by insinuating into practice the principle as well as the name. Happily, however, this power fell at last, and the mild spirit of our common law was suffered to operate.

It is remarkable that the rule of strict confinement is in England established with

interstices between the gimlet holes, he mounted from his table and chair to the garret above; thence he had access to the staircase, easily wrenched out the bar of the window with his crank, and made his escape. On this case the judges held, 1. That the escape lays the *onus probandi* on the magistrates. 2. That in making out their case they must show a combination of vigilance with sufficiency, such as to give the public assurance of the effectual execution of the laws; that it may not be enough to say of a jail it was not arched, or the windows had no shutters; yet, wherever there is a weak or questionable point of this sort in the construction of a jail, there must be proportionably greater vigilance to counterbalance it; that here the free supply of instruments undetected makes a prison no place of security; that if creditors have no other assurance for the execution of law than that the prisoner has no friends who will carry up to him, or hand in to him at his window, instruments of irresistible power, there is no prison in Scotland; and that the general obligation of

having sufficient jails, with the duties of watching and warding, require every point of weakness or exposure to be strengthened by guards. The case was heard in presence, and the magistrates were found liable. A petition was refused without answers.

In the House of Lords the judgment was affirmed with costs. 20 March 1809, 5 Pat. 254.

The great defect in the prisons of Scotland, and which leads to these continual questions, is, that in general they are single buildings standing in the middle of a town, with the windows open to the street. A prison should be enclosed within a courtyard; and thus there would at once be greater security to the public, and a humane provision for the exercise and health of prisoners. [See note 3 on p. 437.]

¹ *Fendar v Paterson*, M. 11729.

² *Parker & Mitchell v Mags. of New Galloway*, 1751, M. 11740.

more rigour than here, and without those relaxations which reconcile necessary severity with the mild spirit of our jurisprudence. In England, the necessity of a close and strict confinement of prisoners for debt is well established. 'When a defendant,' says Mr. Justice Blackstone, 'is once in custody upon this process (*capias ad satisfaciendum*), he is to be kept in *arcta et salva custodia*; and if he afterwards be seen at large, it is an escape, and the plaintiff may have an action thereupon against the sheriff for his whole debt.' And he adds that the sheriff, 'upon a taking in execution, could never give any indulgence; for in that case confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor.'¹ This obligation to close confinement is so strong in England, that instances have occurred of the courts being obliged to refuse the discharge of a debtor acknowledged to be insane.² The strict confinement of the English law is not limited: it is for life if the debt be not paid, unless there be now a remedy under the Insolvent Acts.³

In Scotland, the design of the law in sanctioning imprisonment for civil debt, is to subject the debtor to a confinement so strict as to compel him to pay the debt, or to disclose any funds which he may have concealed. While the Scottish imprisonment lasts, it is as close as the *salva et arcta custodia* of the English law; and accidentally it happens, from the state of the prisons, to be a punishment of great severity. But when that change on the state of our prisons is accomplished which has already made such rapid advances, we shall have no cause to lament the severity of the law.

In all the Acts for erecting new prisons in Scotland, provision has been made for proper airing-grounds; and where prisons have been so erected without legitimate authority, the [548] prisoners have been held entitled to this benefit. In a recent case, on occasion of an application to the Court of Session to sanction a new prison which had been erected, the doubt was raised whether, without the permission of the Legislature, sanction could be given to an airing-ground as part of the establishment. On a consultation of the whole judges, the prison was sanctioned as legitimately constructed.⁴

The rule of strict confinement is in Scotland qualified by limitations which do not seem to be recognised in England, or which have recently been introduced there in wise imitation of the Scottish law. 1. It is restrained in point of severity, so that the prisoner's health shall not suffer; a prisoner, in case of sickness, being entitled to get out of prison on a sick bill.⁵ 2. It is qualified by the necessity of the creditor furnishing a maintenance if the debtor be indigent. And, 3. It is limited in point of duration, the debtor being entitled after a month's imprisonment to liberation on *cessio bonorum*.

1. PROVISION FOR THE SICKNESS OF PRISONERS.

The severity of close confinement for debt, so adverse to all our ancient institutions, had gradually been relaxed after the fall of the ecclesiastical power; insomuch that, in the middle of the last century, it had become customary for jailors to suffer debtors to go freely about, taking the benefit of air and exercise. The right of the creditor was considered as uninvaded, while the debtor was prevented from effecting his escape. This, certainly, was a degree of indulgence which accorded not with the principle or view of the law, and which it was very necessary to correct, that the law of imprisonment might be restored to due efficacy. A case occurred in the seventeenth century, which presented an opportunity of settling the law upon its proper footing.

¹ 3 Black. 415. [Stephen's Com. iii. 681.]

² *Kernot v Norman*, 2 Term. Rep. 390; *Nutt v Verney*, 4 Term. Rep. 121.

³ [Under the English bankruptcy law there was protection from arrest, and release if already in custody, subject to conditions; and in no case could imprisonment endure beyond three years. But see 32 and 33 Vict. c. 62.]

⁴ *Mags. of Kirkaldy*, 1827, 6 S. 146. See also *Rutherford v Mags. of Perth*, 1822, 1 S. 533, N. E. 490.

⁵ [Now application may be made to the sheriff under 23 and 24 Vict. c. 105, sec. 72, by the administrators of the prison.]

The Court held that, by law, a prisoner was not entitled to be out of prison, except in case of sickness.¹ But it was thought necessary, besides this judgment, to make an Act of Sederunt for clearing the common law upon this interesting point.²

The application for relief under this Act of Sederunt, has been called a 'Bill of [549] Health.'³ At first sight it may appear that the Act of Sederunt is a harsh and severe declaration of the common law, in so far as it restricts the description of sickness, which is to entitle a debtor to relaxation from the rigour of confinement, to that which endangers life. But the severity of imprisonment is as strictly enforced in England; and it ought also to be recollected that in Scotland the period of liberation on a bill of health is computed in part of the month's imprisonment necessary to entitle the debtor to the *cessio*; so there is every chance of the indulgence being utterly abused if not strictly guarded. It is necessary in cases of bad health to give an immediate remedy, without abiding the issue of an investigation into circumstances. A simple certificate is therefore sufficient to procure the liberation; and it was proper to limit that effect of a certificate to cases of serious malady, before which the ordinary rights of the law ought to give way.⁴

When a prisoner is liberated on account of bad health, the restraint ought still to be

¹ *The Town of Brechin v the Town of Dundee*, 1671, M. 11721. An action was brought against the town of Dundee for suffering Lawrence Dundas, confined for debt, to go out of prison. He had been permitted to go to church on Sunday, and, on account of indisposition, to go upon the river Tay, which passes the town, and to cross over to the opposite shore of Fife. He even walked the street, and frequented the tavern, without any other control than the presence of a guard to prevent his escape. The magistrates contended that Dundas never having been allowed to go without a guard, was to be considered as a prisoner during the whole time, though not in jail; that the universal practice of the country sanctioned and established this degree of freedom as legal, or at least saved them from any blame or penal consequence for having permitted it; and that it would be hard and unjust to prevent magistrates from allowing prisoners to go abroad, who, on account of bad health, might absolutely require such indulgence. The creditor, in reply, founded upon the expressions of the caption ('to keep and detain him (the debtor) in sure ward, firmance, and captivity,' etc.), and upon his right to insist for the *squalor carceris* as the means of enforcing payment. He also maintained the inexpediency of allowing magistrates or jailors to judge of the occasions of giving liberty to a prisoner, and the propriety of an application being made, in case of necessity, to the Court of Session. 'The Lords, considering the ordinary custom of burghs, found that, as to the time past, they would not make them liable for suffering prisoners to go out with a guard for necessary causes; and found the defence relevant, that this prisoner was let go out with a guard for his health, or to the kirk on the Sabbath; but found his going out to the street and taverns without a necessary cause, though with a guard, relevant to infer the debt. But they further declared, that in time coming they would have no regard to that unwarrantable custom; but that the magistrates of burghs should only have power to let prisoners come out of the tolbooth under a guard in the extreme hazard of their lives by sickness, and not without testificates by physicians or skilled persons upon oath, bearing the party's condition to require the same; and that, without great hazard, they could not suffer debtors to make supplication to the Council or the Session.'

VOL. II.

² 'The Lords considering, that albeit by the law magistrates of burghs are obliged to detain in sure ward and firmance persons incarcerated in their tollbooths for debt, yet hitherto they have been in use to indulge prisoners to goe abroad upon severall occasions; and it being expedient that, in time coming, the foresaid liberty taken by magistrates of burghs should be restrained, and the law duely observed, therefore the said Lords doe declare, that hereafter it shall not be lawfull to the magistrates of burghs, upon any occasion whatsoever, without a warrant from His Majesty's Privy Council, or the Lords of Session, to permitt any person incarcerated in their tollbooth for debt to goe out of prison, except onely in the case of the party's sickness, and extreame danger of life, the samen being always attested upon oath, under the hand of a physician, chirurgeon-apothecary, or minister of the gospell in the place, which testificate shall be recorded in the town court-books, and in that case that the magistrates allow the party onely liberty to reside in some house within the town [see *Gillies*, petitioner, 7 Feb. 1843, 5 D. 512, and cases *infra*] durning the continuance of his sickness, they being always answerable that the party escape not, and upon his recovery to return to prison. And the Lords declare, that any magistrates of burghs who shall contraveen the premises, shall be lyable in payment of the debt for which the rebell was incarcerated. And appoints this Act to be intimate to the agent for the Royall Burrows, and to be insert in the Books of Sederunt.' 14 June 1671.

³ [The procedure must be by petition, and not by suspension. *Goodsir v Fleming*, 1829, 7 S. 351.]

⁴ A proper sense of the danger of collusive devices to defraud creditors of that right of imprisonment which the law gives them, has made the Court of Session rigid in their interpretation of the Act of Sederunt. The Act requires the certificate to be upon oath; and in one case the Court found magistrates liable for liberating a prisoner, for this reason among others, that the certificate was not upon oath, but on soul and conscience. *Fullerton & Kennedy v Mags. of Ayr*, 1781, M. 11755. [*Bell v Sterry & Co.*, 1825, 4 S. 306. The magistrates are not bound to intimate the application to the incarcerating creditor. *Emond v Mags. of Haddington*, 1835, 14 S. 124.]

continued upon him in every respect, unless in so far as the care for his health entitles him to relaxation. He ought not, therefore, to have the power of going freely abroad, enjoying all the blessings of perfect freedom; but to be confined to a house—a more comfortable prison.¹ At the same time, where the illness is of such a kind as absolutely to require air and exercise, the debtor will, under the general principle of the law, be entitled to enjoy it.²

There is no little difficulty in reconciling the relaxation from the severity of confinement which health requires, with the interests of humanity on the one hand, and the security of the creditor and of magistrates on the other. The Act of Sederunt has said nothing more than this, that 'the magistrates shall be answerable that the party escape not, and upon his recovery return to prison.'³ In Lord Stair's time, who was President of the Court when this Act of Sederunt was passed, the security of the magistrates was under-[550] stood to depend upon their own vigilance: 'Where such warrant is granted,' says he, 'the magistrates ought to choose the place of the prisoner's abode, that the same be secure, and the guards attending.'⁴ But this leaves a great deal of questionable matter unsettled. Great expense may thus be occasioned to magistrates, if they are to be held responsible for one who is out of prison: much annoyance may be imposed on the debtor, inconsistent even with that repose which his health may require.⁵ Two occasions occurred for construing the Act of Sederunt within the last half-century, and inquiry was made into the practice of burghs; the result of which seems to have been, that in one-half of the burghs of Scotland the magistrates were not in use to fix any house within the burgh for the residence of the debtor; that in the other half the practice was to fix on the debtor's own house, whether within the burgh or not, sometimes on another house; and in all it appears not to have been their practice 'to keep any guard on or take any charge of the debtor after he was liberated, or to make any inquiry into his conduct.' Amidst the various and loose usages which had thus arisen, the rule that seems now to be fixed is, that the magistrates shall first be satisfied upon proper certificates of medical persons (or more correct

¹ *Fullerton & Kennedy v Mags. of Ayr*, p. 441, note 4. The Court subjected magistrates for a debt, because instead of confining the debtor to a house, and remanding him to prison upon recovery, they had allowed him to go freely about the country in the exercise of his profession as a country surgeon.

² *Stewart v Mags. of Edinburgh*, 1799, n. r. A debtor having complained to the Court of Session that confinement to a private room was nothing better than confinement in a prison, since in his malady air and exercise were prescribed by the physician as necessary for recovery, the Court left the instructions general, expressing their opinion that the magistrates were bound to give such relief as the health of the prisoner required, taking proper measures for their own security, according to the circumstances of the case.

³ *Stair* iv. 47. 22.

⁴ This vigilance has sometimes been excessive, as in a case not many years ago from Dundee, where a debtor was relieved from prison on account of ill health, and placed in a lodging in the town; but he was so continually annoyed, day and night, with the presence of his guards in his chamber, that he petitioned to be restored to the secure quietness of the prison.

⁵ *Forbes v Mags. of Canongate*, 1793, n. r. Robertson was liberated on a physician's certificate. No place of residence was appointed, and the debtor went freely about everywhere in town and country, and in a course of dissipated living, very inconsistent with bad health. No attention was paid to all this by the magistrates, or by the creditors, for nine months, when the debtor died. The creditors brought an action against the magistrates, grounded on the duty of the

magistrates to keep the debtor a prisoner in some house within the burgh, and that the neglect of this was an escape. The Court sustained the defences of the magistrates.

Fordyce v Mags. of Aberdeen, 1793, n. r. Ross, a butcher, was liberated on a bill of health, resided in his own house, carried on his trade, went occasionally to a distance of many miles, was never under a guard or in restraint. The magistrates were not held liable as for an escape.

Ritchie v Mags. of Canongate, 25 Jan. 1814, Fac. Coll. Wight was liberated on caution 'that he should reside in some house within the burgh, and on no account go beyond the jurisdiction of the same; and immediately on recovery of his health, or when required, return and surrender himself prisoner within the tolbooth, under penalty of paying the debt, etc., and also to indemnify and harmless keep the magistrates,' etc. Wight lived at large, although lodgings were taken for him in the Canongate. An action was raised against the magistrates; and the Court, looking back to the cases of *Forbes* and *Fordyce*, held the magistrates not liable. In the House of Lords, Lord Chancellor Eldon said that 'he should have had some difficulty, if the construction of the Act of Sederunt had not been in some measure settled by prior decisions.' As to those decisions, he said: 'In those cases the Court, correcting its own act, held that magistrates were not liable; and when the magistrates have been so instructed by the Court twenty-two or twenty-three years ago, and have acted on these instructions ever since, it seems to me too much now to depart from that principle.' So the judgment was affirmed. 5 Dow 87-127.

proof if the fact should be disputed) that the prisoner's health requires indulgence; that the best security shall be taken which circumstances afford against the abuse of the indulgence, or the final escape of the prisoner; that where the creditor calls for the reincarceration of the debtor, it shall be sufficient if the magistrate shall produce him, to be sent again to prison, or the indulgence continued if his health should still require it.

It had arisen as a practice, by which some of the difficulties of magistrates were provided for, that security should be exacted from the debtor when liberated on a bill of health. This precaution, extremely proper in some cases, if sanctioned as one upon which the magistrates were in every case entitled to insist, would occasion gross injustice and cruelty.¹ But the decisions already referred to go far to resolve this difficulty. The creditor is cited [551] as a party to the bill of health,² and has it in his power to insist on such precautions as the case may admit; the magistrate being entitled to judge in the circumstances what it is fair for the creditor to require before the prisoner shall be liberated.

Where caution is found, the bond is granted to the magistrates, and it is held that the creditor is not entitled to an assignation of such bond.³

In some jails a practice long prevailed, of allowing debtors the privilege of what was called OPEN JAIL, upon their finding security to indemnify the magistrates in case of their escape. This privilege of open jail entitled the debtor to have access to the different apartments of the prison, and to the hall or court-house, which in many burghs is under the same roof with the prison, and is not shut during the day. In one case, from Annan, it appeared that this was the custom in that burgh, and in Dumfries, Lochmaben, and Ayr. The privilege had been granted to Mr. Armstrong, the sheriff of the county, who was imprisoned as a debtor; and he actually as sheriff sat in the court-house, and pronounced judgment with open doors. This was challenged by the creditor as an illegal indulgence, and the magistrates were found liable for the debt.⁴

Thus it is the established right of a creditor in Scotland to keep his debtor in close confinement within a legal prison; and of this severity of imprisonment the law gives no relaxation, unless on account of bad health. The provisions by which the *duration* of this strict imprisonment is limited, shall be the subject of future consideration.

¹ In a case which came before the Court some time ago, the question occurred, Whether the magistrates were entitled to insist for caution?

Lord President Campbell took occasion to observe, that upon one occasion, some years ago, the magistrates of Edinburgh desired the advice of the Court how they should conduct themselves in a case of this kind. Lieutenant Hamilton applied to be liberated upon caution on account of bad health, and afterwards he altered the offer of security to juratory caution. Difficulties were started, and the case was brought before Lord Dunsinnan, who thought that, the Act being silent, the magistrates were bound to take precautions to prevent escape, but that it were inhuman and illegal to keep a debtor in prison because too poor to give security. Under the Act, it is plainly implied that the security of the magistrates is to depend upon the precautions which they take. The magistrates were advised to liberate the debtor, and to take the best precautions they could against his escape. They followed this advice; released him from prison, lodged him in the captain of the guard's house, and took his word of honour that he should not go out nor attempt to escape. In that house he accordingly remained till he recovered his health. But it was thought expedient to settle a point of this importance, and memorials were ordered to be prepared, and a committee of the Court named to consider the law. The committee, however, never met.

The Lord President concluded with saying, that, in his opinion, the only thing to be done in the case before the Court, was to give instructions similar to those given in Lieutenant Hamilton's case. The rest of the judges agreed that the instructions proposed were good, and consistent with law; and it was observed, that the law stands clear, without any further declaration, magistrates being bound to pay regard to the health of prisoners, and to take such precautions as the circumstances might enable them to take consistently with the rights of the debtor.

² [But see *Emond v Mags. of Haddington*, *supra*.]

³ *Cunningham v Baillie*, 1821, 1 S. 27.

⁴ In *Shortried v Mags. of Annan*, 1790, M. 11760; aff. 15 April 1791, 3 Pat. 230. The question was very fully discussed; and Lord Justice-Clerk Rae, in respect of the circumstances of the case, particularly that this is an action highly penal, and that the defenders (the magistrates) appear to have followed a practice which, however erroneous, had long subsisted unchallenged in the town of Annan and some other burghs, of allowing prisoners for debt the benefit of what is called open jail, assolizied the defenders. The Court, upon reviewing this judgment, adhered to it upon the grounds specified, and upon an additional ground special to the case. But upon hearing the cause again, they altered their decision, 'repelled the defences, and found the magistrates jointly and severally liable in payment to the pursuer.'

2. PROVISION FOR THE MAINTENANCE OF PRISONERS; AND ACT OF GRACE.

Persons imprisoned for debt must, if they are able, maintain themselves.

Prisons are instruments of the executive power, and their erection and support naturally form a burden on the public. When criminals are imprisoned, in order to be tried and punished, for public example and benefit, the public is interested in the execution of the warrant, and the whole cost is part of the expense of public justice. But the public interest [552] is little concerned in the imprisonment of a debtor: it is the creditor who is truly interested in the detention, by which he may hope to enforce payment of his debt, or to accomplish a disclosure of funds which may have been concealed. The creditor alone, therefore, should maintain his debtor in prison, when that debtor is himself unable to do so, and no burden should fall on the public. In the law-merchant both of England and of Scotland, the creditor who confined his debtor was bound to furnish him with bread and water. But no such provision was made in Scotland for the maintenance of debtors imprisoned on caption. They were imprisoned as criminals rather than as debtors; as rebels and despisers of the church or of the king. They are charged by the caption to enter into ward upon their own expense; and in obedience to this charge, they must, if they are able, maintain themselves. The prison-house is furnished by the burgh.¹ But fire, candle, and bedding for prisoners, with the service necessary, must be defrayed by the prisoner. This expenditure is advanced by the magistrates or their jailor, and is repaid by what are called Jail Fees.

JAIL FEES are in general regulated by the magistrates, and the right to demand them has been recognised. In 1808, a case was decided, after very full inquiry into the practice both of England and of Scotland, by which the Court sanctioned the demand of jail fees to the amount of fourpence a day.² It appeared from the reports in that case, 1. That jail fees had been universally demanded; 2. That this practice prevailed in England as well as in Scotland; and, 3. That the fees were intended to replace the expense of fire, bedding, light, and attendance on the prisoner.

This being a legitimate demand, may be settled by bill, on which the jailor may afterwards proceed to diligence, as in an ordinary case of debt.³ The jailor may also bring his action for those fees. But it does not appear that he could detain the prisoner after the original debt was paid, unless he had a caption against him, and chose to arrest him in prison. Without this he has no warrant on which to detain, unless it could be conceived that some sort of right of lien over the person were competent, which is utterly inconsistent with law. While the debtor continues a proper prisoner, however, the case may be different: as where he is liberated not by payment or discharge of the debt, but for want of aliment. In that case it is not incongruous to suppose that the magistrates or jailor may, by furnishing an aliment, be entitled to detain him on the original warrant.⁴ The jailor cannot take his fees out of the aliment, under the Act of Grace. (See below, p. 447.) But he is not deprived of his claim as a common creditor for their amount.⁵

Where prisoners were not able to maintain themselves, they must, according to the old law, either have been left to starve, or have become a burden upon that public fund which was allotted for the maintenance of criminals. In either case, their situation was humiliating and miserable, such as should have called for the interposition of the Legislature. But this relief arose at length from motives of mere selfishness. In 1696 the royal burghs of

¹ 1577, c. 273; Acts of Sederunt, 11 Feb. and 14 June 1671. [Now by the County Prison Board.]

² *Welsh v Begbie*, 1808, 15 F. C. 49.

³ Such was the form in which the demand was made in the above case of *Welsh*.

⁴ The cases which are stated to have given the jailor this

privilege may have proceeded on some such principle. [See *Smith v Mags. of Annan*, 1813, Hume 492.]

⁵ *Carnaby v Duncan*, 1815, 19 F. C. 41. [All prison fees were abolished by 2 and 3 Vict. c. 42, sec. 19. See 23 and 24 Vict. c. 105.]

Scotland applied in a body to Parliament for relief from the maintenance of poor prisoners; and this application gave birth to a law which has proved a blessing to many poor and unfortunate men, and which has been called the Act of Grace.

3. OF THE ACT OF GRACE.

The original Act of Grace was the statute of 1696, c. 32.¹ It has been recently [553] reformed by the statute of 6 Geo. iv. c. 62.

The intention and principle of the original law was to secure the public funds from a burden which ought not to fall upon them; its effect has been to soften the hardships of debtors, and to infuse a milder spirit into the law of imprisonment. The Act of 1696 provides, 1. That a prisoner for a civil debt or cause, who cannot aliment himself, may apply to the magistrates for an order upon the creditor to give him an aliment. 2. That this application must be intimated to the creditor, and must be supported by the debtor's making oath that he has not wherewith to aliment himself. 3. That the creditor shall within the space of ten days provide the aliment, and give security for it, the amount not being under three shillings Scots per diem. 4. That after the elapse of the ten days, this order not being complied with, the debtor shall be set at liberty.

PERSONS ENTITLED TO THE BENEFIT OF THE ACT OF GRACE.—The statute was at first misunderstood in this point, and the distinction between civil and criminal imprisonment not sufficiently attended to. The Court of Session restricted the application of the law to debts arising *ex contractu*, and refused the benefit of it to all persons who were confined for debts arising from delict.² Upon the authority of this case, Mr. Erskine has laid it down,³ that 'no person imprisoned for the not-payment of a fine, or a sum awarded against him in name of damages, upon a delict or penal law, can claim the benefit of the statute.'⁴ A very erroneous idea seems thus to have been entertained of the principle of the law,—that the Legislature meant to bestow a boon upon the unfortunate debtor, which was not to be extended to those who had by their delict, though merely civil, brought the evil on themselves; as if the innocent debtor only were to be kept from starving, while a prisoner guilty of a mere delict, shut up in a dungeon for the debt so incurred, and disabled [554] from subsisting himself by labour, should be deprived of the necessaries of life. The true object of the law was to draw the line of distinction between prisoners to be alimented from the public funds, and those confined for no public cause, but at the interest of an indivi-

¹ 1696, c. 32. 'Our sovereign Lord, considering that generally the burghs of this kingdom, havers of prisoners, are troubled and overcharged with prisoners thrust into their prisons who have nothing to maintain themselves, but must of necessity either starve or be a burden upon the burgh, doth therefore, and for remeid thereof, with advice and consent of the estates of Parliament, statute and ordain, that where any person is made or shall be made prisoner for a civil debt or cause, and shall be found or become so poor as that he cannot aliment himself; then and in that case it shall be leisume to the magistrates of the burgh where the prison is to which the said prisoner is committed, upon the complaint of the said prisoner, and his making faith in their presence that he hath not wherewith to aliment himself, to intimate the same to the creditors, one or more, at whose instance the said prisoner was committed or is detained, and to require him or them either to provide and give security for an aliment to him, not under three shillings per diem, or else to consent to his liberation; which if the said creditors refuse or delay to do within the space of ten days thereafter, then it shall be leisume to the said magistrates to set the said poor indigent prisoner at liberty, without any hazard of being liable for the

debt and cause of the imprisonment, or to any other censure whatsoever; providing always, that if any other creditor, at whose instance he is made or detained prisoner, give surety to aliment the said indigent debtor, he shall still be kept prisoner as before; as also, that prisoners for criminal causes be in the same state as formerly.'

² Macleay, 1738, M. 11810. 'A prisoner,' says Lord Kerran, 'is entitled to aliment only when he is imprisoned for debts arising *ex contractu*. So the Lords understood the words civil debt in the Act of Parliament in opposition to debts arising *ex delicto*; and therefore where a party had, for a gross delinquency in the execution of a caption against his debtor, been decerned in a certain sum in name of damages and expense to the person injured, and ordained to be carried to prison, and there to remain till payment, he was not found entitled to aliment, notwithstanding that this was not a penalty, properly so called, imposed for a crime, but a damage arising *ex delicto*, for which he was imprisoned.'

³ Ersk. iv. 3. 28.

⁴ To the same effect are these decisions: Will v Urquhart, 1754, M. 11810; Wright v Taylor, 1768, M. 11813.

dual, and to provide a method by which the latter might get out of prison, if those interested to detain them did not choose to furnish the means of subsistence. The question was reduced to its true principles in a case where one had been guilty of an assault and battery. A prosecution having been brought against him before the justices of the peace, he was sentenced to pay £3 to the party injured, to pay a fine of £1 to the public prosecutor, to pay 40s. of costs, and to find security to keep the peace for a year. Having failed to fulfil this judgment, he was imprisoned, and applied for the benefit of the Act of Grace. This was refused by the magistrates, and he appealed to the Court of Session. The Lords were 'unanimously of opinion, that the procedure in the case of Maclesly ought to be departed from, and that damages, though *ex delicto* awarded to a private party, were, in the sense of the statute, a civil cause of imprisonment. Some (though not a majority) of the judges thought that the fine decreed to the procurator-fiscal was to be viewed in the same light. As to the caution for keeping the peace, there was no doubt entertained of the burgh being bound to aliment the prisoner, while confined on that account.' The cause was sent back to the magistrates with these instructions: 1. To find, that if the private party should detain the complainer in prison for the £3 awarded to him, he must aliment him in prison while he is so detained; 2. To find, that if the procurator-fiscal should detain him in prison for payment of the 40s. of expenses, he should be obliged to aliment him in prison while so confined; and, 3. That the procurator-fiscal shall be at liberty to detain the complainer in prison till the £1 of fine be paid, without being obliged himself to pay him aliment while so detained.¹

Thus, the line is drawn between the public and the private interest. So far as the public is concerned in the imprisonment as the punishment of a proper crime, the statute does not apply, and the prisoner, of course, becomes a burden upon the public fund. So far as individuals alone are interested, the public funds are exempted: the burden of aliment [555] is left upon the individual creditor; and if he do not choose to defray it, the prisoner, if unable to maintain himself, is entitled to relief by liberation under the statute.²

One case, however, there is of civil obligation in which a prisoner is not entitled to the benefit of the Act of Grace, and yet the public is not bound to subsist him. This is where a man is imprisoned for not performing an act within his own power. Thus, one having been imprisoned for not producing bonds which he acknowledged to be in his possession,

¹ *Clerk v Johnstone*, 1787, M. 11818. To this case may be added as a confirmation that of *Aitken v Gray*, 1790, M. 11819, where a prisoner, confined upon a charge of fraudulently disposing of his effects to disappoint his landlord's hypothec, was found entitled to the benefit of the Act of Grace, although he was refused a *cessio bonorum*. In the case of *Douglas v Baillie*, 1794, M. 11795, the doctrine of Clerk's decision was fully confirmed; for Mrs. Baillie, though imprisoned for damages and expenses awarded in an action against her for defamation, having applied for the *cessio*, the analogy of the Act of Grace was brought into the argument; but it was observed on the bench that the analogy had no application, and that 'the Act of Grace applies wherever the imprisonment is at the instance of an individual, whatever be the ground of the obligation. In some early cases,' it was added, 'this seems not to have been sufficiently understood.'

See also *Edwards v Physicians of Glasgow*, 11 July 1818, F. C. [*Robertson v Collins*, 1837, 15 S. 572.]

In speaking of this difference of principle between the earlier and the later judgments upon this question, it may be observed, that in the very same year in which the last of the erroneous decisions above cited was pronounced, a case was tried at the 'Sceance pour les Prisonniers,' held in the Con-

ciergerie of Paris in August 1768, nearly resembling that of Clerk above stated. The case is thus stated by Denizart:—Lozier, accused of the crime of adultery, was prosecuted at the instance of Cagè, the husband. He was in June 1766 condemned to banishment for three years, and the wife of Cagè was punished 'à la peine d'authentique' (that is to say, forfeiture of her dower and matrimonial provisions, etc., in terms of l. 30, Cod. ad Leg. Jul. de Adult. lib. ix. tit. 9). Both were besides condemned jointly in 1500 livres of civil reparation to Cagè. Cagè consigned the aliment for Lozier at first; but neglecting to supply any more, Lozier applied for his enlargement. Cagè opposed this application, and pleaded that he could not maintain him without forfeiting the sums found due to him; that Lozier was to be considered not as a civil debtor, but as a criminal, whom it was the duty of the public prosecutor, not of the individual, to aliment. The Court, after delivering their opinions at great length, decreed that unless Cagè furnished the aliment in three days from the date of the arrêt, Lozier should be set at liberty. 3 Denizart 806.

² [The Crown is bound to aliment a prisoner confined for non-payment of taxes. *Adv.-Gen. v Mags. of Inverness*, 1856, 18 D. 366.]

the Lords 'finding that the ground of his imprisonment was not a debt, but a fact prestable by himself' (within his own power), 'they refused to modify any aliment, or to set him at liberty, till he first exhibited the papers he had in his hand.' 'In this decision,' says Lord Fountainhall, 'they proceeded upon the analogy of the sanctuary, which, although made a sanctuary for debtors, yet, if any be decerned for exhibition of papers, they have no privilege, but the bailie of the Abbey may expel them till they obey the will of the charge, and produce the papers.'¹ On the same principle is to be determined the case of a bankrupt imprisoned for not signing a disposition, or for refusing to desist from an unlawful occupation.²

The debtor must be in prison in order to be entitled to the benefit of the Act of Grace. In one case it appeared, in a question of *cessio bonorum*, that the debtor had been allowed aliment on the Act of Grace while at large upon a sick bill, and that he was discharged from restraint on the creditor failing to lodge the aliment. This the Court held to be novel and extraordinary.³

RATE OF ALIMENT.—The law, in providing the remedy of imprisonment, has intended to make it a state of inconvenience and uneasiness to the debtor for the purposes of coercion, and a fit instrument of justice in the hands of creditors. And the necessary expense of the maintenance of a prisoner should press as lightly upon creditors as may be consistent with health and sufficient subsistence. The Legislature, however, left room in the statute for much abuse in the fixing of the aliment. They fixed, indeed, a minimum of three shillings Scots per diem, but left the maximum unlimited. It was not unnatural for magistrates, both from motives of humanity, and from the suggestions of prudence, with a view to empty their jails as much as possible of debtors, to appoint sums so ample for the aliment of debtors under the statute, that the creditors chose rather to abandon their diligence altogether than to pay them. This effect was at one time very sensibly felt, while yet it was held doubtful whether the Court of Session could interfere to restrict the aliment.⁴ But this power is now exercised under the review of the Court of Session, and has in [556] general been administered by magistrates with great discretion and justice.

In the recent Act no alteration has been thought necessary in this respect. But it is thereby declared 'not to be lawful for the jailor or keeper of any prison to which a prisoner shall be brought to be confined for a civil debt, to receive such prisoner into his custody, or confine him in such prison, unless the sum of 10s. sterling shall be deposited in his hands by the creditor-incarcerator, as a means of and security for the aliment of such prisoner' (6 Geo. iv. c. 62, sec. 1). It is by the same Act enacted, 1. That if the prisoner shall within thirty days petition for aliment, the deposited money shall be applied by the jailor to his aliment at the rate fixed until the sum shall be exhausted; 2. That if no application for aliment shall be made within thirty days, the deposited money shall be returned to the creditor; 3. That if the aliment shall be refused, the deposited sum shall be returned to

¹ *Turner v Ross*, 1707, M. 11802.

² In *Edwards v Physicians of Glasgow*, 11 July 1818, the Court distinguished justly. A judgment was pronounced for damages and interdict against Edwards for encroaching on the privileges of the faculty. He was imprisoned on this decree, and the faculty declared this was only to enforce the interdict, and that they would consent to his liberation on his signing a bond to desist. He applied for aliment; and the Court holding that this was imprisonment for civil debt, not breach of interdict, and that there was no right on the part of the faculty to require a bond of desistance, remitted to the magistrates of the Glasgow to find the petitioner entitled to the benefit of the Act of Grace. [But see *Smith v Nicholson*, 1853, 15 D. 697.]

³ *M'Lain*, pet., 1821, 1 S. 61, N. E. 62.

⁴ Lord Fountainhall says: 'It was observed that since this Act (of Grace) bankrupts sought no more the benefit of the *cessio bonorum*, but came out of prison without any stigma or deserved note of infamy, by persuading the magistrates to modify a greater sum than the creditors could comply with. But the Lords found that the Act was correctory and unfavourable, no ways to be extended; and if they (the magistrates) colluded with the prisoners, they (the Court) might rectify it, and were as competent judges of the parties' circumstances.' He adds: 'All knew that there was a mistake in the Act, which should have fixed a maximum beyond which they should not go, as well as it had made threepence the minimum; but this was forgot, *canis festinans*,' etc.

Durham v Glasswell, 1710, M. 7460. [*Brechin v Taylor*, 1842, 4 D. 909.]

the creditor; and, 4. That on the creditor's consent to the debtor's liberation before he shall have had reasonable time to apply for the benefit of the Act, the money shall be returned, under deduction of the lowest rate of aliment in use to be given in that burgh.

INDIGENCE OF PRISONER.—The debtor, in applying to the magistrates, must swear to his indigence, and inability to maintain himself. The debtor's oath is *prima facie* evidence of indigence, and on that proof aliment is awarded in the meantime.¹ This requisite has a particular view to such alimentary funds as are beyond the reach of creditors, though, no doubt, it is also intended to lead to a discovery of such funds as the prisoner may have secreted. It is not with us as in England, where execution against the person stops execution by that creditor, at least against the estate. The debtor in Scotland may have much property, and yet be unable to maintain himself: it may all be attached, and beyond his reach. If a debtor have an annuity or pension, or any other fund settled on him as aliment, he cannot be entitled to the benefit of the Act without giving it up to his creditors,² unless it shall happen that he has already assigned such aliment fairly.³

CITATION OR NOTICE TO CREDITORS.—Intimation must, in terms of the Act of 1696, be made to the creditor⁴ of the debtor's application, that he may have an opportunity of opposing it, or of agreeing to furnish the aliment. The term allowed for the creditor to provide an aliment, or consent to liberation, is ten days from the term of notice; and if the aliment be not furnished within the ten days, the debtor may be liberated. He may be so liberated on the *tenth* day.⁵

CONVEYANCE OMNIUM BONORUM.—It had been the practice in Edinburgh, and in most burghs, to make the debtor, upon his liberation, grant a conveyance *omnium bonorum* to the [557] incarcerating creditor. But the Act did not require or authorize this.⁶ The liberation, being merely a consequence of the want of funds to maintain the debtor, may be said not properly to have any concern with such an assignment or disposition;⁷ but, at the same time, it is not inconsistent nor inexpedient that the debtor should be required, on applying for aliment, to give up his funds to his creditors by such a conveyance as that which is granted in a *cessio bonorum*, namely, in favour of the whole creditors, or rather of a trustee for the common behoof; and accordingly, by the 6 Geo. iv. c. 62, sec. 7, it is required that prisoners claiming the benefit of the Act shall, if desired, grant 'a disposition *omnium bonorum* in favour of the creditor at whose instance he is incarcerated, for behoof of all his creditors.'⁸ The expense is to be laid on the creditor requiring such conveyance, and the refusal to grant it is to bar the aliment while the debtor shall persist.⁹

¹ *Smellie & Co. v Forman*, 1823, 2 S. 129, N. E. 121; *Minorgan v Hog*, 1824, 3 S. 116, N. E. 77.

² Yet this, clear as it may seem, was doubted once. In *M'Kenzie v Blair*, 1734, M. 11809, a debtor had £15 a year from the Exchequer charity roll, and applied notwithstanding for the benefit of the Act of Grace. The creditor objected, upon the ground that his pension enabled him to maintain himself; but the Court found him entitled to the benefit of the statute, though afterwards they altered their judgment. [*M'Donald v Mags. of Inverness*, 1826, 4 S. 414.]

³ See *Arnold v Lyon*, 1825, 3 S. 645, N. E. 451.

⁴ [Or to his agent employed to incarcerate the debtor. *M'Kenzie v M'Lean*, 14 Jan. 1830, 8 S. 306; *Crawford v Dawson*, 1836, 14 S. 688.]

⁵ *Blair v Mags. of Edinburgh*, 1704, M. 3468.

Hood, Henderson, & Co. v M'Kirdy, 1813, F. C. Here there was some discrepancy in the execution of notice. The notice was said to have been served on 25th, but at least it was served on 26th November. The creditor remitted aliment on *seventh* December. The prisoner was liberated on the afternoon of *sixth* December. The Court held the liberation on the

afternoon of the *sixth* to be regular. [The aliment awarded runs from the date of the award. *M'Iver v Mags. of Linlithgow*, 1832, 11 S. 415. See *Gibb v Mags. of Hamilton*, 1833, 12 S. 28.]

⁶ The old Scottish statute is so far different from the Lords' Act of England, that the main purpose of the latter was to give freedom to debtors who were willing to assign everything to their creditors, the aliment being provided for only in case of opposition to this liberation. An assignment was therefore an essential part of the English liberation under the Lords' Act.

⁷ There was one case in which this matter was brought under the notice of the Court of Session, but the question was evaded. 'The Lords would not burden the liberty with a disposition, but left it to the magistrates to require it if they thought fit.' *Durham v Glasswell*, 1710, M. 7460.

⁸ [As to such dispositions, see *Johnstone v Peddie*, 1836, 14 S. 380; *Souter's Crs. v Brown*, 1852, 15 D. 89.]

⁹ [Such a disposition is exempt from stamp duty. *Rae v Henderson*, 1837, 15 S. 653. Aliment paid under the Act of Grace founds a claim to repayment if the debtor should afterwards be able to repay it. *Rodger v Miller*, 1799, Hume 491.]

DEBTOR'S LIBERATION FROM PRISON.—There is manifestly a difference between the liberation on the Act of Grace and that under the *Cessio Bonorum*. The Act of Grace is merely a regulation by which a creditor, following out the legal coercion of imprisonment, is prevented from starving his debtor on the one hand, or burdening the public on the other, but by which no prejudice is intended to the diligence of the creditor. If the creditor then choose to give that aliment after liberation which he refused at first, he will be entitled to exercise his right of imprisoning the debtor. The difficulties which were formerly felt on this point are now removed by the necessity of depositing subsistence money at the time of imprisonment.¹

CHAPTER II.

OF IMPRISONMENT AS IN MEDITATIONE FUGÆ.

A PERSON who has merely a claim, not yet followed by a judgment in his favour, can in justice demand no more than security for rendering his eventual right effectual, when sentence shall have been given in his favour. This security, in so far as the estate of the debtor is capable of affording it, the claimant at once attains in Scotland by arrest- [558] ment and inhibition. Still it may happen that the security of the claimant may chiefly depend on execution against the person; but to admit of such execution previous to the claim being established, is as unjust as it is impolitic. It is quite fair to demand that the person of the debtor shall remain within the reach of the law, so that execution may proceed against him upon sentence being pronounced. This is attained with us by a warrant, granted upon satisfactory proof, *prima facie*, of an intended escape. Upon this the debtor is apprehended; and if it shall appear that he really means to leave the kingdom, he is committed to prison, unless he shall find security to the creditor *de judicio sisti*, that is to say, that his person shall be found within the jurisdiction of the courts upon sentence being pronounced.

The practice of arresting the person at the commencement of a suit, seems in Scotland to have first begun upon the borders, and in burghs. Upon the borders, something of this kind was necessary for maintaining order and the course of justice between the inhabitants of the opposite sides. In a case which occurred towards the end of the century before the last, where an Englishman had been arrested on the Scottish side of the border, the creditor alleged in his defence, 'That past memory it was the custom on both sides of the border, that the inhabitants of either side being found on the other, upon application to any magis-

¹ *Law v White*, 1709, M. 11803; corrected by *Abercrombie v Brodie*, 1759, M. 11811. Abercrombie was imprisoned as a debtor by Brodie, and set at liberty on the Act of Grace. Some years afterwards, Brodie apprehended him again upon the same caption, and Abercrombie raised an action of wrongous imprisonment. The Court first pronounced judgment similar to that in *Law and White's* case; but upon reconsidering the question they altered that judgment, and found the imprisonment to be lawful. It was observed on the bench, 'that although a liberation on the Act 1696 does not legally discharge the diligence, or restrain the creditor from again putting it in execution; yet, if he commit a moral wrong by using that diligence in an oppressive manner, he is

to put his diligence in execution against Abercrombie a second time, and to incarcerate him thereupon, notwithstanding of his former liberation upon the Act of Parliament 1696, for the aliment of poor prisoners.'

See also *Pollock v Fulton*, 1769, M. 11815. [*Campbell v Mullen*, 1850, 13 D. 78; *Morison v Forbes*, 1826, 4 S. 668. But the creditor reincarcerating must be able to show a change of circumstances subsequent to the liberation, such as the debtor's succession to property, or the discovery of misconduct. *M'Kenzie v M'Lean*, 1830, 8 S. 306; *Crawford v Dawson*, 1836, 14 S. 688; *Denovan v Cairns*, 1845, 7 D. 378. But see *Pender v M'Arthur*, 1846, 8 D. 408, where the creditor's failure to provide aliment in consequence of a mistake in

trate, they are arrested, and incarcerated till they find caution to answer and pay;’ and there was ‘a testificate produced from a number of noblemen and gentlemen on the border, declaring that this was the custom.’ The Lords ‘found the defence upon the custom relevant;’ but not thinking the certificate proper evidence, they ordered the custom to be proved by witnesses upon oath.¹ In burghs, which were associations of traders and manufacturers for mutual protection and safety, it was necessary to have some means for enforcing the payment of articles furnished by the dealers in the burgh to the inhabitants in the surrounding country; and accordingly it was usual to poind the effects, horses, etc. of such debtors when they came within the gates, till they gave security to appear before the courts of the magistrates. By the 34th and the four following chapters of the *Leges Burgorum*, the creditor was entitled to poind or seize the debtor’s moveables, except in some particular cases: having poinded, he was entitled to keep what he had so attached till it was repledged by the offer of security, and he was not obliged to accept of any man as his bail but a burgher. At what time this law, so firmly established of old, respecting the attachment of moveables, was extended to the attachment of the person, is uncertain. But in 1672 a law was passed, restricting the practice to those cases in which a person not domiciliated in the burgh was indebted for meat, clothes, or other merchandise, without having given document for the debt. And Sir George M’Kenzie in his *Observations* says, that, by an old custom in Scotland, burgesses might have arrested strangers, if they found them within the burgh, till they found caution to pay them what was due.²

In one other case, this practice of a commencing arrest was introduced as a step of common procedure, viz. in actions before the Court of Admiralty. This by special statute is declared a privilege of that court, whose jurisdiction is chiefly concerned with foreigners.³

It seems to have been about the middle of the seventeenth century that the extraordinary remedy of warrants for apprehending debtors as *in meditatione fugæ* was adopted. [559] Perhaps a case which Sir George M’Kenzie mentions in his *Observations* upon the statute of 1621, c. 18, afforded the first example of such a warrant. ‘In Mason’s case,’ says he, ‘5th November 1665, the Lords summarily, upon a bill, issued out a warrant to apprehend him, *tanquam debitorem suspectum et fugitivum*; and though at first they doubted whether their own powers could extend thus far, yet thereafter they found that they might.’⁴ The obvious justice and necessity of guarding against the evasion of personal execution has, with the strong authority of the civil law, which has ever had much influence with our lawyers, established this remedy firmly in the practice of the country, guarded by restrictions and qualifications which serve to correct its harshness.

SECTION I.

OF THE PROCEEDINGS IN MEDITATIONE FUGÆ.

The *meditatio fugæ* warrant may be issued by any civil judge or magistrate, upon the application of a creditor, who shall swear to the verity of his debt, and also to his belief that the debtor means to leave the country; specifying in his oath such circumstances as shall afford reasonable ground for justification of that belief. Under this warrant the debtor is immediately apprehended and brought before the judge; who, after an examination into

¹ Bell v Robertson, 1676, M. 12631.

² Observations on Statute, Parl. 2 Charles II., sess. 3, c. 8. See, on the construction of this Act, Ersk. i. 2. 22; 1 Bankt. 460. Law v Dick, 1677, M. 7676.

³ 1681, c. 16. [The power to require defenders in maritime causes to grant bonds *de judicio sisti et judicatum solvi*

was abolished by 13 and 14 Vict. c. 36, sec. 24, as to the Court of Session; and by 1 and 2 Vict. c. 119, sec. 22, except for special cause stated by the judge, as to Sheriff Courts.]

⁴ M’Kenzie’s Observations on Stat. p. 176, ed. of 1675. Mason’s Crs., 1665, M. 8547.

the circumstances, either liberates him as one against whom there is no just ground of suspicion; or authorizes his imprisonment till he shall find security to appear in an action to be raised against him within a certain time, usually six months; or if there be diligence subsisting against him, to abide the course of it.

The application is of a summary nature, and without notice; for the arrest must be sudden in order to be effectual. It is not necessary that the warrant should be issued by the court which is to try the cause, as in England: it is an act of magisterial duty, which should be performed by the judge ordinary of the jurisdiction within which the debtor is found.¹

It is not necessary that the debt should be established by document or decree, in order to sanction an application of this kind. If it were not competent, upon a mere claim of debt, the remedy would be defective, since the very object of it is to prevent the execution of a fraudulent purpose in the debtor to remove beyond the reach of the jurisdiction of the Scottish courts.² But although full evidence of the debt is not necessary, an oath is required by the creditor to the truth and particulars of his demand,³ on which, if false, he may afterwards be tried for perjury. This produces no undue delay, while it deters from attempts to abuse the law to the purposes of injustice.

It may appear, that where the debtor has an heritable estate unencumbered, and such as can afford security to the creditor, an arrest as *in meditatione fugæ* ought not to be permitted, the creditor having the means of trial and of execution against the land. But the law gives to the creditor, at one and the same time, a remedy against his debtor's person and against his estate; and the hardship can never be very grievous for a person with a good estate to find bail for his appearance; while the inconveniences and delays [560] attendant upon diligence against heritage are such as no creditor can be forced to undergo, where his debtor's person is exposed to execution.⁴

As the *meditatio fugæ* warrant is an extraordinary remedy, and may be made an instrument of great injustice, it is not issued without particular inquiry into the circumstances in which it is applied for. This inquiry is either relative to the original application, or relative to the final warrant for bail or imprisonment.

1. PROOFS NECESSARY TO AUTHORIZE THE DEBTOR'S APPREHENSION.

To justify the arrest of the debtor in order to be brought up for examination, the creditor is bound not only to swear to his present belief of the debtor's present intention to leave the country in order to defeat his claim;⁵ but he must specify the grounds of that belief, that the judge may decide whether there be sufficient reason so far to encroach upon the liberty of the subject, and depart so widely from the common line of the law, as to authorize a premature arrest. Sir George M'Kenzie says, that 'he who craves a warrant to

¹ *Barrowfield v Witherspon*, 1727, M. 8549. The Lords were unanimously of opinion, that upon application to any inferior magistrate, a debtor *sub meditatione fugæ* may be summarily incarcerated.

² In *Wright v Gemmil*, 1782, M. 8553, an attempt was made in the argument to object to the debt as not sufficiently established to authorize an application of this kind, not having been ascertained by legal evidence; but the Court paid no attention to this, and found the warrant legal.

³ *Pratt v Fleet*, 1826, 4 S. 780, N. E. 788. [The application may be made even by a contingent creditor, as by the drawer of a bill who has endorsed it away, against the acceptor. *Thom v Black*, 1828, 7 S. 158. But compare *M'Gill v Ferrier*, 1837, 15 S. 882; 1838, 16 S. 934. See also, as to the necessity for specification of the grounds of debt, *Robertson v Campbell*, 1847, where the question arose, but was not

decided, Whether an illiquid claim of damages is a sufficient ground for granting a *meditatione fugæ* warrant? In claims for aliment, where the amount has not been ascertained by decree, it appears unnecessary to specify the amount demanded; and such a claim for an unborn illegitimate child has been held a sufficient ground for a *meditatione fugæ* warrant. *Davies v Duncan*, 1861, 23 D. 532.]

⁴ In the case of *Dr. Heron*, the Court found that a debtor's being owner of a land estate does not protect his person from diligence, it being optional to his creditors which diligence to use. *Heron v Dickson*, 1773, M. 8550; *Blair v Simson*, 1821, 1 S. 107.

⁵ [It is not necessary to aver in the petition that the debtor's object in leaving the country is to defeat the petitioner's claim. *Jackson v Smellie*, 22 Nov. 1865, 4 Macph. 72.]

take a debtor, who is suspect or fugitive, must libel to the judge reasons why he suspects his fleeing; as, that he was packing up his goods, or was lurking or denying himself when his creditors were seeking him.¹ And, indeed, a creditor cannot believe his debtor to be intent upon flight, without having some reasons for that belief which he can explain. The oath must apply to the circumstances in which the debtor is placed at the time when the creditor demands the warrant.

A warrant will not be granted on an oath to a *meditatio fugæ* long before. Neither will it be granted on an oath taken in another country, without being ratified in Scotland by the debtor [creditor] himself, or by his mandatory swearing conformably,² and justifying the oath by circumstances.

The magistrate is not bound nor entitled to proceed upon a general oath of credulity, but must require the creditor to specify in his oath the special grounds of his belief.³

2. OF THE PROOFS AND PROCEEDINGS AFTER APPREHENSION OF THE DEBTOR.

The first apprehension of the debtor, if unjust, may occasion an interruption or disgrace, attended with great injury. But it is not so oppressive as the final warrant for bail [561] or imprisonment; in which, therefore, the inquiry must be more careful, and the precaution of the magistrate proportionally greater.

It may be doubted whether the creditor can be called upon by the debtor to produce evidence of the circumstances which he states in support of his belief? Whether the debtor is entitled to refute the imputation by opposite proof? Whether his declaration or oath is to be taken, and what is to be its effect? On the one hand, this extraordinary remedy may be turned to the purposes of injustice; but, on the other, the evil against which it is intended to provide is a fraud; and fraud assumes the fairest appearances. It is a part of the evil that the debtor conceals his design from all chance of detection. If, therefore, it be made too difficult to reach this remedy, the object of the law will be defeated. If a creditor must come prepared, not merely to explain his suspicions, but absolutely to establish them by evidence, his application will often be unavailing.⁴ Much discretionary power must be committed to the judge in such a matter, and in cases of difficulty the only safe resource seems to be to put the petitioner under bail for eventual damages.

The magistrate will be entitled to take into his view, in support of the charge of *meditatio fugæ*, collateral evidence capable of instantaneous proof. And he must listen to any evidence which the debtor may offer instantaneously to bring forward in refutation of the suspicions charged against him.⁵

¹ Sir G. M'Kenzie's Observations on 1621, c. 18, p. 178.

² *Place v Donnison*, 2 July 1814, F. C. Here the oath was sworn at York, and neither the creditor nor any person as mandatory or attorney appeared before the Scottish magistrate to swear to the *meditatio fugæ*. The Court held 'that a creditor's affidavit, taken in a foreign country, and a long while previous to the application for the *meditatio fugæ* warrant, was not a sufficient ground for apprehending a debtor. The magistrate must call the creditor before him, and the creditor must swear to his present belief of the debtor's intention of absconding.'

This case does not decide that the creditor was, in the circumstances, not entitled to a warrant without coming to Scotland; but that it is necessary to have an affidavit to the *meditatio fugæ* by some one authorized to act for the debtor, and who is able to state circumstances to justify his constituent's suspicions. See *Scudamore v Lechmere*, 1797, M. 8559; also *Tasker v Mercer*, 1801, M. App. Med. Fugæ, No. 1.

³ In the case of *Laing v Watson & Mollison*, 1789, M. 8555, 3 Pat. 219, damages were awarded both against the creditor who applied for, and against the magistrate who granted, the warrant; the former not being able when called upon to state any circumstances in support of his belief, and the latter not having required an oath.

This case was carried by appeal to the House of Lords, but only as to the amount of the damages. The appeal was entered by the prevailing party, and there was no cross appeal.

⁴ In England the debtor is protected against unfair arrests by security, taken from a creditor in a penal bond for eventual damages. Lord Kames speaks of an Act of Sederunt, of date 18th December 1613, authorizing a similar proceeding. 2 Prin. of Equity 15; Sir Ilay Campbell's Acts of Sederunt, p. 73.

⁵ In the case of *Scudamore v Lechmere*, 1797, M. 8559. Here there was a good deal of discussion upon the subject. That gentleman had left England on account of debt, and

He is bound to examine the debtor himself, with a view to the explanation of [562] anything which may appear mysterious.¹

'Lawyers,' says Sir George M'Kenzie, 'distinguish *inter fugitivum et suspectum de fuga*: the one is guilty only of an intention, but the other has actually fled; and I conceive that *meditatio fugæ*, so much considered by our law, is a midst betwixt the two: for he who is *in meditatione fugæ* has *cum suspecto* designed a flight, and has *cum fugitivo* done some extrinsic deed in order to his flight.'² From what circumstances or extrinsic acts the secret purpose shall be inferred, must depend in a great measure upon the complexion of each individual case. All that seems proper to this place is to inquire what, on the supposition of the evidence being clear, shall be sufficient to authorize the issuing of the warrant. And,

1. It is not enough that the debtor means to leave one part of the country for another. If the law can reach him, though at the farthest corner of Scotland, it is enough. His purpose must be to leave the country.³

2. It is not sufficient to authorize a warrant that the debtor is going to retire to the sanctuary, for this is a legitimate resource which an insolvent debtor may take; and the same principle which forbids him to be dragged from the sanctuary when he has taken refuge there, will deny to the creditor the power of preventing him from going thither.⁴

3. Although this be in appearance a criminal warrant, proceeding upon the idea of the

taken refuge in our sanctuary. The assignees of Walwyn Shepherd applied for a *meditatio fugæ* warrant against him; and having appointed an attorney here, the attorney swore the common oath of belief: 'That Mr. Lechmere was *in meditatione fugæ*, and about to leave Britain, in order to avoid payment of the debt,' etc. Scudamore, one of the assignees, also swore to the same effect; and the documents of the debt, with the proper oath of verity, were produced. Upon this application Mr. Lechmere (who had been apprehended beyond the precincts of the sanctuary) was taken before the Sheriff of Edinburgh and examined. He declared that he had no intention of leaving Scotland, and that he had taken lodgings within the precincts for a year, which was not yet expired. An objection was taken by Mr. Lechmere, in the *first* place, to the form of the mandate, affidavit, etc., as granted only by one of three assignees; and, *secondly*, to the grounds of the application as insufficient, there being no reasons stated for the belief which the creditors pretended to entertain. The sheriff, however, granted warrant for incarceration. This judgment was brought under review of the Court of Session, and they altered it. The Lord President Campbell stated the question for the Court upon this point to be: 'Whether a stranger who has resided a long time in this country, and has taken a house, with the view of remaining longer, can be legally imprisoned on a warrant granted as this has been?' Upon the point of law all the judges were clear that a general oath of belief is not enough, that the creditor must also state his grounds for believing that his debtor is about to leave the country. But at this point of the case a difference of opinion arose. On the one hand, it was the opinion of some of the judges, that when a creditor produces his ground of debt, swears to the truth of the claim, and swears also to his belief of the *meditatio fugæ*, and to the grounds and circumstances upon which that belief is built, the judge must proceed to decision; that if there be nothing inconsistent in the creditor's story, if the suspicion seems to be probable and well founded upon the face of the oath, he must give the warrant, at the risk of him who applies for it, and who must be liable for the damage

that may proceed from an ill-founded application; that, at the same time, he is not entitled to disregard the debtor's offers of refutation, but, on the contrary, bound to examine the debtor himself, and to admit all evidence which he may offer summarily to bring forward in vindication of himself against the creditor's suspicions. On the other hand, it was thought that *meditatio fugæ* warrants, being capable of serving the worst purposes, ought not to be granted unless the creditor can not only condescend fairly and specifically, upon good grounds of belief, that the debtor means to leave the country; but also bring such probable evidence at least as shall satisfy the mind of the judge that the reasons assigned for the belief are well founded. Upon the special case of Mr. Lechmere, the majority was of opinion that the circumstances were not sufficient to support the oath of belief that Mr. Lechmere intended to leave the country.

In the case of *Tasker v Mercer*, 1801, M. App. Med. Fugæ 1, a physician was examined by the debtor, to prove his design of remaining in Scotland on account of his daughter's health.

¹ In *Service v Hamilton*, 25 May 1811, F. C., the Second Division held it clear that the debtor must be examined. Lord Newton laid it down as quite essential; Lord Justice-Clerk, as necessary in justice, to give the debtor an opportunity of explanation or of payment. Lord Meadowbank concurred, and said that Lord Braxfield had given it to him as an injunction, while sheriff, never to permit a warrant of incarceration to be granted without examining the debtor. The case came in by report from Lord Glenlee, as Ordinary on the Bills, on bill of suspension and answers. Bill passed without caution. [*Robertson v Chisholm*, 20 June 1812, F. C.]

² Observations on the Statute 1621, p. 177.

³ In *Laing v Watson & Mollison*, 1789, M. 8555, aff. 3 Pat. 219, damages were awarded against the magistrate for issuing a warrant upon an oath which expressed only the debtor's intention to leave Scotland, or go to another part of the country.

⁴ *Place v Donnison*, 2 July 1814, F. C.

debtor's fraudulent intention to flee from justice; yet the true principle of it is, that the law in this way provides against the evils which would arise to creditors, by their debtors being removed beyond the jurisdiction of the courts of this country, from whatever cause that removal may proceed. As the *meditatio fugæ* warrant is not therefore a punishment for a crime, but an instrument of justice, and a method of preventing loss to the creditor, it may seem doubtful whether it can be applied for against those who are compelled to leave the country in the course of their duty. Thus, 1. In the case of a person not in the public service, it appears that, while he is held liable to this warrant, he will be indulged with a reasonable time to make his appearance, on showing just cause of absence.¹ 2. One who is going abroad in the legal course of his trade, but only for a short time, is not held as *in meditatione fugæ*.² 3. One who is leaving the country in the course of his public duty seems [563] not to be liable to this warrant.³ In England, soldiers and sailors are, to a certain extent, privileged from arrest in civil causes. By several statutes, soldiers and sailors are not to be arrested for a debt under £20. This includes non-commissioned officers, sergeants, and privates.⁴ And, by 30 Geo. II. c. 8, all persons enlisted into His Majesty's forces, who did not voluntarily offer, but were compelled, are freed from arrest.⁵ These Acts seem to extend to Scotland, since they relate to the privileges of the whole service. In the question whether officers or soldiers are liable to arrest on *meditatio fugæ* warrants, the opinions of the Court have altered more than once. In one case, the judges thought it 'no *fuga* that an officer was setting off for his regiment.'⁶ In a later case, the same question having incidentally occurred, a different opinion was delivered.⁷ But, finally, the Court has determined that *meditatio fugæ* warrants cannot be issued against officers on their way abroad, accompanying or intending to join their regiments.⁸

4. A *meditatio fugæ* warrant may be applied for against a foreigner as well as against

¹ *Wright v Gemmil*, 1782, M. 8553. It was questioned, Whether a *meditatio fugæ* warrant was competent against Mr. Wright, who had come to this country from America, and meant to return thither, in order to prosecute his profession of a factor? The facts were acknowledged by Mr. Wright, and the sheriff granted warrant for incarceration. The Court of Session 'had no doubt of the propriety of the sheriff's judgment; but, to accommodate the defender as much as possible, they allowed him to find caution for his appearance six months after requisition by the pursuer.'

A similar case, I understand, was decided, 1803, *M'Callum v M'Callum*. But it is not reported, and I have not the Session Papers. [See Hume 405.]

² See *Gorman v Hedderwick*, 1827, 5 S. 291, N. E. 271. [*M'Kinnon v Nairne*, 9 S. 615; *Anderson v Anderson*, 1848, 11 D. 118.]

³ *Haldan v Struthers*, 1826, 4 S. 380, N. E. 383.

⁴ *Lloyd v Woodal*, 1 Blackst. 29.

⁵ *Turner v Turner*, 1 Burr. 466.

⁶ *Scott v Sandilands & Manderston*, 1744, M. 1929.

⁷ *Campbell of Skerrington v Montgomery*, 1790, Bell's Oct. Ca. 325. The question occurred in the shape of an objection to the expense of a *meditatio fugæ* warrant obtained against Captain Montgomery, and the objection proceeded upon the impropriety and incompetency of any such warrant against an officer, who was not intending to flee from his country, but to go abroad in the line of his duty to join his regiment; and it was further urged, that there could be no motive but revenge for detaining an officer, since the creditor thereby endangered the loss of his commission, and every hope of recovering payment. But it was the general opinion of the

Court that the warrant even in these circumstances was competent, therefore that the expense ought to be allowed. The case of *Wright* was referred to by one of the judges as a precedent.

⁸ *Service v Hamilton*, 25 May 1811 [see 16 F. C. 251]. The Second Division gave a clear opinion against the liability of officers to *meditatio fugæ* warrants; but there was no occasion to decide the point, as the warrant was null on another ground. See above, p. 453, note 1.

On 6th June a new *meditatio fugæ* warrant was executed, which was not liable to the objection of want of an examination of the debtor, and this brought out the question of the competency of such a warrant in the shape of a suspension and liberation. Hamilton was an officer of the 94th; and the regiment being in Spain, he had leave. He was arrested while here. The examination and oath of the creditor bore his 'being about to leave Scotland to join his regiment in Spain.' Lords Meadowbank and Justice-Clerk were of opinion that on this circumstance alone he was entitled to immediate liberation. Captain Hamilton's oath went only to show an intention of joining part of the regiment in Edinburgh, or a veteran battalion. The Court were unanimously of opinion that there was no relevancy in the creditor's statement, and that the bills should be passed,—at first, for giving expenses, but said not to be competent. Court: Then pass the bill, and expedite the letters, and expenses may be given in Outer House. *Hamilton v Bryson*, 6 June 1811, n. r.

Bryson, petitioner, 10 March 1812, 16 F. C. 551. The sequel of the above case was an action of damages. Lord Gillies found damages due for the detention. The Court confirmed his judgment.

a native; and where the debt has been contracted abroad, as well as where it has been incurred in Scotland. The law was so laid down by Erskine.¹ There are some late decisions which confirm this doctrine in many points. Thus, 1. A person who has fled from another country to escape from debt, is liable to this warrant in Scotland, whether the creditor be a foreigner or a native.² 2. A stranger who has acquired a domicile in Scotland has [564] always been recognised as a fit object of this warrant.³ 3. If a foreigner contract debt in Scotland, he is undoubtedly liable to this process: this requires no authority to prove it. But, 4. Where a foreigner is for a time, and without fraud, in this country for a particular and temporary purpose, as a journey of health, of pleasure, or of business, his proper domicile being in his own country, where he is ready to answer, there does not seem to be any good ground for authorizing this sort of warrant to be issued against him, either at the instance of a foreigner or that of a native of Scotland, in order to make him responsible to the courts of this country. In a case which is not reported,⁴ the Court is said to have decided the abstract point unfavourably for foreigners in this situation; but there appears in that case to have been at least strong suspicion, if not evidence, that the person against whom the warrant was applied for had left his residence abroad to avoid his creditors, as in the cases of Bellamy and of Mercer already noticed; and there is one case, of an older date, in which a different decision was pronounced.⁵

It has been held in some cases, that the magistrate, in examining the debtor, must himself act, and not delegate his office to a clerk.⁶ But afterwards the question was again raised, where the deposition had been taken by one of the clerks and assessors of a royal burgh, when there was much division of opinion. It was decided, on a consultation of all the judges, that the examination of the debtor was lawfully taken, and this was affirmed in the House of Lords.⁷ In other cases, it can scarcely be laid down as matter of essential form that the magistrate shall himself take the examination. But at least, if, instead of doing

¹ Ersk. i. 2. 21: 'It makes no difference whether the debtor be a foreigner or a native, or whether he have contracted the debt within this kingdom or in another country.'

² Ray v Bellamy, 1763, M. 2051. Mrs. Bellamy having contracted many debts in London while she continued a favourite of the town, was obliged to leave England. She went to Holland, thence came to Scotland upon an engagement to perform at the theatre. An English creditor followed her; and having immediately after her arrival obtained a *meditatio fugæ* warrant, imprisoned her till Booth, the manager of the theatre, and Digges, became cautioners for her *de judicio sisti*. But the English creditor, displeased with this limitation of the security, brought the matter before the Court, in order to have it extended to caution *de judicatum solvi*. This the Court refused, but confirmed the warrant, and the caution to the extent already granted.

Similar to this was the case of Tasker v Mercer, 1802, M. Cautio Jud. Sisti, App. 2. Mercer had been engaged in extensive concerns in Ireland, and had incurred large debts. He came to Scotland; and one of his Irish creditors following him, applied for a warrant of *meditatio fugæ*, and it was granted, and confirmed by the Court. This decision is noticed in the report of a subsequent question which arose in the case. [Jowett v Woolley, 1797, Hume 403; Hobson v Foster, 1814, Hume 408; Kerslake v Clark, 1820, More's Notes on Stair 6; Crowder v Watson, 1831, 10 S. 29, aff. 16 Aug. 1832, 6 W. and S. 271; Muir v Collett, 1861, 23 D. 1229.]

³ Scudamore v Lechmere, 1797, *supra*, p. 452, note 5.

⁴ Jouet, etc. v Maidmont, 1797, Hume 403. It was, on

the one hand, stated that Maidmont had come to Scotland on a pleasure jaunt for the benefit of his wife's health; on the other, it was stated that Maidmont had taken refuge in Scotland from his creditors in England, and even that he had carried off and secreted the goods of his creditors. There is said to have been much division on the bench; and that the opinion was strongly maintained, that unless in circumstances of proved fraud, or escape from creditors, no such warrant could legitimately be granted in Scotland to hold a foreigner bound to appear here, who has no domicile here, and never expected to answer to the courts of Scotland a claim which he is willing to meet in his own country. See the case stated in Hutchison's Justice of the Peace, vol. i. p. 436. I have been informed, from the high authority of a judge who was counsel in the cause, that this was regarded as a special case; that, on the general ground, the great majority of the Court was of opinion that the warrant could not legally be granted, but that there were very strong grounds of suspicion that Maidmont had run away from his creditors in England, and that he would do so from Scotland as soon as they began to molest him. [Dickie v Dick, 20 Dec. 1811, F. C.]

⁵ Scott v Carmichael, 1775, M. 2057. In this case, however, it should be stated that there was much division on the bench. Some very able judges were against the decision, and it passed only by the casting vote of the Lord President Dundas.

⁶ Borthwick v M'Gibbon & Hamilton, 14 May 1813, F. C.; Anderson v Smith, 26 Nov. 1814, F. C.

⁷ Carrick v Martin & Co., 14 Nov. 1818, F. C.; aff. 26 July 1822, 1 Sh. App. 257.

so, he shall commit an office of such extreme delicacy to a clerk, or clerk's servant or assistant, he will be held guilty of a degree of negligence, which, however untainted with *mala fides*, will subject him to damages, if the circumstances have not been truly collected, and the debtor should thereby suffer.

SECTION II.

OF THE EFFECT OF THE WARRANT DE MEDITATIONE FUGÆ.

[565] As an extraordinary remedy against removal from the jurisdiction of the country, this warrant is not to be obstructed by any of the usual bars to the execution of diligence.

Common diligence cannot be executed on Sunday; but from this general rule the execution of a *meditatio fugæ* warrant forms an exception.¹

Upon the same principle, the sanctuary affords no protection against this warrant. The creditor cannot, indeed, drag his debtor from the sanctuary, so as to expose him to the diligence of caption; but he may have him secured within it in such a way as to prevent him from leaving the country.²

A personal protection will not shield a man from a *meditatio fugæ* warrant, if it can be shown that under that protection he is taking measures for his escape from the country. But no person can be liable to a *meditatio fugæ* warrant who is by privilege exempted from imprisonment, for this warrant is merely an auxiliary to the right of imprisoning the debtor.³

The effect of the warrant is to authorize the debtor's imprisonment in the common jail (or, if he be within the sanctuary, in the jail belonging to the Abbey) till he find bail to answer to the claim in any action to be brought within a specified term. The time for imprisonment or caution is generally six months, on the expiration of which term, without proceedings, the debtor is instantly liberated or his caution discharged. But there may be great oppression in keeping an action or diligence hanging over a man for so long a time, when, if incarcerated on caption, he might have been liberated on *cessio*. The magistrate ought, therefore, on the application for the warrant, to judge and refuse to extend the term beyond what seems reasonable in the circumstances. A creditor, however, cannot be deprived of the benefit of his caution on the ground of his having abused the time allowed, by unnecessary delay in his proceedings.⁴

There is an essential difference between the imprisonment upon this warrant and imprisonment for debt. The object of the latter is to force the debtor by confinement to pay the debt, or to disclose those funds which the law presumes him to have concealed; the object of the former is merely to secure the person of the debtor, that he may not escape from the reach of common diligence. The magistrates may therefore indulge with what degree of liberty they please a person confined upon a warrant of *meditatio fugæ*. All that the creditor can require of them is, that his debtor's person shall be produced in

¹ *Kemp v his Crs.*, 1786, M. 8554. The Court was unanimously of opinion, that as the imprisonment was founded on an alleged intention of defrauding the creditors by fleeing to another country, it might proceed at any time. *Blair v Simson*, 1821, 1 S. 107. Blair had an estate in Berwickshire. Diligence being out against him, he took lodgings in the town of Berwick, where he lived during the week, went home every Sunday morning, and left Scotland in the evening. He was arrested on a *meditatio fugæ* warrant on Sunday, and on Monday morning the caption was executed against him. The Court unanimously held the proceeding regular.

² *Park, etc. v Bennet*, 1787; confirmed by the opinion of the Court in *Wright v Niblie*, 1793. [*M'Ra v M'Cartney*, 1832, 10 S. 300.]

³ [Hence this remedy cannot be legally used for a debt of less than £8, 6s. 8d., for which the debtor cannot be incarcerated. *A B v C D*, 6 June 1843, 5 D. 1116; *Marshall v Dobson*, 18 Dec. 1844, 7 D. 232.]

⁴ *Gorman v Hedderwick*, 1817, 5 S. 291, N. E. 271. [See *Waddell v Russell*, 1808, Hume 406; *M'Callum v M'Callum*, 1803, Hume 403; *Chalmers v Smith*, 1809, Hume 407; *Horne v Smith*, 1823, 2 S. 500.]

judgment when called for. The magistrates do, indeed, run the risk of the debt by any indulgence: they become cautioners for the debtor should he escape, but if he be produced on demand it is enough.¹ In England the same distinction is admitted between the [566] close confinement required where a debtor is imprisoned in execution, and the mere custody of the defendant's person in imprisonment on mesne process. In the latter, the sheriff, where he has confidence in the person against whom the writ is directed, takes the responsibility on himself to present the defendant in court *ad respondendum*, and enlarges him.²

The only method by which the debtor against whom this warrant is issued can escape imprisonment is by finding caution. The next point of inquiry should therefore be, What is the nature and extent of that caution? But this is a subject which has already been discussed.³

SECTION III.

OF CLAIMS OF DAMAGES ON MEDITATIO FUGÆ WARRANTS.

The *meditatio fugæ* warrant being a legal remedy against the evasion of justice on the one hand, and on the other repugnant to the common course of the law, and capable of being made an instrument of oppression, damages may arise to the creditor or to the debtor, for which the law must provide a remedy.

As to the DEBTOR: This warrant is not to be issued without very careful precaution against injustice; but it is not merely by precautions that the law protects a debtor against the wanton indulgence in proceedings so oppressive.

The proper remedy of the debtor is an action of damages against the private party.

And, 1. Where there is no debt due, the person applying will be liable in damages.⁴ 2. If his statements are false in regard to the circumstances on which his suspicions were said to rest, and if he has sworn to those facts without the debtor being able at the time to refute them, he will be liable in damages for the injury resulting.⁵ 3. The creditor will also be liable in damages for apprehension, although his proceedings have not gone the length of a warrant for imprisonment as *in meditatione fugæ*.

The debtor may also in certain cases have a remedy against the magistrate, but it is only where he is guilty of authorizing this warrant *in mala fide*, or irregularly. And, 1. If

¹ *Gordon v Wellis*, 24 Jan. 1786, M. 11756. A creditor attempted to subject magistrates, upon the Act of Sederunt, 14 June 1671, for having permitted a debtor imprisoned on a *meditatio fugæ* warrant, to go at large for a short time; but the Court found the jailor unblameable.

In *Brown v Mags. of Lanark*, 1792, M. 11763, a debtor imprisoned for theft was arrested in prison upon a warrant *de meditatione fugæ* by one of his creditors. He escaped from jail, but was afterwards taken. The creditor, however, chose to make a claim under the Act of Sederunt against the magistrates. The Court had no doubt that the Act was quite inapplicable. It was observed on the bench, 'that the distinction between imprisonment on ultimate diligence in order to enforce payment, and on a warrant *de meditatione fugæ*, is well founded. The Act of Sederunt, which is merely declaratory of the common law, applies only to the former.' [Magistrates of burghs are not now liable in their corporate character for damages for the escape of prisoners. 2 and 3 Vict. c. 42, sec. 18; 23 and 24 Vict. c. 105. *Lamb v Mags. of Jedburgh*, 1865, 3 Macph. 1105.]

² 3 Blackst. 290. [3 Stephen 592.]

³ See vol. i. p. 397 et seq.

VOL. II.

⁴ In *Laing v Watson & Mollison*, 1789, M. 8555, aff. 3 Pat. 219, damages were awarded against the magistrate for issuing a warrant upon an application supported merely by a general oath that the debtor meant to leave Scotland, or to go to another part of the country. [*Mantle v Miller*, 1856, 18 D. 395. The pursuer of such an action is not bound to put in issue malice and want of probable cause. *Ford v Muirhead*, 1858, 20 D. 949; *Carne v Manuel*, 1851, 13 D. 123. Malice and want of probable cause must in general be inserted in an issue against the magistrate granting the warrant. *Carne v Manuel*, *cit.* And these cases seem to show that the propositions in the following paragraph are too broadly stated. Although a magistrate in some early cases has been held liable on the grounds stated, they would now in all probability only avail so far as they lead to a reasonable inference of malice and want of probable cause. But the magistrate has been held liable in damages for gross irregularity in the procedure. *Pollock v Begg*, 1829, 8 S. 1. In *Cowan v Begg*, 1833, 11 S. 999, damages were awarded against the agent who obtained the warrant.]

⁵ An illustration of this occurred in *Laing v Watson & Mollison*, *supra*.

the magistrate grant the warrant on a general oath, without requiring circumstances to be stated, he will be answerable. 2. If, instead of taking the examination himself, he delegate an office of such extreme delicacy to a clerk, he will be exposed to the risks already stated. See above, p. 455. 3. If he grant the warrant where the debtor is only to remove from one part of the country to another, or to retire to the sanctuary, he will be liable. Or, 4. If he grant a warrant where a soldier or sailor is on his way to join his ship or regiment on duty. But, 5. Where a magistrate judges fairly, and to the best of his powers judicially applied to certain circumstances proved before him, he will not be liable in damages, any more than in ordinary cases where he is called upon to judge of evidence.¹

[567] As the debtor has his remedy against the illegal or oppressive use of this diligence, so has the CREDITOR, where the warrant has illegally been refused. And although a magistrate, who forms his judgment to the best of his ability, will not be liable; yet if he obstinately refuse a warrant, where the *meditatio fugæ* is sworn to, and justified by manifest proofs of an intention to escape, the subsequent escape will expose him to a claim of damage.

CHAPTER III.

OF PROTECTIONS AGAINST IMPRISONMENT, BY SANCTUARY, PRIVILEGE, OR JUDICIAL AUTHORITY.

ALTHOUGH imprisonment for debt has grown up into a right upon which every creditor is entitled to insist, the law acknowledges several ways in which the debtor may be protected against it. These exemptions it is the object of this chapter to explain. They are of three kinds:

1. By personal privilege.
2. By privilege of time or place. And,
3. By personal protection.

SECTION I.

OF EXEMPTION FROM IMPRISONMENT BY PERSONAL PRIVILEGE.

Under this title may be comprehended not only the privileges which are conferred upon particular orders of men, but those exemptions also which Nature herself points out in the case of infants, and of those who are weak in intellect.

1. OF INFANTS, AND OTHER INCAPABLE PERSONS.

A person under age, or *non compos mentis*, though incapable of personal obligation, may yet in several ways become liable for debt. In consequence of debts, for example, burdening a succession, to which an infant may by his tutors or curators have entered, diligence may proceed against his estate, but against his person there can be no proceedings. Personal execution is not permitted against those incapable of acting for themselves. Common humanity, as well as the principle upon which the law of imprisonment was introduced, forbid this punishment to be inflicted upon persons incapable of rebellion or disobedience, and unable alike to conceal or to disclose the funds of payment. All that is

¹ [See preceding note.]

harsh and personal in legal execution is in such cases taken away, and nothing is left to the creditor but those powers of attaching the estate which are necessary for the purposes of justice.¹

Although at a very early period personal diligence was in Scotland issued against pupils (with whom may be classed all who are incapable of acting for themselves), this diligence always stopped short of imprisonment. The oldest case upon the imprisonment of minors is reported by Colville, where it was found that a pupil cannot be imprisoned for his father's debt.² It was afterwards decided that a minor at school might be put to [568] the horn, but that his person could not be apprehended with caption.³ In the close of the year 1695 the last case occurred that is to be found in our books on this point, and there is every reason to believe that it was in consequence of this case that the statute was made prohibiting the imprisonment of minors.⁴

In the Parliament of September 1696 a statute was passed, enacting 'that no minor within the years of pupillarity shall be liable to caption or warding for any debt or civil cause; but declaring all such minors, in respect of their nonage, and during all their pupillarity foresaid, to be exempted and freed from the same.'⁵ This has not the appearance of a declaratory law; but both the reason of the thing, and the decisions of the courts, proceeding upon the common law, seem to point it out as declaratory; and the principles of the common law, which it goes to recognise in the case of pupils, are precisely applicable to the case of all lunatics, idiots, and all who by accident or birth are incapable of acting for themselves. Whether disobedience and rebellion to the king be taken as the principle and foundation of the law of imprisonment, or the coercion of imprisonment as necessary to force the discovery of funds which law presumes to be concealed, no man who is incapable of acting—of committing the rebellion or the fraud on the one hand, or on the other of understanding the coercion, and acting in consequence of it—can be a proper subject for such diligence.

That this exemption on account of incapacity is no bar to rendering the person bank-

¹ In the French law minors were exempted from the *Contrainte par Corps*. 'Il est de jurisprudence,' says M. Pothier, 'que les mineurs pour dettes civiles et hors le cas de dol, sont aussi exempts de la contrainte par corps.' (*Traité de la Procédure Civ.* 287. See also Denizart, *Col. de Jurisp.* vol. i. 696.) But if they had entered into merchandise or business on their own account, they were reputed majors in that respect, and subject to imprisonment.

² Johnson, 1577, M. 8906.

³ *Somerville v Somerville's Crs.*, 1624, M. 8906. Samuel Somerville, burgess of Edinburgh, was cautioner for his brother Patrick. He died, and left an infant daughter; and a charge having been given upon the bond against the daughter, as representing her father, after she had attained the age of fourteen she presented a bill of suspension. The Lords 'suspended all personal execution of caption, and warding of her person for the space of a year, after the expiry whereof they would consider whether any further prorogation could be granted, without prejudice to all other lawful execution against her lands and goods.'

⁴ *M'Kenzie v Scott*, 1694, 1 Fount. 633, 4 B. S. 282. A fine had been imposed upon Sir William Scott of Harden, and was paid (in consequence of a donation from the Crown) to Sir George M'Kenzie of Rosehaugh. This was reversed by Parliament, and upon the decree of Parliament Harden did diligence for restitution. He took out a caption against Sir George's son, a boy of nine years of age, and was met with a suspension upon the ground of minority. The case was

argued for the pupil upon what was said to be the common law of all nations,—'since restraint is penal, and a pupil who is not *doli capax* cannot incur it during his pupillarity, which continues till fourteen.' The Court had some difficulty in suspending a decree of Parliament; but finding upon perusal that the decree 'did not ordain all sorts of execution to pass, but only in common style; and as this was not to suspend the Parliament's decree, but only to regulate and explain the manner of executing the same, which they might do by adjudging, pointing, arresting, and all sorts of diligence; but the putting it to execution, by apprehending the child's person, was against the common law, therefore they found no such caption could pass against him during his pupillarity. But, to pay all just deference to Parliament, they sisted execution by caption till his pupillarity expired, or the sitting of the next session of Parliament, which of them first occurred; and that they might proceed *causa cognita*, they ordained the time of his birth and age to be proven, that it might be known when this sist would expire, by his attaining the age of fourteen. But if the Parliament should happen to sit before that time, then they (the suspenders, I suppose) were to apply to them to stop caption during that time, wherein all laws give him a personal privilege on the accounts foresaid; as also, that the education of youth might not be impeded.'

⁵ 1696, c. 41. [This does not extend to minors above pupillarity. *Thomson v Ker*, 1747, M. 8910, Bankt. i. 7. 47.]

rupt, so as to operate to the equalizing of diligence against his estates, has been already pointed out.¹

2. PRIVILEGE OF PARLIAMENT.

Privilege of Parliament protects all Peers of the realm, and all members of the Commons House of Parliament, from arrest.

[569] 1. All PEERS, whether English, Scottish, or Irish, and whether Peers of Parliament or not, are privileged from arrest. By the 23d article of the Treaty of Union,² *first*, All the privileges of Parliament possessed by English Peers are communicated to the sixteen elected Peers of Scotland; and, *secondly*, All other Peers of Scotland are declared to have the same privileges with the English Peers before the Union, except the privilege of sitting in the House of Lords, and the privileges thereon depending. And it was the settled law of England, that the dignity of the Peerage conferred a freedom from arrest.³ The widow of a Scottish Peer has been found entitled to the privilege.⁴ Irish Peers are, in consequence of the Union with Great Britain, entitled to the same privilege.⁵

2. MEMBERS of the HOUSE of COMMONS enjoy, as one of the privileges of Parliament, freedom from arrest during the sitting of Parliament, and for forty days after every prorogation, and forty days before the next appointed meeting. This, according to the usage, is equivalent to a protection during the subsistence of Parliament; for it is seldom prorogued for more than fourscore days (or three months) at a time.

3. Formerly it was a part of the privilege of Parliament, that the domestics, lands, and goods of the members were free; but this is now abolished.⁶

SECTION II.

OF PROTECTION FROM IMPRISONMENT BY PRIVILEGE OF TIME OR PLACE.

The privilege of holidays and of the sanctuary, however grateful to unfortunate debtors, and however fit under proper restrictions to serve wise and expedient ends, are not, as some have affected to consider them, legal remedies invented for those purposes of humanity or of policy, but accidental limitations merely of the legal right of imprisonment.

1. OF HOLIDAYS.

In Rome, under the Christian emperors, Sunday was consecrated from all labour, and from all legal proceedings.⁷

Before the Reformation, the execution of caption (which had been introduced or sanctioned by the authority of the church) does not appear to have been interrupted by Sunday. But both in England and in Scotland, the strict observance of Sunday was enjoined by the Legislature. In Scotland, by 1644, c. 14, 'All execution of letters of caption, raised for civil debts, is discharged in any time of the Lord's day, or upon ordinary week days appointed for solemn fast or thanksgiving, during the time of divine service.'⁸ This Act was rescinded, but the rule thereby established has been in observance ever since.⁹ On Sundays, and on general fast-days appointed by Government, no warrants of imprisonment can legally be executed. But it would appear that the rule does not apply to parochial fasts.

¹ See above, vol. ii. p. 157.

² 5 and 6 Anne, c. 8, art. 23.

³ See Comyn's Dig. *voce* Dignity, f. 3; also Privilege and Parliament. [2 Stephen's Com. 356.]

⁴ M'Donald, 1756, M. 10031.

⁵ 39 and 40 Geo. III. c. 67, art. 4.

⁶ 10 Geo. III. c. 50.

⁷ Cod. lib. 3, tit. 12, De Feriis, l. 3. 7. 11.

⁸ The English statute is 29 Charles II. c. 7. See also 3 Blackst. 290; Crompton's Prac. of K. B. and C. P. p. 12; 29 Charles II. c. 7.

⁹ Oliphant v Douglas, 1663, M. 15002, where an arrestment found null as a judicial act *auctoritate judicis*.

So of an inhibition of old date, proved by almanacs and calendars to have been executed on Sunday. Forbes v E. of Aberdeen, 1702, M. 15003.

The sanctity of the day affords no security to a criminal, or against a *meditatio fugæ* warrant, otherwise the ends of justice would be frustrated.¹

2. SANCTUARY.

In England, every man's house is his sanctuary against the common diligence of the law for debt, either by arrest or *capias*. But as executions are the life of the law (as the English lawyers speak), this general right admits of these exceptions: 1. The king's debtors are not protected in their own house; the sheriff may break in. 2. When the sheriff or bailiffs have got into the house, they may take the debtor from it. 3. Upon repeated *capiases* and outlawry, a *capias utlagatum* may be issued, in virtue of which the sheriff may break in; and it would appear that this is competent upon mesne process.² And, 4. A *capias* may be issued from King's Bench or the Chancery, for forcing a man to find sureties to keep the peace; which, by a fiction similar to that which made trespass a ground of civil jurisdiction, is sometimes employed to effect execution in common debts.

In Scotland, also, every man's house is his sanctuary against the original imprisonment under the merchant law; an act of warding being no legal warrant for opening a door. But against the caption a debtor's house is no protection to him. He is an outlaw and a rebel; a contemner of the law, against whom the executive power is let loose to compel obedience: and the letters of caption contain an express warrant of open doors.

But there is one sanctuary, the precincts of Holyrood House, to which every debtor in Scotland may flee for protection against imprisonment.

There have been two kinds of sanctuaries in modern Europe: one arising from religious considerations, and another from respect for the person of the king.

In Scotland, not only the respect which is due to the person of the sovereign, but the alarming consequences of civil broils in the palace, and their frequency in Scotland, bars the execution of personal diligence within the king's palaces. Religious sanctuaries lost much of their usefulness as the spirit of private revenge yielded to the power of regular government; and in their stead was introduced a mercenary and most mischievous trade of protections, carried on by churchmen for their private advantage, and the benefit of their order. The sanctuaries which in the reign of Alexander II. were useful or expedient, had by the middle of the fifteenth century become the refuge of deliberate murder. The Legislature interposed to check the evil, and ordered a trial by jury upon murderers who had taken sanctuary, to determine whether their crimes had been forethought; in which case they were deprived of the benefit of sanctuary.³ But it was necessary only two years afterwards to renew and enforce this law.⁴ In 1535 the Legislature still found reason to complain that churchmen acquired rights to the keeping of sanctuaries, and bestowed illegal and improper protection upon trespassers; and it was required that proper bailies should be chosen, and booked with the Justice-Clerk, and that it should be their business to deliver trespassers to the judges before whom they were to be arraigned. There was thus a continual struggle against the clergy to maintain the authority of the law. The Reformation abolished all religious sanctuaries in Scotland. 'Now,' says Sir George M'Kenzie, 'the churches being a sanctuary or girth is in desuetude, since Popery was [571] abolished; though the king's palaces are still sanctuaries in all nations, if princes be dwelling therein. Yet,' he continues, 'I think they should not be sanctuaries if they dwell

¹ *Kempt v his Crs.*, 1786, M. 8554. Gavin Kempt tried the question in a case of *meditatio fugæ* warrant; but the Court 'were unanimously of opinion, that as the imprisonment was founded on an alleged intention to defraud creditors by flying to another country, it might proceed at any time;' and the imprisonment was accordingly found legal.

² 3 Blackst. 284. See 2 Sha. 87, pl. 78. [Arrestment upon mesne process is abolished by 1 and 2 Vict. c. 110, except upon evidence of *meditatio fugæ*.]

³ 1469, c. 43.

⁴ 1471, c. 43.

not there, except that allowance be granted them either by express concession or prescription.¹

The privilege of sanctuary was claimed for many places formerly; but now the Abbey of Holyrood House is the only spot in Scotland privileged against the execution of diligence. The mint, or 'cuinzie-house,' once a sanctuary, is now no longer so, since there is no coinage in Scotland. The Castle of Edinburgh was once also thought to be a sanctuary; but on the question being brought to judicial discussion, it was found entitled to no privilege.²

The privilege of Holyrood House may be fairly traced to either of the two grounds on which such privileges rested in former times; for it was the palace of our kings, and adjoining to the palace there was a very ancient religious establishment.³ The privilege stands most firmly perhaps upon that prescription which Sir George M'Kenzie, in the passage quoted above, requires for maintaining the privilege of any spot after the original cause of its sanctity had ceased.⁴ But in a recent case it was necessary to discriminate precisely on what ground the privilege rests. The question there related to the execution of poinding in the apartments of the palace; and the House of Lords, reversing the judgment of the Court of Session, held the palace to be privileged as the royal residence.⁵

The sanctuary affords protection against imprisonment for debt only. There are two classes of cases in which it is of no avail: in one, the person claiming the privilege may be carried forth to a common jail, and exposed, of course, to the diligence of all his creditors; in the other, though the debtor cannot be dragged forth from the sanctuary, the creditor is entitled to have him confined in the prison of the Abbey.

EXCEPTIONS.—1. To a criminal the sanctuary affords no protection. The statute law forbade the bailies of sanctuaries to protect trespassers, but ordered them to put them forth from the sanctuary to the vengeance of the common law.⁶ But it does not appear that ever the palaces of our kings afforded sanctuary to criminals; and fraudulent bankrupts are criminals, to whom the sanctuary is no protection.⁷

2. To a person who is under diligence for the performance of a fact within his own power, the sanctuary is no protection. He is a criminal who unjustly deprives another of his right; not an innocent and unfortunate debtor, taking refuge against a calamity which [572] he cannot otherwise avert. The bailies of the Abbey may exclude such a man from the sanctuary, as a proper object of the diligence of the law.⁸

3. The king's own debtors have no privilege within the Abbey: for this, says Mr. Erskine, 'would be in effect to use a privilege which arises merely from the respect due to the sovereign, against the sovereign himself.'⁹

¹ Observations, 3 James III. c. 36, p. 69.

² *M'Kay v Campbell*, 1714, M. 14305.

³ The Abbey appears to have been founded by David I. in 1128; and in 1528 James V. erected at the south-west corner of the Abbey a royal palace.

⁴ In the reign of Charles II., when much dissatisfaction prevailed concerning personal protections, the Court of Session had occasion to consider the effect of the sanctuary; and 'the Lords,' as Dirleton says, 'on debate among themselves, thought that the Abbey, being His Majesty's house, should not exempt nor protect any person against His Majesty's laws, and the execution of letters of caption; and they recommended to the keepers of the Abbey to put him out, and not to shelter him there.' Dirleton 52. But this injunction does not appear to have been observed, for the Abbey was still considered as affording protection, and the prescription in favour of its privileges has run on uninterruptedly to the present day.

⁵ *E. of Strathmore v Laing*, 1826, 2 W. and S. 1. [See *Att.-Gen. v Dakin*, 4 Law Rep. H. L. 338.]

⁶ 1535, c. 23.

⁷ In the case of *Park & Brown v Bennet*, 1787, M. 7, a *meditatio fugæ* warrant was applied for against Bennet, who had taken sanctuary in the Abbey; and on his being unable to clear himself from the suspicion of *meditatio fugæ*, he was committed to the Abbey jail. But afterwards the creditors, intending to bring Bennet to trial as a fraudulent bankrupt, applied for a warrant to bring him from the Abbey and imprison him in a sufficient jail; and warrant was granted accordingly, and confirmed by the Court.

⁸ *Turner v Ross*, 1709, M. 11802. In a case already referred to, p. 447, the question was, whether the Act of Grace was applicable to an obligation *ad factum præstandum*, and the Court found it inapplicable: 'for they considered that the Abbey is made a sanctuary for debtors; yet if any be decerned for exhibition of papers they have no privilege, but the Bailie of the Abbey may expel them, till they obey the will of the charge and produce the papers.'

⁹ *Ersk. iv.* 3. 25. Lord Fountainhall, in a ms. quoted by Lord Elchies, mentions an order of Council, 14th March 1678: 'That the Abbey should not defend any one who were

4. In order to entitle a debtor to the privilege, it is not enough that he shall be within the precincts. That, indeed, is the protection to him for the space of twenty-four hours, but not longer. He must have his name entered in the record of the Abbey Court; and on this entry of his name, a certificate of protection is granted to him, subscribed by the bailie.¹ He is then under the protection of the baron-bailie, whose concurrence is necessary to the execution of all warrants within the sanctuary.²

5. The protection is available only within the precincts; but if a debtor leave the sanctuary and return, he is still protected, unless he has been away during a space which may ground the presumption of his having abandoned it; in which case he must, by the usage, again enter his name and obtain a new protection. The *notandum* at the foot of the protection specifies a fortnight as the time, and that is agreeable to the usage. But although, strictly speaking, the privilege may have expired, yet if the debtor have contracted new debts, leading the furnisher to believe that he is no longer under privilege of sanctuary, the Court will not hear him plead the privilege against such creditor.³

6. As the privilege of the sanctuary, however it may have originated, or whatever its progress may have been, is acknowledged and maintained by law, no man who has acquired the privilege can be deprived of it either by force or fraud. 1. Wherever his presence is necessary for the purposes of justice, the Court of Session will grant a warrant for bringing him out, or a personal protection as his guard. But whether a personal protection be granted expressly or not, it is necessarily implied in a warrant for bringing a debtor from the sanctuary.⁴ 2. Where the debtor is insidiously drawn or kept out of the sanctuary, [573] the creditor guilty of the fraud is barred from taking advantage of it.⁵

owing to the king for excise customs, feu-duties,' etc. The Court had refused to recommend to the Bailie of the Abbey to give his concurrence to diligence for duties to the Crown. *Munro v M'Millan*, 1736, Elch. Abbey, No. 1.

¹ The protection runs thus: 'G. R. At Holyroodhouse, the day of . . . The which day A B was, and hereby is, admitted and received to the benefit and privilege of the sanctuary of Holyroodhouse, whole bounds and precincts thereof; and he was, and hereby is, protected therein accordingly conform to law. (Signed) C D. Extracted from the records of the sanctuary by me, clerk of Holyroodhouse, E F.

'N.B.—This protection to have no force in case of the debtor's returning to the sanctuary after having left it for fourteen days.'

² *Grant v Donaldson*, 1779, M. 5, Hailes 816. [See *M'Kellar v Livingston*, 1861, 23 D. 1269.] There is a distinction worth observing between this case and another. The Court found it not necessary to infer bankruptcy under the Act 1696, c. 5, that the debtor should be booked. *Dickson v Mitchell's Reps.*, 1751, M. 4. But Lord Bankton properly distinguishes between such a question and the effect of the sanctuary. Bankt. vol. iii. p. 15. And this distinction received the sanction of the Court in *Grant's* case.

³ *Berry v Bowes*, 24 Feb. 1820, F. C.

⁴ In a case which was brought before the Court, but which never came to judgment, a young man in the Abbey for debt came abroad on Sunday; and having been involved in a drunken quarrel on the street, he was next day brought out of the sanctuary, in consequence of a warrant, as guilty of rioting, and obliged to find bail for his appearance. When this matter was settled, a creditor executed his diligence against him, and put him in prison. A bill of suspension and liberation having been presented, some of the judges were of

opinion, that unless this was all a concerted business, for the purpose of laying hold of the debtor, the arrest was effectual. But the prevailing opinion was, that the privilege of the sanctuary is a legal privilege, of which a man is not to be violently deprived; that when any warrant is executed against him for the purposes of justice, he is under the protection of the Court which brought him out, and must, after finding caution, be reinstated in all the rights which he formerly enjoyed. This case was before the Court in summer 1799.

This opinion is agreeable to the ancient practice of the country, as appearing from Sir J. Stewart's *Answers to Dirleton*, *voce* Protection, p. 228. In the case of Sir J. Urquhart, 7 Dec. 1669, M. 10470, the Court granted a protection against all hornings he should specify, he having been cited to appear before the Council for alleged riots. [*Paton*, 8 March 1836, 14 S. 679.]

⁵ *Halyburton v Stewart*, 1709, M. 2. Here a debtor complained to the Court: 'That having come to Edinburgh upon a Sunday, to treat with Mr. Stewart, one of his creditors, about his satisfaction and security, and his own liberation, he did trepan him, and ensnare him, by pretending much kindness and inviting him to supper, and then protracting the time in overture and terms of accommodation till the town clock struck twelve at night, and then he had a messenger prepared to take him to prison, by a most illegal and treacherous practice,' etc. To all this it was answered: 'That the debtor staying till the Monday morning, there was neither law nor reason to stop diligence.' The Lords 'allowed trial to be taken of the time of his being apprehended, and the manner how he was detained; or if he offered to go back to the Abbey, and was enticed to stay, or hindered to go out.'

In *Archer v Law*, 1791, M. 8894, a messenger employed to execute a caption against a debtor in the sanctuary, wrote out a false citation, citing him to appear before the justices of

PRISON IN THE SANCTUARY.—There is a prison within the sanctuary, in which the debtors who have taken refuge may be imprisoned for debt there contracted, and in which those who are *in meditatione fugæ* may be confined (without forfeiting their immunity from caption) till they find bail to remain in the country.¹

The prison of the Abbey has sometimes been considered as the prison originally belonging to the burgh of regality of Canongate. But there seems to be no ground for holding this as the origin of the Abbey Prison, or of the jurisdiction of the bailie. That jurisdiction rather appears to have been accessory to the office of hereditary keeper of the palace. But however it originated, it is certain that by very long usage the jurisdiction of the bailie, and the right of holding a prison, has been established. The bailie holds his office from the Duke of Hamilton, the hereditary keeper of the palace; and he has jurisdiction in all civil debts contracted within the precincts.² To the effect of giving decree for the debt in diligence raised on a bill, and for the expense of the diligence, this was held a competent jurisdiction by one judgment; but the case was settled out of court.³ This decision may be considered as sanctioned in a later case, where a creditor having done diligence by horning [574] and caption on a bill granted by a person resident in the Abbey, was found entitled to a warrant to imprison him in the Abbey until he should make payment of the contents of this bill and interest.⁴

In this prison of the sanctuary, all debtors who have contracted debt within the precincts may be confined by warrant of the bailie; and while there, 1. They are entitled to the common law privilege of a bill of health, as fully as if confined in any common jail. 2. They are entitled to the benefit of the Act of Grace; and, indeed, the subjoined list proves that in practice they receive the benefit of it.⁵ But, 3. They are not entitled to the benefit of *cessio*; at least not without renouncing the privilege of sanctuary.⁶

The sanctuary would be little else than an instrument of fraud, if it were possible for a debtor to take refuge there while planning his escape from the country, to the effect of being protected against all *meditatio fugæ* warrants. Such warrants may therefore be put to execution within the sanctuary; but in such a way as not to deprive the debtor of that protection to which, by taking refuge there, he is entitled. He will not be taken from the sanctuary, but he will be imprisoned within its jail (as he would, if at large, have been imprisoned in any common jail) till he shall find security not to leave the country.⁷

peace; which the debtor having obeyed, the messenger seized him. This was held an illegal device, and the messenger was held liable in damages and expenses.

¹ In *Cockburn of Clerkington*, 1708, M. 1, the question of the right to a prison in the Abbey was also taken notice of. 'Some doubted (says Lord Fountainhall) of their having a prison, and thought he should have been transported to the Canongate or Edinburgh tolbooth (jail); but then his other creditors might have arrested him, which they cannot so well do in the Abbey, which is a sanctuary.'

Another occasion on which the right of a prison within the Abbey was called in question, was where an action was brought against the Abbey jailor for allowing a debtor imprisoned on the bailie's warrant, for a debt within the sanctuary, to go free, but all debts were overruled; for, says Lord Kilkerran, 'such prison for debts contracted within the Abbey has been in use by long practice, and the same doubt was formerly made and overruled. The Court thought that where an escape happened by the fault of the jailor, he would be liable for the debt as damage; and they allowed a proof before answer' (before judgment) 'as to the usual way of keeping prisoners incarcerated within the Abbey for debt

there contracted.' *Husband*, 1749, Kilk. 502. [*M'Ra v M'Cartney*, 1832, 10 S. 300.]

² The competency of his jurisdiction was tried in the case of *Cockburn of Clerkington*, 12 June 1708, where a suspension of the decree of the bailies, pronounced for the price of victuals furnished to a debtor within the Abbey, was refused.

³ *Townly v Perry Ogilvie*, 1810, F. C.

⁴ *Berry v Bowes*, 24 Feb. 1820, F. C.

⁵ List of persons confined within the jail of the sanctuary, and liberated on the Act of Grace:—1. David Lindsay, petition for liberation presented 17th January 1775; 2. Elizabeth Jameson, petition presented 20th August 1775; 3. James Watson, petition 22d January 1776; 4. George Scott, petition 30th March 1794; 5. A. M. Drummond, petition 22d April 1794.

⁶ See *Dunlop's case*, 1799. [*Bayley v Swan*, 1830, 14 S. 619.] If a debtor were to apply to be transferred to the Canongate jail, I have no doubt that he would be found entitled so to do, to the effect of getting his *cessio*.

⁷ This doctrine was clearly laid down by all the judges in *Scudamore v Lechmere*, 1797, M. 8559. At first it was supposed by the judges that Lechmere had been apprehended

SECTION III.

OF PERSONAL PROTECTION AND SUPERSEDERE.

At one time the granting of personal protections, or, as they were called, *supersederes*, was a grievance to the creditor, and an interruption to the fair course of the law. The personal protection of the present day is an authorized interposition of the judicial power for the furtherance of justice.

In former times protections were in almost every kingdom of Europe issued by the royal authority to monasteries and burghs, and even to individuals, taking them under the king's immediate guardianship against all oppressors. Those protections were a source of revenue, and an encouragement to loyalty. They became less necessary as the hands of Government grew stronger. But still the king seems to have retained the practice of granting protections of another kind—protections against the execution of the law itself. With these protections favourites were gratified, and the royal influence extended. A privilege was assumed of keeping other creditors at a distance, till the debts of the [575] Crown were paid.¹

In England at common law it was held, 'That the king might take his debtor into his protection, so that no one might sue or arrest him till the king's debts were paid; but by the statute 25 Edward III. st. 5, c. 19, notwithstanding such protection, another creditor

within the precincts; whereas he had been in the practice of walking about at large in the city, and was found in the street of Edinburgh when he was arrested. But this led the judges to speak of the question, and they were all perfectly clear that no debtor can on such a warrant be brought out of the sanctuary—that nothing but a crime can forfeit that privilege to him; whereas a *meditatio fugæ* warrant proceeds at the worst upon the belief of a crime being intended, and that a *meditatio fugæ* warrant can authorize imprisonment only within the precincts till caution be found not to leave the country.

The case of *Park & Brown v Bennet*, already mentioned, may illustrate also the present point, since all that the creditors could obtain by the *meditatio fugæ* warrant was imprisonment within the Abbey. See above, p. 462, note 7.

¹ In France the power of issuing royal protections against legal execution had been very long established, under the name of 'Lettres de Repit.' The courts of law had at one time indeed assumed a power of granting those protections; and M. Savary, who wrote in the end of the seventeenth century, in treating of repits, says that they might be obtained either by *lettres de repit du roi*, or from the Parliaments by *defences generales*. Savary, vol. i. p. 300. But this opinion is opposed by the best and latest of the French lawyers, who clearly lay it down that the courts of law had no power but in confirming voluntary respites granted by the creditors, or in suspending execution till the king's letters should be registered. Pothier, *Traité de la Procéd. Civ.* pp. 302, 303.

The law of *lettres de repit* was, about the middle of the last century, regulated by several ordinances. 1. The only occasions on which the *lettres de repit* could be granted were accidental misfortune by fire, shipwreck, etc., so great and serious as to incapacitate the debtor from paying his debts without some indulgence; but still they could not be applied

for against the payment of aliments, rents, wages, funeral expenses, etc. 2. It was necessary to accompany the application with evidence of the misfortune, and with a certified state of the debtor's property, moveable and immoveable, and of his debts. This state he was obliged to send to the public register, with his books and papers, if he was a trader, merchant, or banker. 3. The letters were addressed to a royal judge, in the district where the debtor lived, requiring him to call the creditors, and give such a respite as he might judge reasonable, but not beyond five years without consent of two-thirds of the *creanciers hypothécaires*. 4. The intention of the indulgence was to give the debtor an opportunity of selling his property and drawing in his debts, in order to pay his creditors; and their effect was to give a protection to the debtor's person, and his furniture, and moveables of personal use from all execution, leaving to the creditors the power of arresting the other moveables, and also the immoveable property, and having them sequestered but not sold, till expiration of the indulgence. And the creditors might either, at the registering of the letters, insist that the debtor should lodge, with a person named by them, the titles of the property in his state; or they might meet and elect a trustee, which being intimated to the debtor and the public, he could do nothing in selling his property or getting in his debts without the trustee's concurrence. And, 5. It was a necessary consequence of this indulgence that it inferred a kind of stain upon the debtor, incapacitating him from holding public offices in a city, or having an active voice in a community, etc., till the debts were paid off. Pothier, *Traité de la Procéd. Civ.* pp. 301, 303.

These protections had, however, gone so much into disuse in France, that it was a matter of some dispute among the French lawyers whether they were not to be considered as obsolete. They were all agreed that the obtaining of *lettres de repit* would be a very difficult matter in modern times.

might have proceeded to judgment against him, with a stay of execution till the king's debt were paid, unless such creditor would undertake for the king's debt, and then he should have execution for both.¹ The power of royal protection was also exercised to prevent the interruption of the king's affairs. 'The king,' says Blackstone, 'hath, moreover, a special prerogative, which is indeed very seldom exerted, that he may by his writ of protection privilege a defendant from all personal and many real suits for one year at a time, and no longer, in respect of his being engaged in his service out of the realm.'²

In Scotland the evils of royal protections were severely felt. As personal execution was introduced for the punishment of rebellion, the right which the king had from the first exercised of granting protections was in point of law natural and consistent. But so great in point of expediency had the evil become, that in 1587, during the reign of James VI., the Legislature interposed.³

[576] The Court of Session, and indeed all the Courts, the Privy Council, the Court of Justiciary, and the Exchequer, seem to have assumed a power of granting general protections as well as the king. In 1621 this practice attracted the attention of Parliament, and a statute was passed, in which the Legislature, 'understanding that there may sundry protections be sought by bankruptis and utheris who are addebted in great sums of money, whereby the execution due unto the creditor by the laws of the country, against the debtor, may be frustrate, to the great damage of the creditor; for remeid thereof statute and ordain, that hereafter the Lords of Session shall grant no protection from any execution due and competent against any man by the law; and declares, that if any shall be hereafter granted, the granter of the same shall be subject and liable of the law, to the creditor, for the sum from the which he has granted protection.'⁴ During the usurpation, the most remarkable measure relative to debtors, and connected with the subject of our present inquiry, was a proclamation, of which a copy is subjoined in the notes.⁵

¹ 3 Blackst. 289.

² *Ibid.* This was a power which had been quite abandoned in Queen Elizabeth's time, and was revived only in one instance by King William, to save Lord Cults in 1692 from being outlawed by his tailor.

³ 'Understanding the greit contempt to be done to his Hienes laws, and great hurt to his lieges, be passing of licences and supersederies, quilk dayly uses to be grantit to sick as by thameselfis, or their friends, hes credite of his Majesty, they being at his Hienes horn, either for causes of tressoun, or non-satisfeing of thair dett to thair creditours, or not obtemperand decreitis and charges; thairfor, etc. statuitis and ordanis, that no sic licences and supersederies be grantit in onie time cuming; and in cais onie happinis to be purchessit, declairis the same to be null of the law, and not admissible be onie judge, nor effectuall to the purchaser in onie ways; and ordanis all jugs within this realm to proceid and do justice to the parties, siclike, and in the samin manner, as gif the said supersederies had nevir been purchessit nor produceit.' C. 31, 3 Acta Parl. 450.

⁴ 1621, c. 13.

⁵ I do not know the history of this measure, or by whom it was proposed; but it contains views and touches principles which deserve attentive consideration. The paper was communicated to me by Thomas Thomson, Esq., the Deputy Clerk Register of Scotland.

'Tuesday, the 15th of April 1656.

'At the Council at Whitehall.

'Ordered by his Highness the Lord Protector and the Council, That for the relief of debtors who are willing to

satisfie their just debts, and for the moderating the rigor of comprysings and the severity of proceedings by creditors against debtors in Scotland, every debtor of Scotland who shall give in a list of his just debts, by himself, tutor, or curator, to the Commissioners for administration of justice to the people in Scotland, and shall make oath before them that he is not able to satisfie the same, either by money or other personal estate, and shall declare that he hath lands, tithes, or other real estate, and that he is willing that so much of his lands, tithes, or other real estate, shall be set out and allotted, as by indifferent persons to be appointed by the said Commissioners for administration of justice, for valuation of lands, tithes, or other real estate in every county, upon oath, shall be found sufficient to satisfie every creditor his just debt, principal, interest, together with necessary charges and expenses, as the same shall be allowed by the said Commissioners, and according to the priority of diligence of the respective creditors; and shall likewise declare that, according to the appointment of the said Commissioners, he will legally convey and assure the said lands, tithes, or other real estate so to be set out and allotted, unto his respective creditors, as aforesaid:

'That in such cases, and to such persons (as well principals as cautioners respectively), the said Commissioners are hereby empowered to grant suspensions for a convenient time, not exceeding one year after the date thereof, and to do all things requisite to the putting the premises into effectual execution; provided alwayes, that every such debtor, principal or cautioner, shall do and execute all things requisite for the perfecting the premises, at his or their charges and expenses

After the Restoration, the Act of 1621 was renewed in 1663, and the Privy [577] Council and Court of Exchequer included in the prohibition against the granting of protections, as well as the Court of Session.

But there is one kind of personal protection which is an essential part of the exercise of justice, and this power is by the above laws expressly reserved to all the judicatories, and to the Justiciary, viz.: 'When any person or persons are summoned and appointed to appear personally before them, to give order now, as they have been in use formerly to do, for suspending personal execution against the persons so summoned and appointed to appear, for such few days as they may come to give their appearance, and during their necessary stay, and some few days for their return; and that according as the said respective judges shall find reason, upon the particular application to be made thereupon.'

Thus the law respecting personal protections was gradually approaching to its true principles. The practice of royal and general protections was stopped by the hand of the Legislature; the arbitrary protections of the Privy Council and of the courts of law were also abolished; and no power of protection was left, but where the occasions of justice required a temporary suspension of diligence.

But strong as the legislative declarations were, they did not prove completely effectual in redressing the grievances of which the nation complained. Still general protections were issued, till even the Privy Council was ashamed of the enormity. 'The Council,' says Sir George M'Kenzie,² 'to prevent the granting of protections, whereby the private interest of the subjects was so much destroyed, and the execution of law eluded, did, by an Act in

respectively; and that the lands, tithes, or other real estate thus to be conveyed, shall be completely settled within one full year next after the granting of the said suspension; otherwise all benefit claimed or intended by these presents shall be null and void to the said person or persons, as if the same had never been granted; unless the said Commissioners for administration of justice shall find that such failure hath not been occasioned directly or indirectly by the debtors.

'Provided also, that these presents shall not be of force to stay any execution of any of the said creditors against the personal or moveable estate of any of the said debtors, whosoever it can be found at any time before the perfect conveyance and settlement of the lands, tithes, or other real estate, as aforesaid; nor shall it hinder any whose principal debts amount not to above the sum of one thousand marks Scots money, to have liberty to proceed to execution against the person of the said debtor, principal or cautioner, as well as against his or their personal or moveable estate, or, at their election, to have the benefit of these presents, and to come in with other creditors. It is also hereby declared and ordered, that all comprysings that have been laid and deduced against any debtor since the first of May 1652, shall be satisfied, as other debts, out of the debtor's lands, tithes, or other real estate, as aforesaid, as well for the principal sums and interest as necessary expenses bestowed by the compryser in the deducing the comprysing, and obtaining infestments of the superiors; and being thus satisfied, the said comprysings shall be *ipso facto* void and null.

'Provided always, where the lands, tithes, or other real estate of the debtor, principal and cautioner, is not sufficient to pay all his creditors, that then the said lands, tithes, or other real estate, shall be equally divided *pro rata portione* between all the said creditors, allowing only to such of them who have the prior diligence the said proportion respectively, in such places as they shall require it, and the necessary

charges they have been at in obtaining the said diligences; excepting out of these presents all comprysings whereof the legals are expired before the date hereof; and also all comprysings which have been laid and deduced before the first of May 1652, and all final transactions and agreements made betwixt creditors and debtors, and all rights given upon any such transaction and agreement.

'It is also hereby declared, that the lands, tithes, or other real estate of the debtor, which are nearest the usual dwelling of the creditor, and which lie contiguous in the Lowlands; or in case he have none, or not sufficient in the Lowlands, then such of his lands, tithes, or other real estate as lie nearest to the Lowlands, shall be first set out and conveyed as aforesaid, unless the creditors shall desire to have the same in the Highlands.

'Provided also, that no debtor who shall not seek the benefit of these presents within one year after the date hereof, shall ever thereafter be admitted to the same.

'Ordered by his Highness the Lord Protector and the Council, that the Council in Scotland do cause this matter to be published by proclamation in Scotland.

'W. JESSOP, Cl. of the Council.'

'Thursday, the 22d day of May 1656.

'At his Highness Council in Edinburgh,

'Ordered, That his Highness and the Council's order of the 15th April 1656, for the relief of debtors who are willing to satisfy their just debts, and the severity of proceedings by creditors against debtors in Scotland, be forthwith proclaimed and printed. 'EMANUEL DOWNING, Cl. of the Council.'

EDINBURGH: Printed by Christopher Higgins, in Hart's Close, over against the Trone Church, 1656.

¹ 1663, c. 4.

² Obs. 11, James VI. 47, p. 242.

January 1678, and signed by all of them, declare, that whoever voted to any such protection should be liable to the debt.' But Parliament was forced again to interfere, and renew the former laws, that of 1663 particularly, with this further provision, that 'all protections, *supersederes*, etc., shall be signed by such as grant them, and that their signing thereof shall prove against them their voting thereto, and shall make all who sign them, whether the President of the Court or others, as liable as if they had become cautioners for the said [578] debt, and that these protections shall be recorded in the books of the Court which granted the protection,' etc. There is a similar reservation, as in the law of 1663, of the power of protecting those cited to appear before them for a space not exceeding a month; 'the parties who require witnesses to be cited, or their tutors and curators if minors, giving their oaths of credulity, or subscribing a certificate under their hand, upon oath, that those who are cited by them to be witnesses are material witnesses; which protections shall bear the cause for which they are granted.'¹

But the granting of royal protections had not ceased; and an example occurred, just on the eve of the Revolution, which made some noise. Sir William Sharp was a creditor of the king, and had, it seems, procured a royal protection, stopping all legal proceedings against him for any of his uncle's debts, to whom he had succeeded, until he should be repaid what the king owed him. The judges, with the spirit that became them, condemned this letter of protection. 'The Lords proceeded,' says Lord Fountainhall, 'notwithstanding of the letter as surreptitious, *et rescriptum contra jus quod ab omnibus judicibus refutari debet*. Sir William, however, procured a new letter to the Lords, which was read on the 12th January 1688, bearing that the Commissioners of Treasury had acquainted the king, that though he had discharged the Lords of Session to proceed against Sir William Sharp of Scotsraig for some debts of his uncle's, whereon he was pursued by Sir Alexander Gibson and others, which the king had taken off, therefore His Majesty willed that he should not be troubled, etc. The President (Sir George Lockhart) was very much displeased at this, as stopping justice, but at last complied, yet would not record the letter.'²

After the Revolution there do not appear any more of these unjust indulgences; and the only other Act to be found in our statute book relating to protections, prior to the sequestration statutes, is that of 1698, c. 22, requiring the creditor to be cited, on fifteen days' charge, to give in objections against the passing of the protection.

The statutes which have now been taken notice of, relative to *supersederes* and personal protections, may be regarded as declaratory of the common law, by which every supreme tribunal must be entitled to dispense with the common diligence, in order to provide for the furtherance of justice without encroaching on the privilege of debtors.

Under this power not only is a party or a witness entitled to be protected in the course of a trial, criminal or civil, wherein his evidence or his presence may be necessary; but the power extends so far as to entitle the Court of Session to grant a warrant for bringing a prisoner out of confinement to attend on such occasions. This was done to enable a person to attend a court-martial for trial;³ so in the case of a clergyman confined for debt in order to his attending a Presbytery or the General Assembly in a judicial inquiry into his conduct.⁴

Under the bankrupt laws it was necessary to vest in the Court new protecting powers, for the purpose of more effectually enforcing the means of recovering and distributing the debtor's estate, and of holding out encouragements to the bankrupt to act fairly. The personal protections introduced by these new laws may, accordingly, be distinguished into two classes: Those which, on the principle of the common law, are necessary for enabling the creditors to have the bankrupt and others examined; and those which are granted to

¹ 1681, c. 9. A rule similar to this had been made by the Court of Session in an Act of Sederunt, 1 Feb. 1676.

² 1 Fount. 490, 14 Dec. 1687.

³ *Hope v Grosser*, 11 Dec. 1816, F. C.

⁴ *Presbytery of Dumfries*, 7 July 1818, F. C.; *Presbytery of Stirling v Mudie*, 8 July 1818, F. C., note; *Moodie*, 18 May 1819, F. C. This was on the consent of the incarcerating creditor. [*Rennie*, 1850, 12 D. 994.]

the bankrupt as a reward of his honesty and good conduct, and in order by his aid [579] to forward the recovery of the estate.

1. OCCASIONAL PROTECTIONS DURING EXAMINATION, ETC.

By the Sequestration Act of 1772 it was provided, in order to give the creditors the benefit of the debtor's presence for explaining his affairs and assisting the factor, that the Court of Session should have a power to grant 'a protection from personal diligence for such time as to the Court or the Lord Ordinary on the Bills should seem expedient for the execution of the Act.'—'To grant warrant, if the debtor was in prison, for bringing his person into Court, or before the Lord Ordinary on the Bills in time of vacance, in the custody of a macer of Court, messenger, or other person authorized for that purpose; or, if that is not required, to grant warrant for liberation; and in either case, when such debtors appear in court, or before the Lord Ordinary on the Bills in time of vacance, a personal protection may be granted them or not, as their behaviour in doing justice to their creditors may seem to merit.'

By the statute of 1783 this was a good deal altered, and the proper distinction observed between the protections necessary for the creditors, and those which should be granted as an indulgence to the debtor.

The Court were at common law entitled to grant a personal protection to the bankrupt when brought up for examination; and by the 15th section of the Act 1783 this power is confirmed: 'The Court or the Lord Ordinary on the Bills shall, in case it be necessary, grant a personal protection to the bankrupt, at the application of the factor or trustee, for such time as may be necessary for enabling him to attend the diets of examination; or may grant warrants to messengers-at-arms, or other officers of the law, to bring his person out of prison to attend such meetings, and thereafter to carry him back to prison.'

2. TEMPORARY PROTECTIONS TO BANKRUPTS.

The debtor's title to a personal protection as an indulgence was in 1783 made to rest upon the concurrence of his creditors. By sec. 42 it is enacted, that 'at any period after the sequestration, and before the final distribution, it shall be competent for the bankrupt, with concurrence of the trustee, and four-fifths of the creditors in number and value who have produced and proved their debts, to apply to the Court of Session, or to the Lord Ordinary on the Bills in time of vacation, for a personal protection from diligence for such time as the Court or the Lord Ordinary shall think reasonable; and the same being once obtained, shall be renewed if applied for in the name of the bankrupt, with consent of the trustee alone, unless any of the creditors oppose it, in which case the consent of four-fifths of the creditors in number and value shall be required as before.'

By the Bankrupt Act of 1793, while the law respecting personal protections for examination is renewed *in terminis*, those protections which are for the bankrupt's own advantage are laid under still further restrictions; and by the subsisting statute of 54 Geo. III. those provisions are renewed. The law on this subject has already been commented on.¹

Except under the bankrupt statutes, there is no power in Scotland which can force a creditor, independently of his own consent, to grant a suspension of his diligence to the debtor. In France, the *atermoyement*, which corresponds with our *supersedere*, could be granted by three-fourths of the creditors in value.² But in Scotland a debtor is left [580] to the provisions of the statute, if a merchant; to the common law remedy of *cessio*, if not a trader; and failing these, to the unconstrained indulgence of the individual creditors.

¹ [See the provisions of 19 and 20 Vict. c. 79, secs. 44–47.] Vol. ii. p. 298.

² 'When in a contract of *atermoyement*,' says Denizart, 'all the creditors are not agreed, the opinion of those who

hold three-fourths of what is due by the bankrupt prevails over that of the other creditors, who hold among them only the fourth of what is due.' Tom. i. p. 184.

‘Creditors sometimes,’ says Mr. Erskine, ‘grant voluntarily a surcease of personal execution in behalf of their debtor, which is commonly called a *supersedere*; and the creditor who signs or promises to sign it, if he use personal execution within the time indulged to the debtor, is for his breach of faith liable to him in damages.’¹

Before closing this subject, it may be proper to mark the peculiarities of the English law. There is no such provision in the bankrupt laws, as in our statute, relating to personal protections. Those which are necessary for the purposes of justice are already well secured at common law; and as to personal protections during the subsistence of the commission, they are utterly unknown. The creditors who come in under the commission are not entitled to proceed against the bankrupt’s person, when he has already given up all his property to be distributed among them; and those who make their election to proceed at law are entitled so to do, taking satisfaction on the debtor’s person, and leaving his estate to be distributed among the other creditors under the commission. This right can be taken away only by a certificate confirmed, and final discharge.

CHAPTER IV.

OF CESSIO BONORUM.

It is inconsistent with expediency, no less than with humanity, that a debtor should be confined for life to a jail; and in the mild system of jurisprudence adopted in Scotland, two remedies are provided against this evil,—one at common law, another by statute. The statutory provision was intended for the commercial part of the country, as a remedy against the unforeseen misfortunes of trade, and a provision for restoring to the public the services of men engaged in commerce and manufactures. The other arose at a time when commerce had made little progress in Scotland, and proceeded chiefly on motives of humanity. From the difference in the objects, a very material difference is to be looked for in the nature of the remedies. The common law remedy is merely a release from the hardship of imprisonment, leaving the debtor subject to all his debts, should his future acquisitions ever exceed mere subsistence. The statutory remedy has a further object in view—the encouragement of industry and of honest commercial enterprise; and is not therefore confined to liberation from prison, but includes a complete discharge, in consequence of which the debtor may again begin the world a free man.

Without entering into the controversy whether any other relief ought to have been given by legislative authority than that of the *cessio bonorum*, it may confidently be stated, that if the discharge under the bankrupt statutes is to be admitted, the co-operation of the *cessio bonorum* has a manifest though silent effect in confining that discharge to the cases that are proper for it. If creditors, when called to decide on the application of their debtor for a discharge, have the apprehension set before them that a refusal of his application is equivalent to a sentence of perpetual imprisonment, they may be induced by motives of mere humanity, or perhaps by a dread of being thought illiberal and severe, [581] to give a consent which they ought to have refused. But if they are aware that their refusal is not a final sentence of imprisonment; that the debtor may notwithstanding apply for benefit of the *cessio*, and, on giving up his whole property to his creditors, be liberated from prison, and left free to labour for his subsistence and for the payment of his debts;

¹ Ersk. iv. 3. 24. See below, conclusion of Book vi.

they will feel their judgment on his conduct less trammelled, and may, under less hesitation, decide on his application with a wholesome severity.

Since the first edition of this work was published, an institution similar in principle and design to the relief of debtors by *cessio bonorum* has been introduced into England. It was not to be expected that an institution of this kind should all at once become perfect, and work with the ease and effect of an institution that had grown up with the laws and habits of the people. Every indulgence to debtors, how necessary soever in humanity and in justice, must at first look like an invasion of the rights of creditors, and operate as a diminution of the constraint under which debtors are held to the performance of their engagements. It is not therefore to be wondered at, that the recent institution in England should have been ill received by creditors; that the administration of justice under the new law should have been the occasion of discontent; and that many fraudulent devices should have been fallen upon to take advantage of the law in cases not intended to be comprehended within it. It is not proposed here to enter into any explanation of the particulars of this institution, but, with every hope and confidence that it will ultimately prove of advantage to England, to proceed to the law of *cessio bonorum* in Scotland.

The law of *cessio bonorum*, as now established in Scotland, rests upon this principle, that a person who contracts debt is presumed able to discharge it, and guilty of fraud either in the contraction of the debt, or in the disposal and concealment of his funds, until the contrary be shown by a fair and open disclosure of his affairs; that he is not therefore entitled to liberation from prison until he shall, in an action before the Court of Session, and after the creditors have had during his imprisonment a full opportunity of inquiring into his conduct and circumstances, satisfactorily account for his insolvency, and give up everything he has for the payment of his debts.

The law of *cessio bonorum* had its origin in Rome. It was introduced by Julius Cæsar as a remedy against the severity of the old laws of imprisonment.¹ And his law, which included only Rome and Italy, was before the time of Diocletian extended to the provinces.² The first law of the code respecting the *cessio bonorum* expresses in a single sentence the whole doctrine upon the subject: 'Qui bonis cesserint,' says the Emperor Alexander Severus, 'nisi solidum creditor receperit, non sunt liberati. In eo enim tantummodo hoc beneficium eis prodest, ne judicati detrahantur in carcerem.'

This institution having been greatly improved in the civil law, was adopted by those of the European nations who followed that system of jurisprudence. In France, the institution was adopted very nearly as it was received with us. Perhaps, indeed, it was from France that our law on the subject received its distinguishing features. The law in that country was during the seventeenth century extremely severe, not only against bankrupts (which name they applied to fraudulent debtors alone), but against debtors innocently insolvent. To operate by restraint upon thoughtlessness and extravagance,³ it was required that [582] every debtor who demanded the privilege of a judicial '*Cession des Biens*,' should himself appear in court in the most humiliating garb.⁴ The debtor was then carried to the market-place, and the *cessio* published. It was next enrolled in a table or list hung up in the hall of the court, and the debtor himself got a green bonnet from his creditors, which he was obliged to wear, and which was his sole *protection* against imprisonment. A fraudulent bank-

¹ At least that great man, whose genius in legislation was perhaps not inferior to his military capacity and eloquence, improved into this admirable institution an imperfect and almost forgotten law made under Sylla's dictatorship.

² Cod. lib. 7, tit. 71, l. 4, Qui bonis, etc.

³ 'Toutes ces dispositions infamantes contre les cessionnaires,' says M. Savary, 'n'ont été faites à autre fin que pour ôter, par cette infamie, honte, et confusion qui reçoivent ceux qui font cession des biens, le désir qu'auroient les negociens

de faire des cessions et abandonnemens des biens à leur créanciers, parce qu'ils les feroient plus facilement s'ils ne encouraient aucune infamie.' See also Pothier, *Traité de la Procéd. Civ.* 300.

⁴ 'Il falloit que les cessionnaires comparussent en l'audience tête nue et descient; c'est à dire, qu'il falloit que celui qui faisoit cession des biens, ôtât la ceinture qui l'on portoit en ce tems-là sur la pourpoint, qui marquoit une infamie particulière.' Savary, *Parf. Negoc.* part 2, p. 383.

rupt could not have the benefit of the *cessio*, and these degrading and opprobrious ceremonies were necessary even to the most innocent. But this harshness was gradually abolished. It came to be held sufficient if the debtor had the green bonnet *about* him, and showed it when a creditor was proceeding to execute diligence against him; and at last this affair of the green bonnet fell quite into disuse, in cases of insolvency where no fault could be charged against the debtor.

In this country the very same progress is distinguishable as in France. Even before the adoption of imprisonment for civil debts, in the ordinary course of diligence, the *cessio bonorum* was known to our law;¹ and happy it is, that when imprisonment came to be introduced for civil debts, it admitted easily of the *cessio bonorum* being applied as a remedy. Under the law-merchant, imprisonment was properly a coercion to force the debtor to dispose of that property which he could not conceal, and to bring forth what he might have in secret. As a punishment of disobedience introduced by the clergy, and afterwards adopted by the civil magistrate, imprisonment could endure only while the disobedience continued; and the *cessio bonorum* was the fullest evidence of contrition, and of a desire to comply to the utmost. But though adopted as a remedy against the imprisonment for debt, in those times it was natural to assign to a blameable or fraudulent conduct every case of insolvency. It was in 1592 that the Parliaments in France established by *arrêts* the green bonnet as the habit of the *cessionnaire*. Within fourteen years after this, in 1605, the Court of Session in Scotland made an Act of Sederunt, requiring the magistrates of Edinburgh to erect a pillar near the market-cross, with a seat upon it, 'quhairupon, in time coming, sall be sett all dyvoris, and sall sit thairon ane mercatt day from ten hours in the morning quhill ane hour after dinner; and the saidis dyvoris, before thair liberty, and cuming furth of the tolbuith of Edinburgh, upon their awn charges, to cause mak and buy ane hatt or bonnet, of yellow coloure, to be worn be tham all the tyme of thair sitting on the said pillerie, and in all tyme thairafter, swa lang as they remane and abide dyvoris, with speciall provisioun and ordinance, if at any time or place efter the publicatioun of the said dyvoris, at the said mercatt-croce, ony person or personis declarit dyvoris, beis fundin wantand the foresaid hatt or bonnet of yellow coloure; toties, it sall be lawful to the baillies of Edinburgh, or ony of his creditors, to tak or apprehend the said dyvour, and put him in the tolbuith of Edinburgh, thairin to remane in sur custodie the space of ane quarter of ane yeir, for ilk fault and fellie foresaid.'² Somewhat more than half a century after this, it was thought necessary to strengthen rather than relax the rule; and instead of a bonnet, a whole habit was ordered to be worn, the one-half yellow and the other brown, with a cap or hood which they are to 'wear on their head, party-coloured, as said is.'³ In 1688 an oath was drawn up, to be sworn by every bankrupt claiming the *cessio*, in which he swears that he has given up all his property to his creditors by a conveyance and inventory; that he has made no other conveyance since his imprisonment, nor put out of his hands any money, goods, etc., belonging to him; that he has not cancelled any writings since his imprisonment, or if he has, that he specify them particularly; and that he has not granted any conveyances before imprisonment which he has not specified.⁴ In July 1688 the rule of the habit was enforced; but it was declared, at the same time, that if innocent misfortune should be libelled and proved as the cause of insolvency, the habit should be dispensed with. In the same Act it was declared that the imprisonment must have continued a month before the debtor could apply for the *cessio*.

And by statute in 1696, c. 5, the Court was forbid to dispense with the habit, unless in the summons and process of *cessio* the bankrupt's failing through misfortune be libelled, sustained, and proven.

¹ Quon. Attach. c. 7, sec. Stat. Wilhelmi, c. 17.

² 17th May 1606, Acts of Sederunt, p. 38.

³ Act of Sederunt, 26th February 1669. This is further enforced, 23d January 1673.

⁴ Acts of Sederunt, p. 179, 8th February 1688; and p. 192, 18th July 1691.

The short digest of the law of *cessio* in Scotland, then, is,—

1. That a debtor who has been a month in prison for a civil debt may apply to the Court of Session, calling all his creditors before that Court by a summons in the king's name, and concluding that he should be freed from prison on surrendering to his creditors all his funds and effects.

2. That he is entitled to this benefit without any mark of disgrace, if, proving his insolvency, he can satisfy the Court, in the face of his creditors, that this insolvency has arisen from innocent misfortune, and is willing to surrender all his property and effects to his creditors.

3. That though he may clear himself from any imputation of fraud, still, if he have been extravagant, and guilty of sporting with the money of his creditors, he is in strict law not entitled to the *cessio*, but on the condition of wearing the habit, but which is now exchanged for a prolongation of his imprisonment.¹

4. That if his creditors can establish a charge of fraud against him, he is not entitled to the *cessio* at all, but must lie in prison at the mercy of his creditors, till the length of his imprisonment may seem to have sufficiently punished his crime; when, on a petition, the Court may admit him to the benefit. And,

5. That if he has not given a fair account of his funds, and shall still be liable to suspicion of concealment, the Court will in the meanwhile refuse the benefit of the *cessio*, leaving it to him to apply again when he is able to present a clearer justification, or willing to make a full discovery.

SECTION I.

OF THE TITLE TO PURSUE A CESSIO BONORUM.

The circumstances essential in the debtor's situation to entitle him to apply for a *cessio bonorum* are these: 1. That he shall have been imprisoned for a civil debt during the space of a month; 2. That he shall not, at the time of deciding on his application, be within the sanctuary, or beyond the jurisdiction of the Court; and, 3. That he shall be unable to pay the debt.

I. IMPRISONMENT.—The pursuer must have been confined during the space of a month as a prisoner for debt, before he can be entitled to the benefit of the *cessio*.

The process of *cessio bonorum* was introduced as a humane termination to imprisonment, after it might be supposed to have accomplished every salutary purpose. Had courts of law attempted to grant this relief against threatened imprisonment, the *cessio bonorum* would have been contrary to the spirit of the statutes against general protections. It was in the same year in which the Court of Session made so honourable a stand against the Crown, in the case of Sir William Sharp's protection,² that by Act of Sederunt the term of [584] imprisonment requisite to authorize an application for *cessio* was fixed.³ The period fixed was a month. And although it does not appear why that term was chosen, it is now settled beyond dispute as the necessary duration of the debtor's imprisonment; sufficient as a ground of inference of the debtor's inability to discharge the debt, and for enabling the creditors to make all necessary inquiries into the state of the debtor's affairs, and the causes of his failure.

It is not necessary that the debtor shall have been confined for a month before bringing his action of *cessio*; it is sufficient that his imprisonment shall have endured for a month

¹ [The habit is abolished by 6 and 7 Will. iv. c. 56. This statute constitutes the rule of procedure in applications for *cessio bonorum*, whether brought in the Sheriff Court or in the Court of Session.]

² See above, p. 578.

³ Act of Sederunt, 18 July 1688.

at the time that he moves for decree in the *cessio*. The rule of the Act of Sederunt is, that the certificate of imprisonment shall be produced 'with the process.' But although the month should not have elapsed at the date of calling the summons, yet, if the debtor be then in prison, the only effect of a plea on the Act of Sederunt will be to delay the proceedings till the month shall expire. The practice at present is, to make great avizandum in the meanwhile, the debtor being aware that, unless he shall produce evidence of the month's imprisonment having expired at moving for decree of *cessio*, it will be refused.

The imprisonment, if actual and for debt, although irregular and unlawful, will ground a process of *cessio*.¹

The month's imprisonment must be uninterrupted. The right of the creditors to insist on the close confinement of their debtor subsists, at the least, for this term; and if interrupted by any interval of freedom, the creditor who imprisons the debtor is entitled to insist that a new term of imprisonment shall begin.²

Under the description of imprisonment is included the custody in which a debtor remains while freed from jail upon a bill of health. The settled doctrine now is, that the rule of the Act of Sederunt 18th July 1688 is qualified by the previous Act of 14th June 1671, so that in reckoning the month the debtor is entitled to take into account the period during which he may have been at large on a sick bill; and on satisfactory evidence that the illness and danger have continued till the time of the application, the pursuer is entitled to insist in his action.³

[585] It is not necessary that the imprisonment should be continued to the time when the decree is to be pronounced, provided the debtor has been a month in prison. He may, after expiration of the month, be freed from jail by consent of the creditor-incarcerator, on caution to return, or the diligence may even be abandoned on which he was imprisoned; still the debtor is entitled to proceed with his action, as having by the month's imprisonment acquired a *jus quæsitum*.⁴

It has been found not requisite that the debtor shall be in prison at the time of bringing his action, provided he have endured a month's imprisonment, and is, at the time decree is to be pronounced, subject to any order which the judges may issue against him.⁵ See below, p. 476.

¹ Ranken v M'Laren, 1823, 2 S. 519, N. E. 456.

² Stair iv. 3. 32.

³ 1. *Cases from the Sanctuary*.—Lindsay v his Crs., 1798, n. r. On 27th December 1797, Lindsay was, while residing in the Abbey, imprisoned, and three days after liberated on a bill of health, in terms of the Act of Sederunt. The Court granted the *cessio*.

Donaldson v his Crs., 1798, n. r. On 24th November 1797, James Donaldson was imprisoned also in the Abbey jail; and the certificate of the Bailie of the Abbey bore that he had 'continued prisoner in the said jail ever since (till 19th January 1798), with this relief only, that on account of indisposition he had for some time been removed to a house in the neighbourhood for the benefit of fresh air, but is still confined as a prisoner under the custody of the officers of Court, and having found caution to return on reconvalescence.' The Court decerned in the *cessio*.

M'Kenzie v his Crs., 1799, M. 11791. The same decision was given where the debtor had been liberated on a bill of health, after about a fortnight's confinement in the Abbey jail.

Dunlop v his Crs., 1799, M. 11800. In this case there was a similar liberation; but the refusal of the *cessio* proceeded on the ground of the debtor's being at the time in the sanctuary.

2. *Cases of Ordinary Imprisonment*.—Pickard, 17 Jan. 1813, F. C. Here the opposition had been withdrawn.

Sheriff, 3 March 1814, F. C. Here no opposition.

Ross, 5 July 1816, F. C. Here no opposition, but the case discussed on the bench, and the judges divided. The decision for granting the *cessio* proceeded greatly on the weight of precedents. The judgment bears the Court to have proceeded 'on the very particular circumstances of this case, and there being no opposition from any of the creditors.'

Macdonald, 3 July 1817, Fac. Coll. Here there was opposition. Four other cases, in 1816 and 1817, are stated along with this, in which the Court followed the case of Ross as a precedent. And on the prisoners producing a medical statement of extreme danger attending a confinement, they were found entitled to the *cessio*.

M'Laine, 1821, 1 S. 62; Snodgrass, 1822, *ib.* 558, N. E. 510; Houston v M'Millan, 1824, 3 S. 214, N. E. 152. Here the suspicious appearance of the imprisonment, with the singular character of the alleged losses, combined to make the Court refuse the *cessio*.

⁴ Nielson v Stewart, 25 Nov. 1809, Fac. Coll.

⁵ M'Kenzie v his Crs., 1779, M. 11791. M'Kenzie raised a *cessio*, having been the due time in jail. A few days before the summons came into Court, the incarcerating creditor

If the incarcerating creditor have abandoned his diligence within the month, the debtor cannot, by voluntarily staying in prison, obtain the *cessio*.¹ Yet the Court would no doubt interpose to prevent oppression, by successive abandonments and renewals of the caption.²

The jail of the Abbey is no legitimate prison to entitle a prisoner, confined in it for debt, to the benefit of the *cessio*. He contends with his creditors on unequal terms. After there had been a kind of usage in the Court to hold imprisonment in this jail as sufficient,³ the question came to be solemnly tried, when a judgment was pronounced fixing the rule as now laid down.⁴

The imprisonment must be for *debt*; not as *in meditatione fugæ*, nor under the criminal law.

Imprisonment on a *meditatio fugæ* warrant grounds no title to *cessio*,⁵ nor can an [586] imperfect term of imprisonment for debt be eked out by imprisonment on such a warrant.⁶

By the civil law, a debtor *ex delicto* had not the benefit of the *cessio*.⁷ Such also was the law of France.⁸ And Mr. Erskine says: 'No debtor, whose debt arises from a crime or delict, is entitled to this privilege, which is conformable both to the Roman law, whence we have borrowed it, and to the analogy of the Act of Grace.'⁹ But as the Roman law gave the *cessio* as a mere indulgence, any personal exception might be thought to deprive a man of his title to it; whereas in Scotland it is more an act of justice to the debtor, who has suffered the full punishment of any supposed contumacy, and against whom the legal presumption of concealment has been taken away by the due term of purgation. As to the Act of Grace, it is a dangerous analogy, since the object of that law was to ascertain the right of the public to devolve the maintenance of private debtors on the creditors who chose to imprison them. There has, accordingly, been a great fluctuation of opinion respecting this doctrine. But, 1. It is clear that imprisonment on a criminal warrant is not a ground for *cessio*.¹⁰ 2. Where the delict is of a civil character, not under the cognizance of penal law, imprisonment on that ground will authorize *cessio*. At one time the *cessio* was refused to a person imprisoned for an assythment;¹¹ at another, it was granted to one incurring a penalty by transgressing a prohibition.¹² Then it was refused to a person

intimated his consent to liberation; and the magistrates in their certificate mentioned this. The question was, whether the *cessio* could proceed? The Court granted the *cessio*.

M'Gregor v M'Nab, 3 March 1809, 15 Fac. Coll. 237. *M'Gregor* was imprisoned 16th September 1808, and on 27th October raised a *cessio*. It was objected that the incarcerating creditor had (after the month was expired) liberated the debtor, and that now he was out of prison. The Court held, 1. That, to entitle a debtor to the *cessio*, he must have been in prison for one month; and, 2. That, at deciding the cause, he must be within the power and custody of the Court, to abide any order which his conduct may deserve, but not necessary that he be actually in jail.

M'Donald v M'Intosh, 1825, 4 S. 228, N. E. 231; *Kyle*, 1827, 5 S. 525, N. E. 493.

¹ *Smith v his Crs.*, 1798, M. 11799. In this case the creditor-incarcerator, in order to defeat the remedy, ordered the debtor to be liberated about a fortnight after his imprisonment. The debtor got another creditor to arrest him in prison. But the diligence was null. He remained to fulfil his term. It was objected that he was not within the terms of the Act of Sederunt. The Court held the process incompetent.

Clerk, 2 Feb. 1811. The First Division decided otherwise, where the incarcerator had granted a discharge of the incarceration within the month, but the debtor stayed to complete his imprisonment. The ground of the decision seems to have

been, that the creditor had acted maliciously, and with a view to oppress the debtor.

² See *M'Kenzie v his Crs.*, 1779, n. r.; and *M'Gregor v M'Nab*, 3 March 1809, 15 F. C. 237, where the Court said that the debtor has a *jus quæsitum* by the month's imprisonment, of which he cannot be deprived. Above, p. 474, note 5.

³ See above, p. 474, note 3.

⁴ *Dunlop v his Crs.*, 1799, M. 11800. See also below, p. 476, respecting the effect of the sanctuary in barring the action. If the debtor should move that he should be transferred to the Canongate jail at the time of demanding decree, there would appear to be no further obstruction to his *cessio* on this account.

⁵ *M'Laren v Orr*, 8 July 1820, Fac. Coll.

⁶ The case of *Kennedy*, 1824, does not seem to contradict this. 3 S. 409, N. E. 287.

⁷ Voet ad Pandect. lib. 42, tit. 3, sec. 5, with the authorities there cited.

⁸ Pothier, Tr. de la Procedure Civile, 298; Journal des Audiences, tom. ii., 14 July 1661.

⁹ For the Roman law he cites l. 1. 4, C. Qui bon. ced. poss.; l. 37, sec. 1, De minor; arg. 151, De re judic. See rather, perhaps, the first law of the Pandects, De poenis (lib. 47, tit. 19), or Voet, with all his variety of authorities.

¹⁰ *Thomson*, 1822, 1 S. 555, N. E. 508.

¹¹ *Molloch*, petitioner, 19 Nov. 1751.

¹² *Small v Clerk*, 18 Feb. 1764.

imprisoned for a sum of damages on account of maltreatment;¹ and this more severe or rigid construction of the law of *cessio* had the support of Lord Braxfield. But the Court was afterwards induced to adopt a milder or more liberal construction, as more consonant to the genius of the law of Scotland. Accordingly the course of decisions began to turn. A man imprisoned for payment of a sum as damages on account of the seduction of a woman, was held entitled to the *cessio*.² This was confirmed in the case of one found liable in damages for defamation.³ Afterwards *cessio* was found competent where the imprisonment took place on a sentence awarding a fine to the private party.⁴ And, finally, it has been decided, that a debtor imprisoned on ordinary diligence to enforce payment of a pecuniary penalty to a private party, incurred by the contravention of an election statute, is entitled to the *cessio*.⁵

A person imprisoned for refusing to perform a fact within his power, is no proper object of the law of *cessio*. 'Cum itaque,' says Voet,⁶ 'dolosi atque contumaces ad hoc beneficium admittendi non sint; nec dolo careat, qui quod potest tamen non vult.' This privilege, as well as that of the sanctuary, is most justly denied to such a man.⁷

[587] II. The debtor must be subject to the orders of the Court, and not within the sanctuary, when the Court comes to decide upon his application.⁸

The *cessio* is a remedy against the hardships of actual imprisonment where the debtor has, by undergoing this ordeal, proved his innocence of any concealment, and afforded to his creditors the opportunity of uninterrupted investigation. But where a debtor betakes himself to the sanctuary, avoiding the danger and hardship of imprisonment, he renounces the remedy in shunning the evil. It is of still greater importance to observe, that the benefit of the *cessio* is a benefit to be obtained on a fair trial only, in which the debtor submits himself to his creditors and makes a surrender of his person, to be disposed of according to the issue.

It is now settled, accordingly, 1. That no debtor who is in the sanctuary, and refuses to renounce the privilege which his residence there gives him, is entitled to the benefit of the *cessio*;⁹ and, 2. That although a debtor who has been freed from prison is not, after enduring his month's imprisonment, to be thus deprived of the benefit of the *cessio* by a concession which he cannot prevent, he is not entitled to demand the *cessio* unless he either surrender himself to prison, there to abide the judgment of the Court, or submit himself personally to the disposal of the Court.¹⁰

III. The debtor, by the very supposition of the action, is insolvent; and it is not conceivable that he will otherwise continue in prison for a month, and consent to a conveyance *omnium bonorum*, by which his affairs are taken out of his own management, and his funds exposed to that of creditors and trustees. At the same time, if a case can be imagined in which the debtor is solvent, and where by energy and activity he is able to pay off his debts much more easily or quickly than the creditors could hope to accomplish, there seems to be no doubt of their right to oppose his liberation, and force him, by the inconvenience of personal confinement, to exert himself for their benefit.¹¹

It has been held competent for a foreigner, imprisoned for debt in this country, to

¹ *Stewart v M'Glashan*, 1781, M. 11792.

² *M'Dowall v Moliere*, 1791, M. 11793. [*Cassels v Keddle*, 1852, 15 D. 124, a case of imprisonment for the aliment of a bastard child. In *Chisholm v Denholme*, 1856, 19 D. 116, caution for the aliment was required.]

³ *Douglas v her Crs.*, 1794, M. 11795.

⁴ *Law v Dewar*, 1795, M. 11798. It was reserved for further discussion whether *cessio* could be granted against a fine to the public prosecutor.

⁵ *Murray v his Crs.*, 11 July 1811, Fac. Coll. [*Kerr v Anderson*, 1837, 15 S. 928; *Lawson v Jopp*, 1853, 15 D. 392.]

⁶ Lib. 42, tit. 3, sec. 8.

⁷ [Under the statute 6 and 7 Will. iv. c. 56, imprisonment is not a necessary condition to an application for *cessio*. As to whether the bankrupt must be within the country, see *Hossack v Laidlaw*, 1841, 4 D. 268.]

⁸ [A foreigner may apply for *cessio*. *Gaziot v Crs.*, 1812, Hume 118; *Kennedy v Keir*, 1838, 16 S. 990.]

⁹ *Dunlop v his Crs.*, 1799, M. 11800.

¹⁰ *M'Gregor v M'Nab*, 3 March 1809, 15 F. C. 237.

¹¹ In a case somewhat of this sort the *cessio* was refused. *Sharp v Turner*, 1775, M. 11785.

apply for the benefit of the *cessio*. It is not a discharge, but a liberation from a Scottish prison only, and will have no effect abroad. There are difficulties, however, both in the proof and in the efficiency of the call upon foreign creditors. The disposition, too, may be a very inefficient and useless form.¹

IV. It has been thought that, in the same spirit of indulgence in which a debtor is permitted to bring his process of *cessio* while the month of his imprisonment is not yet expired, the oath which, before his liberation, he must swear may be allowed to be taken by anticipation when the debtor resides at a distance.² So that if the *cessio* shall be granted, he may immediately have the benefit of it, and be saved from the possible danger of there being no sufficient time to have the oath reported before the rising of the Court for the vacation. But this the Court has refused.³

SECTION II.

NATURE OF THE ACTION OF CESSIO BONORUM; PERSONS TO BE CALLED AS DEFENDERS; AND WHAT THE PURSUER MUST ESTABLISH.

The grounds on which the debtor calls his creditors into court are: *First*, That he [588] was on a particular day imprisoned for debt. *Secondly*, That, being unable to pay this and his other debts, he actually has been arrested, or is in danger of being arrested in jail by his other creditors. *Thirdly*, That his insolvency has proceeded not from fraud, but from innocent losses and misfortunes of which a special condescendence is given in. And, *Fourthly*, That he is willing to convey his whole estate and effects to his creditors. The conclusion is, that 'it ought and should be found and declared, by decree of our Lords of Council and Session, that the pursuer's inability to pay his debts is not owing to fraud, but to innocent losses and misfortunes; and it being so found and declared, that the pursuer should be ordained to be set at liberty from the said prison, on his granting a disposition *omnium bonorum*, upon oath, in favour of his said creditors, in such form as our said Lords shall direct; and all judges, messengers, and officers of the law, ought and should be discharged from putting diligence in execution against him, and from troubling, molesting, or incarcerating him in time coming, for not-payment of any debts due by him to the pursuer above named, or others; and our said Lords do dispense with the pursuer's wearing the habit directed to be worn by bankrupts, by any law or practice, or otherwise.'

1. The primary requisite, which it is incumbent on the pursuer to establish in making out his case, is, that every creditor, without exception, has been made a party. It is sufficient at any stage of the process, in order to suspend the proceedings, that any one of the creditors shall specify the name of a creditor against whom no execution of citation is produced. And the Court will not permit the names of creditors to be added after the discussion on the merits.⁴

2. The next point to be established is the imprisonment, which is to be proved by a certificate under the hand of one of the magistrates of the burgh where he is incarcerated, bearing that he has been the space of a month in prison.⁵ Without such certificate it is declared 'that the process is not to be sustained.' But, as already stated, it is in practice sufficient if the debtor have been in prison for a month previous to the decree of *cessio*. See above, p. 473.

3. The other points in the pursuer's case are, the insolvency and the misfortunes or

¹ See *Mercer v Tasker*, 1804, M. App. Prisoner, No. 2.

² See below, p. 483.

³ *Fraser*, 1824, 3 S. 208-9, N. E. 147; and *Cumming's* case, same date.

⁴ *Mathieson*, 1824, 3 S. 166, N. E. 111.

⁵ Act of Sederunt, 18 July 1688.

losses by which it was occasioned. On these points it is not required that the debtor shall produce evidence, but only that he shall state clearly the history of the misfortunes by which he has become insolvent, and lodge a specific and articulate condescendence of his affairs, his funds, his debts, and his losses, so that it may be checked by his creditors, any falsehood detected, or any intended concealment exposed. This minuteness of statement, confirmed by the debtor's oath that he has made a fair disclosure of his effects, is all that in the first instance is required of him. What the effect shall be of particular circumstances in his conduct, whether admitted in the debtor's statement or established in evidence by the creditors, will require a more minute consideration hereafter. The debtor is required further to answer satisfactorily all objections that may be stated to those views of his affairs; and if evidence be offered by the creditors and found relevant by the Court, the debtor must of course join issue, and stand the result of the investigation.

4. That the debtor who seeks a *cessio bonorum* must be insolvent, has been decided.¹ But, 1. It would seem that *cessio* may be granted even where the insolvency is doubtful; and, 2. There seems to be some reason for questioning whether even a solvent person may not be entitled to *cessio*, where he is willing to give up all to his creditors, unless the circumstances plainly show a design of delaying the creditor's payment. A debtor may often [589] be possessed of funds beyond the amount of his debt; yet these may be so locked up, or unsaleable, that they can avail him nothing in paying off his creditors.²

5. In one particular situation it has now become a rule of Court to require something further from the debtor. Where a person whose estate is under sequestration finds it advisable to apply for a *cessio*, either because his creditors are not disposed to grant him a personal protection; or because, after the period appointed for an application for discharge, the creditors are averse to grant it,—the Court require from the trustee on the sequestrated estate a certificate respecting the conduct of the bankrupt: for by certain sections of the sequestration law, if the bankrupt fail to do what is required of him, he is declared to be a fraudulent bankrupt. And, 1. The trustee is not entitled capriciously to refuse a certificate, nor will the Court permit the *cessio* to be defeated by such refusal without cause shown. The trustee will therefore be compelled, by order of the Court, to grant a certificate; or where he improperly refuses to grant a certificate, perhaps the regular method would be to put in a condescendence on the part of the pursuer of the *cessio*, offering to prove by the oath of the trustee and commissioners that he had complied with all the requisites of the statute, undergone his examinations, and taken the oath as required by the Act, and granted the conveyances required of him by the trustee; and on such proof being offered, the Court would probably order the trustee and commissioners to attend, or would grant commission for taking their oaths. Or, finally, perhaps the statement of an unwarrantable refusal, accompanied with evidence of the requisition duly made to the trustee, would be sufficient to throw the burden of this, as of other points of the proof, on the creditors. Where the trustee's certificate is objected to as ill-founded, the Court has sometimes remitted to accountants and persons of skill to inquire into its correctness.³

¹ *Sharp v his Crs.*, 1775, M. 11785. The grounds stated for the judgment of the Court seem not to be satisfactory.

² See this confirmed in *Campbell v Gordon*, 1825, 3 S. 557, N. E. 384.

³ *Forman*, 1824, 3 S. 233, N. E. 163. Here a deficiency, unaccounted for, was alleged in the bankrupt's state of effects,

and the Court remitted to an accountant in Glasgow. [See, further, the provisions of the Bankruptcy Act, 19 and 20 Vict. c. 79, sec. 168, by which in certain cases the majority in number and value of the creditors may resolve that a bankrupt shall not be entitled to a discharge, but only to apply for a *cessio*.]

SECTION III.

OF THE DEFENCES, AND WHAT IS INCUMBENT ON THE OPPOSING CREDITORS.

The creditors may have two legitimate objects in opposing the *cessio*: to force the debtor, by a longer confinement, to surrender funds which they have reason to think he has concealed; or to satisfy their just indignation by insisting on the prolongation of the confinement, as a punishment of fraud or of extravagance. In the administration of this law of *cessio bonorum* there is a severity which is wholesome, and to be encouraged, as well as a cruelty which may be hurtful to the debtor, and not beneficial to the creditors; and although the days have passed in which the dyvour's habit would be tolerated or useful, the Court of Session has full power to regulate the punishment of the debtor, by prolonging or shortening the duration of his confinement.

The defences on the merits of the action may be considered under these heads: 1. Fraud occasioning the insolvency, or tending to injure the creditors; 2. Extravagance and waste of the money of the creditors; and, 3. Concealment of funds.

I. FRAUDULENT BANKRUPT.—Where, in the course of the inquiry in a *cessio*, the debtor is proved to be a fraudulent bankrupt, all that the Court can do is to refuse him the benefit of the *cessio*, and to recommend the case to the attention of the Lord Advocate as public prosecutor. The punishment of fraudulent bankruptcy can be inflicted only in the course of a proper prosecution to that effect.¹ To this ground of opposition to the *cessio*, it [590] seems to be required that the fraud shall be not merely one of those petty or single acts of fraud which so frequently occur in the dealings of low traders, but shall bear some relation to the cause of failure, and the general state of the bankrupt's affairs,—the deficiency of his funds on the one hand, or the excess of his debts on the other.² Thus,

1. If the deficiency of funds have been occasioned by a course of dealing in unlawful traffic or fraudulent practices, the debtor will not be entitled to the *cessio*; and so, a person whose dealings and trade were as a smuggler, and whose insolvency has been occasioned by seizures, seems not to be entitled to the benefit of the *cessio*.³

2. If a person give up in his condescendence of funds debts which evince a course of dealing contrary to the Liquor Act, 24 Geo. II. c. 40, the Court will refuse the *cessio*.⁴

3. If the debts have been fraudulently contracted, the debtor will not be entitled to the *cessio*; ⁵ as, if the debts have been contracted by the discounting of accommodation bills, with names which he represented as real, when he knew them to be fictitious.⁶ So the *cessio* was refused to a confidential clerk who had appropriated £400 of his master's money

¹ See below, chap. v. Of Fraudulent Bankruptcy.

² *Thom v his Crs.*, 11 Feb. 1809, Fac. Coll. Here the distinction was well marked. The Court refused to sustain a charge of fraud on the part of the bankrupt as sufficient, in respect that it did not affect the bankruptcy, neither increasing the debts nor diminishing the funds; but the *cessio* was refused on another ground, that certain debts had been contracted fraudulently.

³ *Drysdale v his Crs.*, 1752, M. 11782. The Court went no further in this case, though the losses were condescended on as incurred by smuggling, than to refuse a dispensation with the wearing of the dyvour's habit.

A similar decision was given, *Crichton v his Crs.*, 1768; and again, *Dick v Morison*, 1775, M. 11791.

Perhaps it is more consonant to true principle, as well as more consistent with the spirit of the times, to refuse the *cessio* in such a case *in hoc statu*, and so keep the debtor in

prison till he shall be deemed sufficiently to have suffered for the impropriety of his conduct.

⁴ In *Aitken v Aitchison*, 18 June 1817, Fac. Coll., the Court refused the *cessio*, 'more especially because a large proportion of the debts due to him appear to arise from petty furnishings of spirituous liquors, for which the statute 24 Geo. II. c. 40 does not allow action to be maintained.'

⁵ *Thom v his Crs.*, 11 Feb. 1809, Fac. Coll. Several of the debts had been fraudulently contracted, and the Court *in hoc statu* refused the *cessio*. See below, p. 484, note 4.

Aitken v Gray, 1790, M. 11819. The debtor had fraudulently disposed of his effects to disappoint his landlord's hypothec, and was refused the *cessio*.

See also *Murray v his Crs.*, 11 July 1811, Fac. Coll.

See also *Isbister v Mags. of Kirkwall*, 17 Dec. 1808, Fac. Coll.

⁶ *Ure v Gilchrist*, 1822, 1 S. 377, N. E. 354.

to his own purposes of extravagance and dissipation.¹ But it will not be enough that the debtor has been guilty of acts of swindling,² or of other detached acts of delinquency, which have not occasioned his insolvency.³

4. But if the fraud that is charged against the debtor be such as to produce no important effect, either in raising up debts or in occasioning the insolvency by losses, the Court does not interfere, as a tribunal of criminal law, to punish this independent and separate crime or delict.⁴

5. If the fraud have deprived the creditors of part of those funds which ought to have been divided among them, it is a ground for refusing *cessio in hoc statu*. So the conveyance [591] of funds after insolvency, though not within the sixty days before bankruptcy, was held to justify the refusal *in hoc statu*.⁵

II. EXTRAVAGANCE is near akin to fraud. A merchant may be allowed to speculate for extraordinary gains with extraordinary risks; because it is impossible to draw a line to which commercial enterprise shall be restrained, and because the creditors of a merchant are dealing in a trade of risk. But where a person, by mere extravagance in living, wastes that fund which belongs to his creditors, or seduces dealers into credit for furnishings to which he knows his funds inadequate, he is guilty of manifest fraud. The Court has accordingly refused *in hoc statu* the benefit of the *cessio* in all cases of gross extravagance, especially where the funds of the debtor were distinctly limited, so that he could not be misled as to the consequences of his profusion.⁶

III. ALIMENT OF BASTARD.—It has been held that a debtor imprisoned for the aliment of a bastard child is not entitled to *cessio*.⁷ This was afterwards much doubted,⁸ and those doubts were again strongly expressed in a more recent case; but the *cessio* was refused.⁹

IV. CONCEALMENT OF FUNDS is fatal to the *cessio*; and where there is clear proof of such concealment, the debtor will by no length of imprisonment be entitled to his freedom till he has disclosed the secreted funds: for this is one of the great evils which imprisonment, as sanctioned in the law of Scotland, professes to remedy.¹⁰

The conveyance of funds collusively is concealment; such conveyance as it was the object of the Act of 1621, c. 18, to avoid. While frauds and conveyances of this kind are unredressed, or at least where the circumstances are not fully disclosed, they will ground a sufficient objection to the *cessio*.¹¹ But where the disclosure is complete, and the remedy is fully open to the creditors by reduction, the *cessio* will be no longer refused.¹²

¹ Sutherland, 1827, 5 S. 703, N. E. 656. [Fullerton v Brand, 1834, 12 S. 517.]

² So said by Lord Glenlee in Murray's case, 11 July 1811, Fac. Coll.

³ This doctrine fully confirmed by what fell from the bench in Smith's *cessio*, 6 Feb. 1813, Fac. Coll.

⁴ See the case of Thom, above, p. 479, note 2, and p. 481, note 4.

⁵ Muir, 1827, 6 S. 226. [Bannerman v Crs., 1834, 12 S. 907; Fernie v Crs., 1835, 13 S. 652; Galloway v Scrivens, 1845, 7 D. 403.]

⁶ *Cessio* refused to a clergyman, whose insolvency had proceeded from extravagance. M'Cubbin v his Crs., 1785, M. 11793.

But a distinction was made where a clergyman had a large family and a very small stipend. Insolvency in that case was not held criminal. Minister of Queensferry, 29 June 1805.

Cessio refused in the Second Division, where a debtor had for a number of years lived in a manner unsuitable to his rank and station, and without any prospect of being able to discharge his debt; no losses or innocent misfortunes to account for his insolvency. The debtor said, that although he might

be said to have lived extravagantly with his family, looking to his present circumstances only, his wife had an absolute right to a considerable fortune, the payment of which was only delayed till a younger sister came of age. The Court (27th June 1811) refused *in hoc statu*. On a petition, adhered. Schinniman v his Crs., 16 Nov. 1811, Fac. Coll.

Cessio refused *in hoc statu* to an officer on half-pay of £80, who had taken on lease a house in the country, with shooting grounds, at a rent of £100 a year. There was also a charge of concealment. Arnold v Lyon, 1825, 3 S. 624, N. E. 438.

⁷ Ritchie, 20 Dec. 1811, Fac. Coll.; Steele, 4 July 1812, *ib.* note.

⁸ M'Alman, 1824, 3 S. 366, N. E. 258.

⁹ Baird, 1827, 5 S. 508, N. E. 477. [The rule is no longer in force. Cassels v Keddle, 1852, 15 D. 124.]

¹⁰ Lennox, 1825, 4 S. 144, N. E. 145; Arnold, 1825, 3 S. 624, N. E. 438. Here a quantity of silver plate, which had been in the debtor's possession, was not fully accounted for.

¹¹ Lang, 1827, 1 S. 26; Glass v Pentland, 1823, 2 S. 127, N. E. 120; M'Naught, 1823, *ib.* 221, N. E. 195.

¹² See Steven v Levy, 1823, 2 S. 268, N. E. 238.

The want of books, in the case of a low and illiterate dealer in retail, is not held a sufficient ground for refusing the *cessio*.¹ But in the case of dealers of another [592] description, the want of books will be taken as a proof of undue concealment;² and the destruction of books is fatal to the *cessio*.³

V. After a certain prolongation of imprisonment the Court will grant the *cessio*, although at first refused; exercising thus a discretionary power of judgment respecting the conduct of the debtor. This discretionary power is held to be well exercised where the fraud or impropriety of the debtor has produced its consequences irretrievably, and where all that the creditors can gain by the continuance of the imprisonment is the satisfaction of their just indignation. The Court then interposes to prevent this from going too far as a punishment, holding the balance even between the debtor and his creditors, and judging how far the fault may have been expiated by protracted confinement. But this is a discretion which the Court does not seem to be entitled to exercise where there is proof of concealment of funds. There the debtor must give a clear explanation and discovery, so that the funds may be made available to the creditors, otherwise they have a right to hold him in confinement. It is only where the concealment is a matter of mere suspicion and inference, that the discretionary power of the Court may be interposed to judge whether the length of confinement, and the opportunity of uninterrupted investigation, have been such as to refute the presumption that there is anything concealed.

VI. The *onus probandi* of the objections now enumerated is laid upon the creditors. They are entitled to have an open and full disclosure of all the debtor's circumstances in his condescence and relative states; for they must be supposed ignorant of his affairs. They will be entitled also to have warrants issued for forcing the production of his books and papers, in order to make the necessary scrutiny; and under the duty of rendering to his creditors a fair and a full statement of all his affairs, is included that of presenting to them, if in trade, such a set of books as may show intelligibly his circumstances, and the course of his traffic.

But it is incumbent on the creditors, if the debtor has made this full disclosure, to come prepared to offer evidence, either by the books and papers of the bankrupt, or from extraneous sources, of such fraud or concealment as will be sufficient to deprive him of the benefit of *cessio*. This doctrine was fully laid down in a case already referred to.⁴

Where the creditors oppose the *cessio* on the ground of fraud, but fail in their proof, the Court holds them to be liable in expenses to the debtor.⁵

SECTION IV.

OF THE INTERLOCUTOR, DISPOSITION OMNIUM BONORUM, OATH, AND DECREE OF CESSIO.

I. JUDGMENT.—In disposing of the case, the Court by one interlocutor either refuses the *cessio*, or finds the prisoner entitled to the benefit of it; and in the latter case, by [593] another interlocutor or decree, after the pursuer has granted a conveyance *omnium bonorum*, decerns in the *cessio*, and authorizes the pursuer to be set at liberty.

Unless where the debtor is proved to have concealed his funds, those objections which

¹ *Fairbairn v Scott*, 1825, 4 S. 157, N. E. 158.

² *Fraser v his Crs.*, 1786, M. 11793.

M'Tier v Ferguson, 1821, 1 S. 98, N. E. 99. Here the debtor was an extensive nurseryman, who kept no books, and gave no satisfactory account of his property.

See Act of Sederunt, 14 December 1805, sec. 5.

³ *Reid v Kelso*, 1826, 4 S. 403, N. E. 406.

⁴ *Thom v his Crs.* See above, p. 479, note 2. Lord Presi-

VOL. II.

dent Blair said that the favour shown to insolvent debtors in the *cessio* consists in relieving them from the burden of proof; that instead of a full proof, all that is required of them is a special condescence of the innocent causes of their insolvency, and a satisfactory answer to any objections that may be made to the statement.

⁵ *Menzies*, 1826, 5 S. 103, N. E. 99.

have already been considered are not held to afford grounds for an absolute refusal of the *cessio*, but only for a temporary denial of the benefit, or a refusal of it *in hoc statu*. It is in this way that the Court exercises the discretionary power of giving freedom to the debtor, or refusing him the benefit of this indulgence, according to his conduct. Formerly this discretionary power was chiefly exercised in dispensing with the stigma of the dyvour's habit, or making this disgraceful accompaniment a condition of the liberation. The matter has in modern times taken a course at once more effectual and less offensive than the infliction of an indelible and inexpedient mark of disgrace. The Court now exercises those discretionary powers by continuing imprisonment as a punishment, or bringing it to an end, if the degree of delinquency seem to be sufficiently atoned for. They refuse the *cessio in hoc statu*, when not satisfied that the debtor's misconduct has been sufficiently punished by the length of his imprisonment, leaving it to him afterwards to renew his application, after the prolongation of his confinement may seem to have amounted to a proper atonement for his extravagance and injustice.¹

A judgment of the Court, refusing the benefit of the *cessio*, is not in this way a sentence of perpetual imprisonment. It does not exhaust the action; it is only a judgment *in hoc statu*. After the debtor has become able to clear up the doubts which had led to such a judgment, or where he is disposed to make a full surrender, or even where the mere elapse of time and continuance of his imprisonment may be supposed to have expiated sufficiently the faults he has committed, he may apply again by a petition, and the Court may then grant that benefit which formerly they saw reason to refuse.

It rather appears, too, that the process does not sleep by the expiration of a year from the date of the judgment refusing the *cessio in hoc statu*, but that this interlocutor implies such a reservation to the debtor as may have the effect of continuing the cause in the Inner House roll. The Court hold it necessary, however, in order to prevent surprise, that after a long interval a petition for resuming the cause and granting the *cessio* shall be intimated to the opposing creditors.

If the debtor is not at once found entitled to the benefit of the *cessio*, but the case is thought fit for further investigation, he must continue in prison, however hard this may be, although it may be at the close of a summer session, which prevents the cause from being resumed for four months. If the creditors consent to liberation in the meanwhile, the Court will, on a petition from the pursuer, free him from confinement. But to this measure the creditors cannot be forced. Such consent is given commonly on security being found to the satisfaction of the magistrates for a particular sum to be paid to the creditors, if the debtor should not return to prison on a day certain.

An undue advantage would be gained by the creditors if they could proceed with the proof while the debtor was in prison, without his having any opportunity of attending to [594] it: the Court will therefore grant him the requisite degree of liberty, either on caution or under a guard.²

If the debtor have endured the full period of a month's imprisonment, and if his conduct have been unexceptionable, the Court pronounces an interlocutor, finding him

¹ This was the course followed in the above case of *Schinniman*. The principle was much discussed on the bench in the case of *Smith*.

This doctrine was also followed in the case of *Thom*, already recited, where, after the Court had refused the *cessio in hoc statu*, they subsequently, on a petition on the principle of the above judgment, granted the *cessio* in consideration of the debtor having already suffered ten months' imprisonment. Lord President Blair stated the law to be: 1. That in granting the *cessio*, and in dispensing with the habit, the Court is bound to take into consideration the innocence or blame of

the whole bankruptcy taken together. 2. That perfect innocence is not to be required, but freedom only from such culpability as might be held important in the particular case. And, 3. That the length of the debtor's confinement should always enter into the view of the Court; as culpability, which at first might prevent the Court from granting liberation, might after a long confinement be held sufficiently atoned for.

² In *Alison's* case, 9 July 1814, Fac. Coll., the debtor was liberated on caution for the opposing creditor's debt during the creditor's proof, and for ten days more to conclude his own.

entitled to the benefit of the *cessio*. This interlocutor is a final judgment on this point, and cannot be brought again under review of the Court of Session. In regard to the right of appeal to the House of Lords, it is an interlocutory judgment which, unless there have been a difference of opinion among the judges at pronouncing the interlocutor, or unless the Court shall grant leave, cannot be appealed until the final decree of *cessio* shall have been pronounced.¹

II. DISPOSITION OMNIUM BONORUM, AND OATH.—If the Court shall find the pursuer entitled to the benefit of the *cessio*, he must then grant a conveyance *omnium bonorum*, accompanied by an oath to the truth of the surrender.²

The conveyance is commonly in the form of a general disposition in favour of a trustee for the creditors. But if there be any heritable property to be conveyed, the creditors may insist on having it specially disposed, with procuratory and precept, so that the title may be completed with the least possible expense.³

The oath bears that the pursuer has no property but that which he has conveyed to his creditors; that neither before nor since his imprisonment has he made any disposition to their prejudice; that he has not parted with or concealed, since his imprisonment, money, or goods, or writings.

It has sometimes been attempted to gain time, in hurrying through the proceedings in the *cessio*, by having the disposition and oath executed and prepared by anticipation; but this the Court has refused to sanction,⁴ indulging the debtor (now since the interlocutor has been made final) with liberation, where accidents prevent the possibility of the oath being reported before the rising of the Court for the session.⁵ It were better, perhaps, to authorize the Lord Ordinary on the Bills to pronounce the decree.

There are certain estates and funds not liable to execution by the ordinary diligence of the law, which yet it is unfair that a person should enjoy if he shall have been imprudent or dishonest enough to incur debt without other means of discharging it. The Court, therefore, in administering the law of *cessio*, will require the debtor to assign a reasonable part of such funds, in order to entitle him to the benefit of the *cessio*. There have been many cases decided of late years on this question, and the rules seem now to be pretty well settled. And,

1. In his conveyance the debtor is not forced to include his working tools, by which he gains his sustenance, nor his necessary wearing apparel.⁶ But in the law of Scotland there is nothing like the *beneficium competentie* of the Roman law, although the words of the Quoniam Attachiamenta⁷ seem to favour the notion. In Pringle's case, already referred to, it was stated from the bench, 'that there is no example where the *beneficium competentie* in the extent known in the Roman law has been recognised in the Scotch courts.' And [595] in one case the Court refused to include under the description of the instruments of his trade, the furniture of a teacher of languages.⁸

2. As to stipends, salaries, half-pay, etc., it has, in the first part of these Commentaries,⁹ been explained what the law as to their attachment is; but it is a question somewhat different, whether the benefit of *cessio* can be demanded without giving up all that may exceed a proper aliment. And, 1. A clergyman has been held bound to give up part of his stipend.¹⁰ 2. An officer of the army has been forced to give up part of his half-

¹ 48 Geo. III. c. 151, sec. 15. See below, p. 484.

² [By statute the decree of *cessio* is declared to operate as an assignation of the debtor's moveables. See *Macgregor v Dobie*, 1852, 15 D. 225; *Taylor v Macdonald*, 1854, 16 D. 378.]

³ [Such trustees are subject to the control of the accountant in bankruptcy. 19 and 20 Vict. c. 79, sec. 167.]

⁴ See above, p. 477, *Fraser's case*.

⁵ *Kirkpatrick*, 1827, 5 S. 565, N. E. 530. [See 6 and 7 W. 4, c. 56.]

⁶ *Reid v Donaldson*, 1778, M. 1392; *Pringle v Neilson*, 1788, M. 1393.

⁷ Dig. lib. 42, tit. 3, l. 6; Quon. Attach. c. 7.

⁸ *Gassiot*, petitioner, 12 Nov. 1814, Fac. Coll.

⁹ Vol. i. p. 124.

¹⁰ *Scott v M'Donald*, 25 Jan. 1817, n. r. Here the clergyman had a stipend of £150, being the minimum provision under the statute for a Scottish clergyman. But he was forced to assign one-half before the Court would give the *cessio*.

pay.¹ But it does not appear that the operation of the statutes respecting officers' pay have been distinctly brought under the view of the Court. By 47 Geo. III. c. 25, sec. 4 (1807), all assignments, bargains, sales, orders, contracts, agreements, or securities whatsoever, for or in respect of half-pay, pension, allowance, or relief, shall be absolutely null and void to all intents and purposes. By the English Acts for the relief of insolvent debtors, provision is made for the appropriation of such part of the pay or half-pay of officers of the army or navy, or in the naval or military service of the East India Company, as upon application by the Court for the Relief of Insolvent Debtors to the Secretary at War, or the Lords Commissioners or Secretary of the Admiralty, or the Court of Directors of the East India Company, may respectively be consented to by them.² And perhaps, although there is no express enactment relative to *cessio* in Scotland, an application made in the same quarters may render effectual an assignment of a portion of pay or half-pay, such as the Court has [596] been in use to require. 3. An exciseman's salary was not required to be assigned, as it was admitted that this would have grounded an order for his dismissal by the Board of Excise.³ But an examiner of the Customs was required to give up more than half his salary.⁴ 4. The widow of an officer of the navy was required to assign part of her annuity.⁵ But the Court will not impose on the wife of a debtor, who holds an annuity, the necessity of giving up any part of it for her husband's liberation.⁶

A debtor holding a lease excluding assignees and subtenants was, notwithstanding, required to grant an assignation before the Court would give the benefit of the *cessio*.⁷

III. DECREE OF CESSIO contains a warrant to set the debtor at liberty.

The judgment of the Court granting the *cessio* is, under the Judicature Act, a final judgment and act, whether the creditors have appeared or not.⁸ It is, of course, like other judgments of the Court, subject to appeal; and in such appeal the interlocutor finding that

See *A B v Sloan*, 1824, 3 S. 195, where a clergyman was in a sequestration ordered to convey a large proportion of his salary to his creditors.

[See *Paul v Ross*, 1843, 5 D. 490, a case of a sheriff-substitute.]

¹ *Kellman*, 1 March 1818, n. r. Here Kellman received half-pay as an adjutant, of two shillings per day, equal to £36 a year, and an allowance from the Lanarkshire militia of £73, being £109. The Court granted the *cessio* on his giving a disposition *omnium bonorum*, 'with a special assignation to the sum of £30 for four years.'

Malone, 8 July 1817, n. r. This was a lieutenant in the navy, on half-pay, amounting to £130 per annum. He had a family. He got the benefit of *cessio* 'on lodging a disposition of his effects, and an assignation of £50 a year out of his half-pay.'

Adjutant Davidson, 24 Feb. 1818, 19 F. C. 504. He held half-pay, and had a family consisting of a wife and eight children. The Court having ordained the argument and precedents to be stated in minutes, found him entitled to the *cessio* on his finding caution to pay £50 yearly to his creditors, and granting a disposition reserving his half-pay. He afterwards, on the ground that he could not find caution, prayed that the sum to be paid yearly should be taken by assignation of his half-pay, or by a commission and power of attorney to uplift it. This was adjusted between the parties, and judgment pronounced conformably. 11 March 1818, Fac. Coll.

Chisholm v his Crs., 20 Jan. 1821, n. r. A captain in the veteran battalion, with a family, had on the retired list £180 of pay, and as fort-major £60, with free house, etc. He was ordered to assign £100 per annum while he enjoyed both

salaries, and £70 should he be deprived of that of fort-major.

Thomson, 1822, 1 S. 350, N. E. 328. A purser in the navy, with £50 of half-pay, required to assign £20.

Barr, 1822, *ib.* 369, N. E. 346. A lieutenant with £92 half-pay, a wife, no family; required to assign £20.

Anderson, 1824, 2 S. 752, N. E. 626. Assignment of £30 out of £82 of half-pay, as consented to by debtor.

M'Alman, 1824, 3 S. 366, N. E. 258. A lieutenant, disabled by wounds, out of £80 of half-pay was required to assign £20 a year.

Fraser, 1824, 3 S. 131, N. E. 88. A sergeant who had served twenty-two years, been repeatedly wounded, with two children, his pension two shillings a day, was not required to assign any part.

Holywell, 1824, 3 S. 108, N. E. 71. He had £45 half-pay, and his wife an annuity of £30; required to assign £25.

Scobie, 1825, 3 S. 616, N. E. 432. A retired captain of veterans, with £250 pay and pension for wounds, with a wife and seven children; debts £4000; required to give up £100 a year.

² See 1 Geo. IV. c. 119, sec. 38.

³ *Chisholm*, 1823, 2 S. 413, note, N. E. 369.

⁴ *Mill v Stratton*, 1824, 2 S. 780, N. E. 646.

⁵ *Mrs. Janet Hyndman*, 4 July 1818, 19 F. C. 505. This was the widow of a naval officer, who, as such, had an annuity of £40. She was found entitled to the benefit of the *cessio* only on assigning £25 of it for the use of her creditors.

⁶ *Holywell*, 1824, 3 S. 108, N. E. 71.

⁷ *Martin*, 17 Dec. 1808, Fac. Coll.

⁸ *Walker v Craig*, 1828, 6 S. 476; *Smith v Hart*, 1827, 5 S. 201, N. E. 186.

the debtor is entitled to the benefit of the *cessio* may be questioned (see above, p. 482). But if an appeal should be entered, the Court has the power of regulating matters during the dependence of the appeal, and will on proper security liberate the debtor.¹

The extract of the decree is the warrant to liberate, and is always lodged with the magistrates or jailor, as their exoneration. Magistrates have been found liable for the debt, on account of their having freed the debtor before extract.²

IV. EFFECT OF DECREE.—The decree of *cessio*, while it is a warrant of liberation, is also a personal protection to the debtor. 1. It is a personal protection not only against all the creditors who appeared in the action, but also against all who were regularly called as parties, whether they appeared or not. But it does not protect against creditors who have not been called as parties to the action.³ Whether this ought to be, may be questioned, since the effect is to give to such creditor a preference, if he alone is privileged. The *cessio* seems rather to be ineffectual in such a case against any creditor.

2. The decree of *cessio* will not save from caption on account of debts arising subsequently.

3. It will subsist as a protection against the creditors called in the *cessio*, as long as the debtor continues in the state of insolvency. But if he should succeed to an estate, or by fortunate exertions become again a solvent man, his *cessio* will not avail him. His creditors, however, do not seem to be entitled to proceed forthwith upon their former diligences to incarcerate the debtor. It would rather appear that the regular proceeding is, to apply to the Court of Session, showing cause for issuing a new caption, notwithstanding the *cessio*.

4. The decree of *cessio* is not a protection or sist of such diligence as is directed against the property or funds alone; and as certain descriptions of diligence may be obtained [597] only on a charge of horning, the *cessio* will not prevent such charge, provided it be distinctly restricted to its operation merely against the property.⁴

The *cessio* is not an interruption of diligence begun for attaching the estate, nor is the conveyance, though judicially sanctioned, anything more in competition than a voluntary disposition. 1. If the debtor be possessed of heritable property, against which his creditors have commenced adjudication, the process or decree of *cessio* will have no effect in stopping the course of the adjudication, or giving the benefit of *pari passu* preference. It will be necessary to adjudge within year and day, or to proceed by judicial sale or sequestration, in order to defeat the diligence. 2. So it is with respect to diligence against moveables: if arrestments have been used, or poinding executed, the *cessio* will have no effect in defeating the preference. The mode pointed out in the Sequestration Act must be adopted for this purpose. 3. The conveyance made to all the creditors under the order of Court will not be liable to challenge on the Act 1696, c. 5, though a spontaneous conveyance to the same effect would be challengeable.

The conveyance is for the benefit of all the creditors. But they are not obliged to acquiesce in it as sufficient. They may follow out the diligence of the law more effectually to attach the funds. But no individual creditor can take separate proceedings to raise for himself a preference subsequently to the disposition *omnium bonorum*.

Where the debtor has acquired new funds by succession or otherwise, his creditors are entitled to proceed with diligence to make them effectual. But this right must be taken under the following qualifications:—

1. Creditors who, having got a disposition *omnium bonorum* in *cessio*, claim payment out of a new fund, must, in competition with new creditors, or in a question with the debtor, account for the proceeds of the estate conveyed by the disposition *omnium bonorum*, and

¹ *Glass v Pentland*, 1823, 2 S. 268, N. E. 238.

² *Wilson v Mags. of Edinburgh*, 1788, M. 11759.

³ *Veitch v Campbell & Co.*, 1821, 1 S. 173, N. E. 165.

[*Tulloch v Pollock*, 1847, 9 D. 582.]

⁴ *M'Kie v Harvey & Co.*, 1826, 5 S. 76, N. E. 70.

show a reasonable degree of diligence in the management of the funds assigned.¹ But the burden of showing that there were funds conveyed, which might have been recovered, is laid on the debtor who accuses the creditors of negligence,² or on the new creditors.

2. The creditors are not entitled to take advantage of new acquisitions which do not exceed the amount or value of what the debtor would have been entitled to retain out of his effects in granting the disposition *omnium bonorum*. But the remedy is to be applied in the way of suspension of the proceedings of the creditors. They are not bound to show the amount of the debtor's funds before their diligence can proceed.³ Respecting the articles which a debtor is entitled to have reserved, something has already been said. But there occurred, in that shape of the question which is now under consideration, a case which seems to fix that nothing but the most absolute necessities of subsistence are exempted from diligence. In this case, the debtor had furnished a small house in the most economical way for a wife and several children; but the Court would not prevent a pouncing, nor interfere further than concerned 'the debtor's person, wearing apparel, and working tools.'⁴

CHAPTER V.

OF FRAUDULENT BANKRUPTCY.

[598] For suppressing the more inconsiderable frauds which are frequently disclosed in the course of a bankruptcy, the discretionary power entrusted to the Court of Session in the administration of the processes of sequestration⁵ and of *cessio*⁶ has been thought sufficient. But there are frauds of a nature and extent so flagrant, that they are placed under the cognizance of the penal law.

By 1621, c. 18, which was directed against fraudulent and collusive alienations to conjunct and confident persons, or to prior creditors in prejudice of the diligence of other creditors already begun, it is 'declared that such bankrupts and dyvours, and all interposed persons for covering or executing their frauds, and all others who shall give counsel and wilful assistance unto the said bankrupts in the devising and practising of their said frauds and godlesse deceits, to the prejudice of their true creditors, shall be reputed and holden dishonest, false, and infamous persons, incapable of all honours, dignities, benefices, and offices, or to pass upon inquests or assizes, or to bear witness in judgment, or outwith in any time coming.'

By 1696, c. 5, 'if any person shall for hereafter defraud his creditors, and be found by sentence of the Lords to be a fraudulent bankrupt, the decree of his fraud shall also be determined by the same sentence, and the person guilty not only held to be infamous, *infamia juris*, but also be by them punished by banishment or otherwise (death excepted) as they shall see cause.'

¹ *Lamb v Duncan*, 1798, M. 6576; *Maclatchie v Morrison*, 17 Jan. 1810, n. r.; *M'Kissock v Murphie*, 10 Feb. 1814, Fac. Coll.

[In *Smith v Macintosh*, 1849, 12 D. 303, it was held that property conveyed by a disposition in a *cessio* for behoof of creditors, ought to be applied to pay off debts before old decrees can be enforced against the debtor.]

² Same cases.

³ In *Reid v Donaldson*, 1778, M. 1392, the Court was of opinion that the charger (the creditor) must be allowed to proceed in his diligence to attach the effects without con-

descending, and that the debtor has no right to have any part of his effects set aside to him for his maintenance. But in case the charger, in the execution of his diligence, should proceed to any act of rigour, such as attaching the tools by which the suspender as an artificer gains his daily bread, the Court will then judge on the circumstances of the case whether the diligence ought to be supported.

See also *Pringle v Neilson*, 1788, M. 1393.

⁴ *Pringle v Neilson*, 1788, M. 1393.

⁵ See above, vol. ii. p. 371.

⁶ *Ib.* p. 481.

By 54 Geo. III. c. 137, sec. 33 (after prescribing the oath to be sworn by bankrupts under sequestration, in relation to their surrender), 'it is enacted, that all persons convicted of taking the above oath, or affirmation if a Quaker, falsely, shall be held as guilty of perjury, and of fraudulent bankruptcy, and punished accordingly, and for ever rendered incapable of holding any office of public trust or emolument.' It is also declared, 'that if the bankrupt shall wilfully fail to exhibit a fair state of his affairs, or to make oath in the terms above specified, or to make a complete surrender, he shall be considered as a fraudulent bankrupt, and punished accordingly, and rendered ever after incapable of holding any office of public trust or emolument; and, in either case, shall forfeit every benefit or privilege arising from this present Act, and be accounted infamous, and incapable of giving evidence in any court of justice, or of sitting or acting in any assize or jury.'

By 7 and 8 Geo. IV. c. 20, it is enacted, 1. That persons accused of fraudulent bankruptcy may be tried before the High Court of Justiciary or the Circuit Court on indictment or criminal letters, as in other crimes; and, 2. That the trustee in sequestration, or any creditor whose claim has been admitted, and has been duly ranked upon the sequestrated estate in the sederunt-book kept by the trustee, may prosecute this accusation with concurrence of His Majesty's Advocate, without prejudice to the title of the public prosecutor.¹

These are all the statutes in which any specific description is given of this crime, or of the punishment to be inflicted on a fraudulent bankrupt, or of the method of trial. The language made use of is lamentably imperfect and vague, considering the nature of [599] the crime, and the very serious consequences of conviction.

1. DESCRIPTION OF THE CRIME.—It is very difficult to confine this offence within the limits of any definition. But it may safely be stated as an essential requisite in all the above enactments, that the bankrupt shall, by concealment or withholding of goods or funds, or by collusive alienation or otherwise, criminally deprive the creditors of what ought to be given up to them for payment of their debts.² Extravagance, gaming, wild speculation, improvidence, and other dishonest conduct, whereby bankruptcy may be occasioned, do not constitute fraudulent bankruptcy. They will deserve reprehension and punishment in the discretionary administration of the law of *cessio* or of sequestration; but they are not to be ranked as fraudulent bankruptcy, cognizable as a crime by the penal law.

2. TRIAL.—It is peculiar to this crime and to Forgery, that they may competently be tried and punished in the Court of Session; and, till the recent statute, that Court was held as invested with the sole and exclusive jurisdiction in fraudulent bankruptcy.³

This proceeding must be at the instance or with the concurrence of His Majesty's Advocate.⁴ The trustee in sequestration was formerly held to have no title to pursue such an action. But this was altered by 7 and 8 Geo. IV. c. 20, sec. 2. By the same Act a creditor may in his own name pursue (sec. 2).

The form of proceeding is, 1. By indictment in the Justiciary; or, 2. By petition and complaint if in the Court of Session, that Court sitting as a criminal court, and the process being of the Inner House.⁵ The petition and complaint must be stated with all the strictness and precision of a criminal libel. The detail of the Acts must be as specific and clear; the witnesses to be examined must be named and described, and a list furnished; and no vagueness or irregularity will be either allowed to be waived by the party or supplied by condescendence.⁶

¹ [See 19 and 20 Vict. c. 79, sec. 162.]

² Noble, 1816, Hume 503. The debtor was apprehended at Liverpool with goods and money to the amount of £430, with which he was about to embark to America.

Morison, 1817, *ib.* A sequestrated bankrupt was detected carrying off bills and money to the extent of £550.

Street & Jackson v Mason, 1673, M. 4914 and 4919. The Court found the debtor guilty of concerting, and endeavouring

to execute, a scheme for defrauding his creditors of his funds. See Forrester's case, 23 July 1748, Kilk. 54.

³ 1 Hume 503; Lord Advocate v Duncan, 1823, 2 S. 132, N. E. 123.

⁴ Syme v Steel, 1765, M. 14979; Darby v Love, 1796, M. 7907.

⁵ Aitken v Rennie, 11 Dec. 1810, Fac. Coll.

⁶ Macdonald v Cameron, 1824, 3 S. 131, N. E. 88.

3. PUNISHMENT.—The crime is punished by pillory, banishment, or transportation; attended with the consequences of infamy and incapacity already enumerated in the quotations from the statutes.¹

CONCLUSION OF BOOK VI.

GENERAL REVIEW OF THE PRACTICAL APPLICATION OF THE BANKRUPT LAW.

[600] In closing this Commentary on the Laws relative to Bankruptcy, it may not be without practical use to subjoin a review of the application and uses of the rules of bankrupt law as between debtors and creditors, in a state of actual or impending insolvency.

In the whole circle of professional duty, there is no task, perhaps, more arduous, or which more requires a thorough knowledge of the dangers that beset the parties,—where there are so many difficult points to be known, and where the attention must be kept alive to so many and such various adverse interests,—as in settling an extensive bankruptcy. And perhaps the most useful form in which to present the few hints which it is my purpose to offer, is that of consultations on the different cases which generally occur in practice amid the contending interests which arise from insolvency.

I.—CONSULTATION BY A PERSON INSOLVENT HOW TO ARRANGE WITH HIS CREDITORS.

Where a man feels himself so embarrassed that he can no longer hope to proceed without the danger of disgrace to his person, or expensive and ruinous diligence against his estate, and interruption to all his transactions, he will naturally desire to take measures for immediately placing his affairs under such management, and making such arrangements with his creditors, as may give him time and personal liberty to pay his debts; or which at least may enable him, without the ruinous expense of adverse proceedings, to pay regularly at certain terms such a composition as his estate may afford, and his creditors may be willing to take. It is necessary, in the first place, to observe with what difficulties he may have to struggle in accomplishing this object, before it be possible to direct him how he may best hope to overcome them.

I. SAFETY OF THE DEBTOR'S PERSON.—If the debtor be not privileged from arrest, the freedom of his person can be secured only in one or other of these modes: 1. By the consent of his creditors; 2. By taking sanctuary; 3. If he has been arrested, by means of a discharge in sequestration if a merchant, or by liberation in a *cessio bonorum*.

1. As there can be no personal protection to a debtor by judicial process, except under sequestration; and as the taking of sanctuary is legal bankruptcy,² which endangers all deeds of trust and voluntary acts by which an arrangement with creditors may be accomplished; the first object of attention should be to secure the assent of the creditors to the debtor's protection by SUPERSEDERE. To this end there is some small share of power in the debtor's own hand, if the creditors be desirous to proceed by a trust-deed, which may be made a safe, as undoubtedly it is an economical, arrangement for all concerned. If there be no hope of a reversion, the expense of judicial proceedings will fall on the creditors; and as the debtor cannot be forced to grant a trust-deed, the creditors must be driven to the necessity of expensive proceedings on adjudication, or ranking and sale, unless the parties can be brought to mutual concession. Reciprocal benefit may thus be obtained: the

¹ 1 Hume 508; Wauchope, 4 Feb. 1776; Kellies, 14 Feb. 1776, n. r.; M'Kenzie v Forresters, 26 July 1748, Kilk. 54.

² See vol. ii. p. 163.

debtor granting a trust; and the creditors a *supersedere*, with an obligation to discharge the debtor, either on his satisfying the trustee or a committee of creditors that he has [601] surrendered everything, or on dividends being made good to a certain amount.

2. If the debtor cannot prevail with all his creditors to secure his personal safety, he may betake himself to the sanctuary for protection, and thence negotiate with his creditors.¹ But, 1. This is of itself an act of bankruptcy, endangering all voluntary deeds (even of trust-deeds for the benefit of all his prior creditors equally) completed within sixty days previous to it. The debtor cannot enjoy there his estates, setting his creditors at defiance. He must live dependent on the bounty of others, since the whole of his estate and effects may be the subject of execution, even by creditors from whose diligence he has fled. The true and only justifiable use of the sanctuary is to serve as a temporary refuge during negotiation, or as a protection against some vindictive creditor, who refuses to adopt the measures which promise benefit to all.

3. If the debtor have been arrested, he may, after continuing the due period in prison, procure his personal liberty by *cessio bonorum*.² But this is a remedy only against the evil of imprisonment, while a man continues in a state of the lowest poverty. He may live on an alimentary provision; or on such share of a salary as his creditors cannot touch, and which the Court may not think it equitable to require him to give up; or on the resources of his friends. But he cannot hope to acquire property by industry, succession, or otherwise, without being again exposed to personal diligence.

4. If the debtor be a merchant, his person may be protected, and finally discharged, under the provisions of the Sequestration Statute;³ and for this purpose the debtor himself (if his conduct has been unexceptionable, and he have confidence in his creditors) may, with concurrence, apply for sequestration, or the creditors may apply without his consent. It too often happens that fraudulent arrangements are on such occasions formed between the debtor and his creditors, for the procuring of an early discharge by means of a composition. This perhaps would be less frequent, at least every apology for such a scheme on the account of compassion to the bankrupt would be taken away, by shortening the term at which a discharge might be obtained. The salutary influence of this (if properly guarded against the evil of too rapid a proceeding) would be felt in the whole administration of bankrupt law. A debtor would with less reluctance apply for sequestration, instead of driving his affairs to irreparable ruin, if he could hope for a discharge after a fair surrender within a reasonable time of his failure.

II. PROCEEDINGS AGAINST THE ESTATE.—It is mutually the interest of the creditors and of the debtor to bring the property into a divisible shape at the least possible expense. The saving will enlarge the dividends to the creditors. To the bankrupt it will give a greater reversion, or at least diminish the balance for which, if the creditors do not agree to a discharge, his person and future acquisitions must be responsible.

1. If the bankrupt be in no danger of diligence to make him bankrupt within sixty days, he may effectually execute a trust. As the law stands, this will prevent preferences; and although it cannot stop the creditors from adjudging, or from proceeding to have the estate sold judicially, it generally will operate to the salutary purpose of satisfying all the creditors that such diligence is unnecessary, and that they ought to join in amicable measures. The debtor must not, however, qualify such a trust with any privilege or protection to himself, or any such restraints on the rights of his creditors, as the common law refuses to sanction without their consent. This would make a deed of accession by all the creditors absolutely necessary, and destroy the best effect to be hoped for from such a deed.⁴

2. If the creditors insist on making the debtor a bankrupt, in order to guard [602]

¹ See vol. ii. p. 461.

² *Ibid.* p. 470.

³ *Ibid.* pp. 298, 367.

⁴ *Ibid.* p. 382.

against preferences ; or if a selfish, vindictive, or ill-advised creditor have it in his power to make the debtor bankrupt within sixty days of the completion of the trust-deed,—then the trust-deed will be in danger of challenge on 1696, c. 5, unless a deed of accession shall be executed by all.¹

3. If diligence have begun against the estate, the debtor cannot make a trust-conveyance that will be effectual to disappoint it. He can do little, if the diligence itself be unexceptionable, but give notice to the other creditors, that means may be taken by negotiation, or by proceedings, as in bankruptcy, to counteract the attempt. Thus,—

(1.) If an arrestment have been used, or a charge given with the intention of pointing, it may be the duty of the debtor insolvent to give notice to the other creditors, that they may name a trustee, by whom arrestment may also be used ; or a conjunction with the pointing insisted for ; or bankruptcy established, to the effect of giving a *pari passu* preference to all the creditors ; or the debtor may himself apply for sequestration.

(2.) If inhibition have been used or adjudications begun, it may be the debtor's duty to make the creditors aware of the necessity of proceeding to adjudge, or of raising an action of sale, or of sequestrating if the debtor be a merchant ; or the debtor may himself apply for sequestration. But the debtor cannot interfere to facilitate the diligence of other creditors by constituting debts. So at least it has been decided in several cases,² though the question is still held doubtful, and the bar are by no means satisfied.

(3.) The debtor, if within the description of the Sequestration Act, may, with concurrence of one or two of his creditors, apply for sequestration, either as the means of preventing expensive separate measures, or with the hope of obtaining a personal protection, and finally a discharge, or as part of an arrangement for a composition contract.³

It is a question which has been thought very doubtful, Whether a debtor who has granted a trust-deed, and afterwards finds it ineffectual to accomplish a settlement with the creditors, is entitled to apply for sequestration ? But it has been decided that this is a resource to which a debtor is now entitled to look, wherever there is fair ground to believe that the trust will be ineffectual to accomplish its purpose.⁴

4. If circumstances permit the creditors and the debtor to enter into an amicable adjustment, the great objects are, on the one hand, a fair distribution of the funds among the creditors, as rapidly and as economically as the situation of the estate will admit ; and on the other, intermediate protection to the debtor, and a final discharge on the contract being faithfully fulfilled by him. It does not seem necessary here to enter into any detail of a contract already considered.⁵ But it may be proper to point out one or two of the evils which remain still to be remedied, and which, although the Legislature alone can redress them completely, should ever be kept in mind in arranging private trusts.

(1.) The Legislature ought to protect a voluntary trust against the operation of the Bankrupt Acts, so that the common benefit and common estate should not be placed at the mercy of a selfish or vindictive individual.

(2.) In the conduct of the trust, it is of great importance for the trustee to observe whether inhibitions have been used, and whether they have been expressly discharged : [603] for if not, he ought to lead a general adjudication by all the creditors before making a sale, and let the adjudication form part of the purchaser's title, else the inhibitors may chance to gain a preference.⁶ This ought to be provided for by statute.

(3.) The trustee cannot be made judicially responsible, without the intolerable delay and

¹ See vol. ii. p. 389.

² *Ibid.* pp. 189, 198.

³ *Ibid.* p. 285.

⁴ In the *Sequestration of R. Meldrum*, 2 June 1821, n. r., where the Court was at first equally divided on this question.

But Lord Robertson's opinion carried it in favour of the sequestration.

⁵ See vol. ii. p. 398.

⁶ See vol. ii. p. 138 et seq., and cases there.

expense of an ordinary action. It might be expedient legislatively to make the trustee amenable to the Court of Session by summary petition, with the hazard of the expense of the petition if wrong. Till some such remedy be provided, the contract ought to provide for this, either by declaring that the trustee shall be bound, when called on by a majority of the creditors, to account for his conduct in a course of multiplepointing to be raised in his name by a committee of the creditors; or by including in the deed of accession (to be signed by the trustee) a reference to some person in whom all parties may have confidence, for ordering and directing the conduct of the trustee, upon any dispute of this sort arising.

(4.) It would seem to be expedient that, on certain conditions, the debtor should be at liberty to apply judicially for a discharge, on proving that he had fully complied with the requisites of any statute to be made on this subject, or with the stipulations of the contract with the creditors. His discharge would then have the force of a decree requiring reduction, and available in foreign countries.

(5.) In general, it is most advisable for creditors to choose, or for a debtor to select, as trustee, a professional accountant, or one who devotes himself to this department of practice. The attention of such a man is directed to the correct conduct of a trustee's administration, as a part of the professional character on which he is to depend; and both the debtor and the creditors will have the trust more effectually conducted, and with less of those suspicions which so often disturb the management of trust-estates, where an individual is selected unaccustomed to this occupation, and having frequently no other recommendation but that which should operate the other way,—namely, his own interest as a creditor on the estate. In this country we have a set of professional accountants, possessing a degree of intelligence and knowledge, and a respectability of character, scarcely ever perhaps equalled in any unincorporated body of professional men. The regularity of conduct, the clearness of accounts, the perfect system of administration, according to which these gentlemen manage their trusts, afford an admirable instrument in the arrangement of insolvent estates; and although improper men will thrust themselves into an employment for which they are unfit, it is seldom that any case of breach of trust has been brought to public notice. Where such a thing has happened, it has generally arisen from incorrectness in keeping the accounts of the trust, in not preventing all admixture with other moneys, and from allowing the funds to be confounded in the bank account of the individual. Such an accident is to be guarded against only by requiring caution from the trustee, or by establishing so strict a control over the trustee in the management of the money, as to keep the funds distinct for behoof of the creditors under the trust.

5. Instead of a trust with all its delays and anxieties, creditors will sometimes be prevailed on to agree to a composition. Of this contract enough has already been said.¹ The benefit to the creditors is, payment within a certain time, secured by caution. To the debtor the advantage is in saving the expense of judicial proceedings, giving him leisure to settle with those indebted to him, or to bring his property to the best market.

II.—CONSULTATION BY CREDITORS HOW TO SETTLE AN IMPENDING BANKRUPTCY.

Where creditors find the affairs of their debtor falling into embarrassment, they [604] have to guard against two opposite dangers: on the one hand, against the extravagance as well as the collusive acts of the debtor, and against his attempts to defeat their remedy; on the other, against the adverse proceedings of individual creditors bent on obtaining preferences.

¹ See vol. ii. p. 398; also p. 490.

I. One great object of attention on the part of creditors ought to be, to prevent the dangers which may be produced by voluntary acts of the debtors.

ESCAPE FROM PERSONAL DILIGENCE.—By the debtor's escape from the reach of personal diligence, the creditors are deprived of a very effectual remedy for enforcing payment of their debts, although it will still be possible to establish bankruptcy, by which the remedy of reduction on 1696, c. 5, can be reached. It sometimes happens, however, that the creditors can hope to make little impression, or derive small benefit, from anything but diligence against the person; or that the debtor intends to grant preferences to favourite creditors, while he may so manage matters as to leave undischarged no bonds, bills, or debts, on which he can be imprisoned or made bankrupt. This may occasion difficulty to creditors, and may even justify them in following extraordinary remedies. And,

1. If the creditors should be aware of an intention to grant preferences, they may inhibit; or by poinding or arrestment in security, make use of the second branch of 1621, c. 18, as a protection; or by caption and a search establish bankruptcy.

2. If the preference be already granted, and there is a likelihood of the sixty days expiring without a bankruptcy (which can only be by horning and caption), it may be considered whether the debtor is liable to the Crown, so that by process in Exchequer a caption may be obtained. By 43 Geo. III. c. 150, sec. 44, diligence by horning may issue from Exchequer against collectors of revenue, in certain circumstances; and generally it may be observed that the writ of extent contains a *capias*, on which horning may be issued, and caption may follow. On this, and the power of issuing extents in aid, may perhaps be engrafted a remedy against fraud; where the debtor is either indebted to the Crown for duties, or indebted to a collector or other Crown debtor, and where no diligence is ready on which the ordinary process of the law can be followed.

3. If there be no such aid to be had, it is to be considered whether, by proceeding in some local jurisdiction, there may not be obtained a decree on which diligence may more rapidly proceed. And if even this should fail, it might, in cases of undoubted insolvency, be perhaps sufficient at common law to ground a challenge of an intended preference, if notarial intimation were given to the creditor about to be preferred of the insolvency, and of the intention to challenge any attempt at preference. Circumstances might even be so strong as to authorize an application for an interdict against the intended preference.

4. If the creditors have reason to believe that the debtor intends to leave the country in order to avoid imprisonment, they may arrest him on a *meditatio fugæ* warrant.¹ But this will afford no remedy against a meditated escape into the sanctuary.²

VOLUNTARY DEEDS AND ACTS.—The debtor has power to disappoint his creditors only in one of two ways,—by extravagance and waste of their funds, or by fraudulent alienations or preferences to favourite creditors.

1. The creditors can guard against their debtor's extravagance no otherwise than by personal diligence, or by inhibitions, and by arrestments or poindings, stopping the sources [605] of his extravagance, and attaching and levying their payment out of his rents, debts, and moveables. They cannot take the money out of his pocket, unless by making out so strong a case of fraud as to procure an order from a judge to have the money consigned with a third party, in whose hands it may be attached.

2. They cannot recall payments made *bona fide* to creditors, for that is not within the reach of the statutes of bankruptcy.³ But there seems to be some ground for holding that a protest against the debtor, and against any creditor to whom a payment were intended, might be sufficient to make out a case of fraud at common law. The difficulty to contend

¹ See vol. ii. p. 449.

² *Ibid.* p. 453.

³ *Ibid.* p. 201.

with here, however, is not easily surmounted,—viz. that a creditor is entitled to take payment at any time while his debtor continues in the administration of his estate.

3. Where preferences have been granted, or are suspected, the creditors must make the debtor bankrupt within sixty days of the completion of them, otherwise they will become effectual. This is a point on which the creditors should proceed with great caution; for they may by precipitancy throw a power into the hands of dissentient creditors, which otherwise they might not have held. While the Legislature has not sanctioned trust-deeds against the operation of the Act 1696, it is frequently an important object for a creditor who wishes to disappoint all proposal of a trust, to render the debtor bankrupt, and so raise to himself a veto on the measure. If not himself possessed of diligence, he may stimulate others to make the debtor bankrupt, by suggesting a dread of advantages to be taken against them. But it is generally possible to know, in time to avoid all danger, whether such a step be necessary. A deed of alienation must have been completed by a recorded sasine, or by delivery of moveables, or by intimation of an assignation, during the space of two months, before it can prove effectual against a challenge on the Act 1696.

II. Dangers to the general interest may spring from the adverse proceedings and diligence of individuals. They may either affect the moveables or the heritage of the debtor.

1. DILIGENCE AGAINST MOVEABLES.—The creditors must look for danger from the Crown as well as from creditors in ordinary debts.

Against the Crown the creditors can protect themselves only by constituting a real right in their persons, and having it completed before the Crown's writ of extent issues. If the creditors can succeed in poinding the effects, or in having decree of forthcoming previously to the fiat of the Barons, the Crown may be excluded.¹ If sequestration can be issued and a conveyance completed in the person of the trustee, the Crown will be excluded.² If a trust-deed be granted and completed by delivery, or an assignment to the creditors in satisfaction of their debts completed, it would seem to be preferable to the Crown; but it may be doubted whether such a conveyance might not be reduced.³

If a creditor have poinded, the creditors, in order to have *pari passu* preference, must not only make the debtor bankrupt within sixty days; but they must, within four months after the bankruptcy, constitute such of their debts by decree as are not already constituted by liquid documents, and either have sequestration, or summon the poinding creditor to divide with them the proceeds of the poinded goods, or raise a multiplepoinding and produce their interests, or claim in the poinding before the sheriff. To facilitate proceedings, [606] they may endorse their accounts to a trustee,⁴ or assign them to him for the purpose of raising the necessary diligence.

If an arrestment have been used, the other creditors must make the debtor bankrupt, and raise actions, and arrest also within the four months, either separately or by means of a trustee. Sequestration within the four months is not to be relied on.⁵

Generally it is easy to satisfy a creditor thus taking the start that he can gain no advantage, and seldom (now that the bonus of 10 per cent. is taken away) do creditors insist in or even attempt such an advantage, unless under the direction of some practiser of the law desirous of professional gain, though unavailing for the benefit of his employer.

The creditors should carefully guard against leaving any openings to poind or arrest after the expiration of four months from the bankruptcy; for it is held that a debtor who

¹ See vol. ii. p. 50. But see below, note 3.

² *Ibid.* p. 52.

³ Whether the Act 1696, c. 5, would not afford a remedy to the Crown on the ground of the personal debt, as in any other case, and to the effect of opening the fund to the

operation of the extent, is a point which never yet seems to have occurred.

⁴ *Lawrie v Perry Ogilvie*, 6 Feb. 1810, 15 F. C. 561.

⁵ See above, vol. ii. p. 75.

has not reconvalesced from his first bankruptcy cannot be made bankrupt a second time, so as to raise a new period of *pari passu* preference.¹

Where the debtor has died, the creditors can proceed only on the principles already explained.²

2. DILIGENCE AGAINST HERITABLE ESTATE.—Dangers may proceed either from inhibition, or adjudication, or adjudication in implement, or (what may be ranked as a sort of diligence) a power of sale in an heritable bond.

(1.) INHIBITION³ is the most insidious and dangerous of all the diligences against which creditors have to guard. It does not indeed establish directly, and by its own immediate operation, a preference over creditors whose debts already exist; but some vigilance and attention are required to prevent an indirect preference from having its effect even against them. If, neglecting an inhibition, creditors agree to a trust, or permit the debtor to sell the estate, consigning the price for distribution among them, and the purchaser is infert, the inhibition will, by the operation sanctioned in Pointzfield's case and others,⁴ confer a preference on the inhibitor.

To prevent such a danger, the trustee ought to adjudge for all the creditors before he sells the lands, and that adjudication should form a part of the purchaser's title; or the purchaser's title by infertment ought not to be completed till the whole transaction be complete, and the inhibition discharged.⁵ An inhibitor will easily see that, if he have no [607] advantage by standing out, he had much better take his dividend along with the rest. It must not too readily be imagined that the accession of the inhibitor is a discharge of his inhibition; at least this must not be taken for granted where the deed of accession contains a clause reserving all preferences, as before the deed was signed.⁶

¹ See above, vol. ii. p. 169.

² *Ibid.* p. 83 et seq.

³ In treating of Inhibition, vol. ii. p. 138, it is said that it may proceed on an English penal bond. But, on reconsideration, the rule of practice seems to be correct, and the analogy of adjudication inapplicable. See, on this point, a note by Lord Monboddo, 1767, 5 Br. Sup. p. 937.

⁴ See vol. ii. p. 139.

⁵ There was an important case decided on this subject, which has not been reported. I subjoin a short note from the record of Court:—

L. Stormont v Farquharson, Tr. for the Cra. of Carruthers of Holmains, 1783, Hailes 933. Here Lord Stormont, a creditor for £1000, used inhibition in November 1778 against Carruthers. In March 1779, Carruthers granted a trust-deed for behoof of all his creditors, with a power to sell and divide. The greater part of the creditors acceded to this trust by deed of accession; but Lord Stormont did not accede. The trustee sold lands to the amount of £20,000. Some of the purchasers were infert, and all of them had paid their price to the trustee. To try the effect of Lord Stormont's inhibition, Mr. M'Crae, one of the purchasers not yet infert, brought a multiplepoinding; and it was agreed to try the case, as if everything competent had been done by the parties to secure or to destroy the preference claimed by Lord Stormont. It was admitted that Lord Stormont could adjudge, and by his adjudication and inhibition combined would have established a preference, if the other creditors could not also adjudge. But, on the other hand, it was conceded that the inhibition alone gave no preference, and that the other creditors, by adjudging, if competent, could prevent Lord Stormont from attaining any preference over them.

Thus the question came to be, Whether the other creditors could adjudge after the sale and payment of the price? The Court held that they could so adjudge, the purchaser not being infert, and therefore that Lord Stormont had no preference over the price. The judgment was: 'Upon report of Lord Kennet, and having advised the mutual informations for the parties, the Lords find that Lord Stormont has no preference to the other personal creditors upon the sums in the trustee's hands; and remit to the Lord Ordinary to proceed accordingly.'

The case was argued by very eminent counsel, Sir Ilay Campbell and Mr. Blair, both of them afterwards Presidents of the Court of Session.

⁶ Russell, Tr. for Cockburn Ross, v M'Leod, etc., Exrs. of Innes, 16 Jan. 1821, n. r. Here Innes stood in the right of an inhibition used subsequent to a trust-deed by Cockburn Ross. This trust-deed was granted to some gentlemen in the country, and was found inoperative, and another was granted to a professional trustee, Mr. Russell, accountant, with power to sell; and Innes, one of the original trustees, signed the new trust-conveyance, which contained a declaration, that 'this disposition should not import or be construed so far to prefer any one creditor to another, or to postpone and annul the rights and diligences of any creditor already acquired, but that the creditors' preferences among themselves should remain mutual, in the same way and manner as if these presents had never been granted.' Mr. Russell sold the lands, and Mr. Innes' representatives claimed a preference on the inhibition. The Court held, 1. That the inhibition gave a preference, on the principles established in Pointzfield's case, and M'Lure's, the inhibitor having a title to object to the sale, in so far as he had not consented to it; and, 2. That

(2.) An ADJUDICATION can be an object of dread only in so far as it may augment the expense and ruin all hope of reversion to the debtor, or lessen the dividends to be drawn by the creditors. The term of *pari passu* preference is so long, and the methods of taking the benefit of it are now so numerous, that the adjudger would be very refractory indeed, or his agent much bent on professional emolument, if he should refuse to come into amicable measures.

(3.) ADJUDICATION IN IMPLEMENT is a much more formidable enemy to the equality recommended by the bankrupt law, for there is no *pari passu* preference here; and if adjudication were to pass and be completed, the creditor would gain an irretrievable advantage over the rest. The remedies are: 1. Sequestration (where that can be accomplished), and the immediate completion of a feudal title in the person of the trustee. 2. Imprisonment, for the purpose of forcing the debtor to grant, either under the Act of Grace or under the *cessio*, a disposition *omnium bonorum*; and for granting such disposition, compelled by the law, the debtor does not seem to be liable to the charge of stellionate. When such disposition is granted, it ought to contain a special conveyance on which titles may be completed; or if the debtor refuse this, and the judge should sanction his refusal, an adjudication in implement on the general conveyance will certainly be a title in competition sufficient to prevent the completion of the individual's title which would lead to a preference.

POWER OF SALE IN A BOND.—This properly is not a diligence, but it is a formidable instrument in the hand of a creditor, as the Court have interpreted the law.¹

III. Creditors under a trust may suffer by sequestration being applied for to supersede the trust. It has been held that a trust-deed is no interruption to a sequestration.² [608] What, then, is the effect of the sequestration on those creditors who have claimed under the trust? 1. In so far as the trust-deed gives real security to creditors, unchallengeable on the bankrupt statutes, the administrator of the estate being changed will not invalidate the security. The private trustees, in denuding in favour of the trustee in the sequestration, devolve the trust with all its burdens. 2. Such payments as creditors may have received under the trust, they will, of course, be compelled in the sequestration to deduct. 3. Such payments as they may have recovered from co-obligants, they will not be obliged to deduct in claiming under the sequestration.³

IV. In regard to the general course of management to be followed, it may be observed, 1. That if the debtor be refractory, the only safe course in general for the creditors to follow, is to proceed with legal measures (sequestration, if a merchant; ranking and sale, and arrestment and poinding, if not; together with personal diligence) in order to bring the debtor to a proper sense of his duty to his creditors. But if the creditors are unanimous, there is, in general, little occasion for precipitancy. Threats of diligence against the debtor will generally bring him to reason, if the creditors are careful to have debts ready, or diligence prepared, to be made use of on the instant. Let care be taken, for example, if there be no bill or bond due, that a decree shall be obtained on which diligence may pass.

2. It is a material object, when the debtor is in bad health, to have immediate proceedings taken for sequestration, or judicial sale or arrestment, so as to save the necessity of proceedings on charges against his representatives. Sequestration is not at all competent after death. But if the debtor is dead, proceedings must be taken by his creditors, within

his consent to the trust, and to the sale under it, was with a full reservation of his right as against the other creditors.

Two doubts may be stated against this judgment: 1. That at the time the reservation was made, Innes had truly no preference, since his inhibition gave him none, except by means of a voluntary sale, which the creditors might have avoided, and which in all likelihood they would have avoided, had not

the inhibitor consented to the sale; and, 2. That the purchaser was not yet infeft, which, Lord Craigie said (and the above case, if known, would have supported that doubt), opened the estate still to the adjudication of all the creditors.

¹ See vol. ii. p. 269.

² *Ibid.* p. 295.

³ *Ibid.* p. 305.

the three years, to complete their diligence, otherwise they will lose their preference over the creditors of the heir.¹

As to the HERITABLE ESTATE: 1. A voluntary trust may be arranged with the heirs willing to make up titles *cum beneficio inventarii*;² 2. The estate may be sold judicially by the apparent heir on the Act 1695;³ or, 3. If the heir be a pupil, he may sell the estate by means of a process of cognition and sale, either as an apparent heir on the Act 1695, or having made up his titles; or, 4. The estate may be sold by process of judicial sale and ranking at the instance of the creditors.

As to the MOVEABLE ESTATE, the best course to be followed is to go into common measures, with the aid of the widow or representative, after confirmation. The whole funds may be made over to a trustee for distribution, under powers expressed in the deed of accession, or the whole brought into Court by a multiplepoinding. The same thing may be done by a creditor confirming as executor-creditor.⁴

3. Where the creditors and the debtor are both desirous of coming to a fair distribution at the smallest possible expense, the first object is, to be assured that every voluntary and every judicial preference is discharged, in so far as they are not already irrevocably completed. It will generally be easy to satisfy the holders of preferences that are challengeable, that they cannot, with any hope of advantage, be insisted in: a voluntary security only requiring a reduction on the Act 1696; an inhibition which strikes not against the debts, requiring only an adjudication or process of sale to defeat it; and an adjudication being [609] subject to the *pari passu* preference. So that the advantage to be gained is only to the amount of the expense to be saved by renouncing the security. If the creditors do renounce the preference, let it be done precisely and clearly; if not, let the proper remedy be taken (before going into a trust, or before selling the subjects under it), by immediately applying for sequestration, or by raising and executing a summons of ranking and sale, or by vesting the debts in a trustee for the purpose of adjudging, or, where the danger lies in that quarter, by rendering the debtor bankrupt.

If there be no obstruction to a voluntary trust, it seems the best and least expensive of all modes of settlement, provided a trustee is chosen who is skilful in the profession of a trustee, and on whose fidelity, knowledge, and vigilance the creditors may rely. And many of the benefits of the sequestration law may be enjoyed by an agreement in the deed of accession, that the rights and preferences of the creditors shall be regulated in the same manner as if sequestration had been awarded at the date of the trust-deed.⁵

It is far better, however, for the creditors to proceed with a judicial sale than to accede to an ill-arranged trust. Indeed, this is a process well fitted for its purpose:⁶ unpleasant occasionally to the debtor from its publicity; recommended by no personal indulgence or protection, and followed by no discharge; but, after all, the best, the cheapest, and the most effectual method of disposing of land estates for their true worth, and of dividing the price among the creditors. The proceedings are simpler and less expensive than formerly, and the evils of delay greatly alleviated; and the difference of expense in respect of auction-duties, stamps, and trustee's commission, which form a burden on private trusts, more than counterbalances in great bankruptcies the costs of judicial proceedings.

III.—OF SOME POINTS IN THE VESTING OF ESTATES IN TRUST, JUDICIAL OR VOLUNTARY.

It would require a volume to explain all the variety of cases in which the making up of titles in the person of a trustee comes to be attended with difficulty. I can only touch on one or two points.

¹ See vol. i. p. 766; vol. ii. p. 79.

² See vol. i. p. 706.

³ See vol. ii. p. 236 et seq.

⁴ *Ibid.* p. 80 et seq.

⁵ *Ibid.* p. 396 et seq.

⁶ *Ibid.* p. 233 et seq.

1. When the bankrupt is feudally infeft, there can be no difficulty in the ordinary case. The trustee in sequestration, by his adjudication, or by the bankrupt's conveyance, acquires right to the estate; and by sasine on the disposition, or on the charter of adjudication, his title is complete. The same may be said of a voluntary trustee.

But there is one case which requires more particular attention, in which the creditors stand opposed to a purchaser, who, although he has no complete conveyance, has a minute or missive of sale, or a disposition without precept or procuratory. This person truly is no more than a creditor, although his situation may appear to be singularly hard. The other creditors, therefore, and the trustee acting for them, are justified in striving to gain a complete title, which may disappoint his hopes, and bring him in only as a creditor among the rest; his remedy being an adjudication in implement. If the bankrupt have granted a conveyance to his other creditors voluntarily, or under the compulsion of diligence, or order of a Court, they may run the race of diligence to get the first adjudication in implement; and it is a rule, that the Court is bound to give decree of adjudication in implement as soon as asked by one in circumstances to justify the demand. If a sequestration have been awarded, it seems still to be competent to the purchaser to proceed with his adjudication in implement;¹ and if he can complete it before the trust-adjudication is completed, [610] he will prevail, but the trust-adjudication will have full effect as an adjudication in implement, as well as for debt, if first completed.² If the creditors have obtained a general voluntary conveyance by way of trust, or a disposition *omnium bonorum* in a *Cessio*, or under the Act of Grace, without precept and procuratory, they will be entitled to lead an adjudication in implement to compete with the purchaser, and the preference will often depend on the vigilance of the parties.

2. Where the bankrupt himself is not infeft, two cases may be distinguished: one where the bankrupt holds by singular titles; the other, where he has succeeded to the estate.

If, in the former of these cases, he hold the property by a conveyance, with precept and procuratory unexecuted, the trustee in sequestration, by means either of the bankrupt's conveyance, or of the adjudication in the act of confirmation, may proceed to complete his title, by taking infeftment on the unexecuted precept and procuratory, or he may even sell the subject; and on his conveyance to the open precept and procuratory, the titles of the purchaser may be completed. The same may be observed of a voluntary trustee.

It sometimes happens that the bankrupt has conveyed or burdened his estate; and that the conveyance to the creditor or purchaser has been followed by infeftment, while the bankrupt himself is not infeft. This may proceed either from carelessness and over-confidence, or from the circumstance of the bankrupt's title-deeds being under hypothec at the time, and intended to be relieved, perhaps, from the loan or price. If, in those circumstances, the creditors allow the bankrupt's title to be completed by sasine, that sasine will accresce to the right already granted, which will thereupon become a complete and effectual right. The trustee must, in such a case, pass over the bankrupt in the way above described, and infeft himself; by which means the infeftment already taken on the voluntary conveyance will become ineffectual.

If the bankrupt's right be constituted by disposition, without precept or procuratory, the trustee must complete his own titles by adjudging in implement as assignee of the bankrupt's right under the disposition, and taking the charter of adjudication in implement to himself; and this is the more particularly to be observed, if there be any person who,

¹ By 54 Geo. III. c. 137, sec. 42, it is provided that 'no other adjudication, led or made effectual after the date of the first deliverance, shall have any effect in competition with the right of the creditors under the sequestration.' But this seems to apply only to adjudication for debt, not to adjudication in implement.

[Under the modern system of conveying the difficulty would not occur. An instrument of sasine being no longer requisite, the purchaser may at once make his right real by recording the conveyance in his favour.]

² 54 Geo. III. c. 37, sec. 30.

as purchaser or lender of money, has already obtained a right followed by infestment in expectation of the accretion of the bankrupt's title.

If the bankrupt have succeeded to his ancestor, and his titles be not yet completed, the trustee must proceed to complete the title, either in the person of the bankrupt or in his own, as in the circumstances may be most expedient. By the 31st section of the Sequestration Act¹ it is provided, that in case the bankrupt's own titles be not completed, the trustee shall take the most safe and eligible method of doing so, which title shall accresce to that already acquired by the trustee. This it may be safe to do, where there is no creditor with a preference already in part provisionally complete. But if any creditor should stand in that predicament, the trustee must take care to complete the title in his own person, avoiding the completion of the feudal chain in the person of the bankrupt. It is not sufficient that the Act has declared that the completed title shall accresce 'to that already acquired by the trustee, in the same way as if it had been completed prior to the disposition by the bankrupt, or adjudication against him;' for the feudal title, already provisionally in the creditor or purchaser, immediately becoming effectual, will prevent or obstruct the accretion to the trustee's title.

¹ [See 19 and 20 Vict. c. 79, sec. 81.]

BOOK VII.

OF PARTNERSHIP.

IN carrying on those extensive enterprises and costly undertakings in which the [611] manufacturing and trading capital of a commercial country are employed, the resources and the mind of one individual are often inadequate. They require the combined capital, skill, and industry of many, with the unity of purpose and of person which belongs to an individual. This it is the object of PARTNERSHIP to supply. In partnership there is a voluntary association of two or more persons for the acquisition of gain or profit; with a contribution, for that end, of stipulated shares of goods, money, skill, and industry; accompanied by an unlimited mandate or power to each partner to bind the company in the line of its trade, and a guarantee to third parties of all the engagements undertaken in the social name.

Partnership is thus a contract involving important relations to the public as well as to the contracting parties. In the infancy of trade it is little regarded or understood; and no proofs, perhaps, are more decisive of the low state of mercantile intercourse in Rome, than the very imperfect state of the Roman jurisprudence with respect to partnership. In the simple view of partnership as a mere society, in all that relates to the shares of parties accidentally associated as joint proprietors, or the rules of contribution and division in the management of a common stock or concern, there is no defect in the Roman law. But the subject is never contemplated in that more delicate and important light which presents for decision the interests and dealings of the company with third parties, and the powers of partners to pledge the stock and credit of the society with the individual responsibility of the partners. In modern times, the effects of this contract, in its relation to third parties, are by far the most important. The question in this view is, not what share of profit, or what proportion of loss, upon a common stock, each partner is to gain or to suffer; but what are the rights of those who deal with the company in claiming preferably on its common stock, and what responsibility is undertaken by the several partners for contracts *bona fide* entered into by third parties? In this inquiry, be the reciprocal rights and liabilities of the partners what they may in respect to each other, they each, in their relation to the public, hold an authority which no force of private stipulation can alter or restrain; and by means of which, in the face of the most express injunctions or prohibitions of their contract, the several partners, or even those perhaps who may long have left the partnership, may, by the act of any one of the number, be made responsible to third parties to the whole extent of their private fortune. It is in this view chiefly that definitions of partnership (which, like all others, are proverbially dangerous, seldom useful) are to be received with peculiar caution, if borrowed or derived from the writings of the civilians, who neglect [612] almost entirely the implied power and unlimited mandate of the partners to bind the rest.¹

¹ *Societas est contractus de conferendis bona fide rebus aut operis, animo lucri, quod honestum sit ac licitum, in commune faciendi.* Pothier, Pand. Justin. Pro Socio, lib. 17, tit. 2, vol. i. p. 432. This is nearly the definition of

Vinnius, in Instit. Comment. 675; of Heineccius, Elem. Jur. Civ. secundum Ord. Pand. iv. 239; and of Pothier himself, a little more amplified, in his Tr. du Cont. de Société. Le Contrat de Société est un Contrat par lequel deux ou plusieurs

Even in the writings of some modern lawyers, this limited character appears in their definitions of partnership, while their doctrine extends to consequences which are not presented prominently in the description.¹

In the further prosecution of this subject, it may be proper, after explaining some necessary preliminaries relative to the general principles of the contract, to observe particularly the nature and effect of PARTNERSHIP, properly so called, where the association is distinguished by a social name or firm; of JOINT ADVENTURE, where the copartners are bound only in so far as the dealings may be with the concern itself, or for acquisitions to the association; and of PUBLIC COMPANIES, which are sanctioned by royal or parliamentary authority, with privileges or limited responsibilities. And, in concluding, the doctrine of BANKRUPTCY of COMPANIES will deserve notice.

CHAPTER I.

GENERAL VIEW OF THE PRINCIPLES OF PARTNERSHIP.

To understand fully the nature and effect of partnership, it is necessary to observe the operation of two principles: the common interest in the estate or stock of the company as liable for debts and (in so far as there may be a reversion) divisible among the partners according to their contract; and the personal responsibility of the partners for all the engagements undertaken by the company, or by any of the partners in the social name or for the company's behoof.

SECTION I.

OF THE COMMON PROPERTY OR STOCK OF THE COMPANY.

The property of the company is common; held *pro indiviso* by all the partners as a stock, and in trust; responsible for the debts of the concern; and subject, after the debts are paid, to division among the partners according to their agreement. This is a great point in the doctrine of partnership, and important consequences are deducible from it.

The common stock includes all lands, houses, ships, leases, commodities, money,—whatever is contributed by the partners to the company use. It comprehends also whatever is created by the joint exertions of the company, or acquired in the course of the employment of their capital, skill, and industry. All this, by the operation of law, and the nature and effect of the contract, becomes common property, is held by all the partners jointly for the uses of the partnership, and is directly answerable as a stock for the payment of its debts.

personnes mettent, ou s'oblige de mettre en commun quelque chose pour faire en commun un profit honnête dont ils s'oblige réciproquement de se rendre compte. Vol. ii. p. 533.

[The importance attached by the author to the principle of implied mandate in partnership, has received a striking confirmation from the decision of the House of Lords in *Wheatcroft v Hickman*, 8 H. L. Cas. 268, where it was laid down that the true test of liability as a partner is not participation in profits, but the question whether the trade was carried on by persons *acting on behalf* of the person sought to be made

liable. See also, on this point, *Bullen v Sharp*, 1 L. R. C. P. 86, 35 L. J. C. P. 105; *Pole v Leask*, 33 L. J. Ch. 155; *Kilshaw v Jukes*, 32 L. J. Q. B. 218. *Re The English and Irish Church and University Endowment Society*, 1 H. and M. 85; per Williams, J., in *Courtenay v Waggstaff*, 16 C. B. N. S. 131; *ex parte Davis, re Harris*, 32 L. J. Bkr. 68; *Lyon v Knowles*, 3 B. and S. 556; *Pott v Eyton*, 3 C. B. 32; *Barklie v Scott*, 1 Hud. and Br. 94.]

¹ Gow on Partnership; 1 Carey on Partnership 1.

I. VESTING OF THE STOCK.—The stock or common fund is held by the partners *pro indiviso*. And,

1. This *pro indiviso* right implies, as between the parties themselves, a right of retention in each partner over the stock, for any advances which he may have made to the [613] company, or for any debt due by the company, for which he may be made responsible.

2. It also implies, in relation to the public at large, creditors of the company, a trust in the several partners, as joint trustees, for payment in the first place of the company debts.¹ And on this point rests, 1. The preference which the creditors of the company have over the company funds; none of the partners, nor any one in their right, as individual creditors or otherwise, being entitled to more than the reversion after the purposes of the trust are fulfilled.² And, 2. The peculiarity, that heritable subjects belonging to and held by a company are considered not as heritable in succession, but as moveable, consisting of the *jus crediti* only.³

3. In this respect, the contract of partnership has the effect of a direct conveyance of property to the company of whatever is engaged to be given, or by clear evidence is contributed to the uses of the company by any of the partners to whom it belongs. The contract does not indeed supersede the necessity of the completion of the transference by tradition or otherwise, but it operates as a conveyance (*titulus transferendi domini*), which, when followed by tradition, possession, intimation, and the other methods of completing a transference by law, vests the property in the partners jointly for the purposes already expressed. 'Society,' says Lord Stair, 'is not so much a permutative as a commutative contract, whereby the contractors communicate each to other some stock, work, or profit. The effect of society is, that thereby something which before was proper, becometh, or is continued to be, common to the copartners.' He adds: 'Yet this communication is not effectual to transfer the property in part, or to communicate it without delivery or possession, by which property by positive law is transferred.'⁴ This distinction is of some consequence. Where the question is between the parties and their representatives, as to what shall be considered as the estate of the company, but without involving any competition with third parties, whatever falls under the fair construction of the contract will as a personal right belong to the company and its creditors. But where there arises a competition depending on the question of real right, it will be determined according to that criterion of real right which the law has appointed in cases of transference.⁵ But in determining what shall

¹ [The notion of the copartners being trustees for the creditors of the partnership will, of course, be understood in a figurative or analogical, and not in too literal a sense. The copartners hold the partnership property as common property in their own right, not as fiduciaries; and the company creditors are not strictly beneficiaries, but creditors, each of whom may, by the due use of diligence, cut out the others from any share in the funds. The point that the interest of each of the partners in the heritable property held in common by the society is moveable, rests on the fact that it resolves into a claim against the *persona* of the society; but it does not involve the doctrine that that *persona* holds its property not in its own right, but as a fiduciary for its creditors. Nor does the company, in fact, so hold its property in trust for its creditors in any other sense than that very loose sense in which every individual who owes debts may be said to hold his property in trust for his creditors.]

² *Corrie & Son v Calder's Trs.*, 1761, M. 14596; *Crooks v Tawes*, 1779, M. 14596.

³ See *Sime v Balfour*, 1804, M. App. Heritable and Moveable, No. 3; for opinion of House of Lords, Fac. Coll. for 1812-1814, App. 684.

⁴ Stair i. 16. 1.

There is a text of the Roman law apparently adverse to this doctrine of transference by partnership: 'Nemo societatem contrahendo rei suæ dominus esse desinet.' Dig. lib. 17, tit. 5, l. 13, sec. 1, De Prescriptis Verbis. But the true sense of the text is, that by the transference implied in partnership, the original property in the partner is not extinguished. The transfer, as Pothier says, is not 'in solidum sed duntaxat pro parte quam confert.' Pand. Justin. vol. i. p. 504, note c. See also Tr. du Cont. de Société, No. ii. vol. ii. p. 534.

[See *Gabriel v Evill*, 9 M. and W. 297, where an intending partner agreed to put capital into the business, but reserved to himself the option of determining at any time within twelve months whether he should become a partner, and the advance was made; but within the twelve months he elected not to enter into the partnership. It was held that the relation of partnership was not constituted between the parties.]

⁵ This distinction reconciles what appears to have occasioned some perplexity in the case of *Sime v Balfour*, *supra*, note 3. What was there stated in the inventories, and used by the company, was held as belonging to the company; while some difficulty was felt in extending this to the houses, dock,

amount to an engagement to contribute, and consequent conveyance of a particular subject, it is not always the use of the subject that will settle the point. In one case, certain subjects of which the use was given to the company were held to be fairly intended as part of the stock, from the way in which they were mentioned in the inventories. In another nearly similar case, the same inference was avoided, the partnership not being of a permanent [614] character, but a momentary joint adventure merely.¹

In respect to moveables, all commodities comprehended within the partnership, and in possession of the partner to whom they previously belonged, are held, as by *traditio brevi manu*, to be vested in the company; for the partners having power to hold for the company as *præpositi*, their possession will be presumed to be for the common behoof. But money due by a third party to an individual partner, or commodities in the hands of third parties, contributed by the owner as part of his stock, will not be transferred without delivery or intimation. The creditors of the owner, using attachment by diligence before intimation of the partnership, would attain a preference over the company.

Ships must be transferred according to the directions of the statute. See above, vol. i. p. 159, etc.

4. As to land and other property, which by the forms of territorial conveyance require to be transferred by deed, the partnership will acquire by the contract nothing more than the *jus ad rem*. If, for example, a cotton-mill is by the agreement contributed as his share of stock on the part of the owner, this will not feudally transfer to the company the property of the mill, so as to entitle them to exclude the adjudication of the separate creditors of the proprietor trusting to the record. But it will, like a general disposition, confer on the company a *jus ad rem*, by virtue of which they may, in a declarator and adjudication in implement, have that property declared and adjudged to the partners jointly, or to a trustee, as part of the stock of the concern.²

5. Such personal property as may have been acquired in the name of the society, becomes *eo ipso* the property of the partnership, although purchased by an individual partner with his own money. He is *præpositus* of the company, and entitled to advance money and acquire property directly for the common behoof.³

6. Such personal property as a partner acquires, even in his own name, provided it be beneficial acquisition and in the company's line of trade, is, according to the spirit of the contract of partnership, to be held as acquired for the company, and the company will be entitled to claim it. But it would rather seem that in such a case the property would pass to the partner in real right, with a *jus ad rem* to the company and its creditors.⁴

7. A partner who binds himself to pay a sum or fungible into the stock, is debtor to the company, and the loss of the money or fungible before being put into stock is his private

etc., though appearing in the inventory, and used by the company. The distinction lay here, that *inter se* the partners were to be considered as having transferred these subjects to the company as a part of the stock; but in relation to third parties, the real right could not be considered as completely transferred.

¹ Contrast the case of *Sime*, p. 501, note 3, with *Wilson v Threshie*, 1826, 4 S. 361, N. E. 366. [*Minto v Kirkpatrick*, 1833, 11 S. 632.]

² [*Keith v Penn*, 1840, 2 D. 633. One of two joint-purchasers of land having made a super advance, and being thus a creditor of the joint adventure, held to have a preference on the price over the other joint-purchaser.]

³ *Wallace v Campbell*, 1824, H. L., 2 Sh. App. Ca. 467.

This must be taken, however, under the qualification that the partner shall not act against the statutes of bankruptcy

in making such acquisition. If he be indebted to the company, and take this method of conferring a preference on the eve of his bankruptcy, and within sixty days of it, the preference would certainly be challengeable.

⁴ See *Ersk.* iii. 3. 20.

[As to the principle of constructive trust in relation to property acquired by a partner in his own name, and the cognate rule that a partner (like a trustee) cannot make profit at the expense of the company when acting on their behalf, see *Duncan v Union Canal Co.*, 1831, 9 S. 398; *Hunter v Cochrane's Trs.*, 1831, 9 S. 477; *Samuel & Co. v Brown*, 1842, 4 D. 1518; *Blaikie Brothers v Aberdeen Railway Co.*, 1854, 17 D. (H. L.) 20, 1 Macq. 461; *Pender v Henderson & Co.*, 1864, 2 Macph. 1428; *Faulds v Roxburgh*, 1867, 5 Macph. 373.]

loss. If he has engaged to put in a specific subject into stock, and it perish, the loss is to the company, unless the partner shall be *in mora*.¹

8. It is commonly said, that there must be an equal contribution of stock. According to the equity of the contract, so there must; but it is for the parties themselves to say what shall be equality of contribution. One man may contribute property, another money, another skill, another labour and industry. But the presumption is, that in the opinion of the parties their several contributions are equalized, though it may be impossible or difficult to state in what that equality consists.

In questions of division or dissolution, the presumption will be for equality of contribution, though apparently there may be a difference in the amount of input stock.

The partners are, by the general law of partnership, equal sharers of stock on the [615] dissolution of the company, and equal participators of profit and of loss,² where there is no special contract relative to this matter. By special agreement, the proportions may be altered; but without some participation of profit, or the hope of it, the contract, as between the parties themselves, cannot subsist as a proper partnership.

SECTION II.

POWERS OF ADMINISTRATION IN THE PARTNERS.

It is another important point in the law of partnership, and is implied from partnership whenever it is established, that each partner is *præpositus negotiis societatis*, to the effect not only of holding possession for the company, and of acquiring property for them in the line of their trade, but also to the effect of entering into contracts for the partnership within the line of the trade which they profess to carry on, and of subscribing the firm, and binding the company in all acts of ordinary administration.³

The power of a partner to bind the firm may be exercised, either by signing a negotiable instrument, as a bill of exchange, or by signing one of the ordinary contracts of the trade, as a charter-party, or by making purchases or sales of such commodities as the company professes to deal in.

In most written contracts of partnership there is a limitation of the power of signing the firm; but whatever effect that may have among the partners themselves, it can have none whatever in saving the company, and its stock and partners, from responsibility to third parties ignorant of the restriction. They are entitled to rely on the general law of partnership, which establishes a general institorial power in each partner.

This is established clearly in the case of negotiable instruments, by which the common dealings of merchants are carried on.⁴ And the company will be bound, although the

¹ [As to contribution between subscribers to local improvements, see *Orr & Co. v Pollock*, 1840, 2 D. 1092.]

² *Peacock v Peacock*, 1808 (Lord Ch. Eldon), 16 Ves. jun. 49.

[Later decisions tend to negative the supposed presumption for equality of contribution, and it is now held that the question of the extent of a partner's interest is a pure question of fact, which must be determined upon evidence of the actual contract, and without reference to presumptions. *Campbell's Trs. v Thomson*, as reversed, 1831, 5 W. and S. 16; *Aberdeen Town and County Bank v Clark*, 1859, 22 D. 44. But it would seem that, in the absence of any evidence as to the division of profits and losses, the presumption is for equality of interest. *Stewart v Forbes*—per Lord Cottenham—1 Mac. and G. 137, 146; *Webster v Bray*, 7 Hare 159; *McGregor v Bainbridge*, 7 Hare 164, note; *Collins v Jackson*, 31 Beav. 645. As to

the use of the partnership books and accounts for this purpose, see *Blair v Russell*, 1828, 6 S. 836; *Coventry v Barclay*, 3 De G. J. and Sm. 320.]

³ [One consequence of this rule is, that where the partnership consists of only two members, one partner may make use of the name of the firm in proceedings directed against his copartner for the recovery of a debt alleged to be due by the latter to the company. *Antermony Coal Co. v Wingate*, 1866, 4 Macph. 1017.]

⁴ Lord Kenyon, in *Harrison v Jackson*, 1797, 7 Term. Rep. 207.

[In order to bind, the bill or note must be granted in the assumed performance of the company's business, or by its authority. One who takes from a partner of a trading company, in satisfaction of that partner's separate debt, a nego-

money or credit so raised may have been applied to the use of the partner, and not to the benefit of the company.¹

[616] The power extends not merely to the making of notes and accepting of bills, but also to endorsements.²

This power, however, is only implied; the presumption being, that each partner is *præpositus negotiis* for the company. When the party then has notice of a stipulated restraint on the power of the partners,³ or when, by the circumstances or in its own nature, the transaction is such as to carry evidence with it of a misapplication of the firm to what is an individual concern only, and not a matter in which the company is interested, the company and the other partners will not be bound,⁴ unless, 1. There can be shown previous

liable security in the name of the firm, is bound to show that it was issued with the concurrence of the other partners. *Leverson v Lane*, 13 C. B. N. S. 278, 32 L. J. C. P. 10. See *Yates v Dalton*, 28 L. J. Ex. 69, as to the powers of partners in a brokerage business; and *Levy v Pyne*, Car. and M. 453, as to solicitors. As to the liability of the firm where the proceeds are shown to have been applied to its use, *Thicknesse v Bromilow*, 2 Cr. and J. 425.]

¹ *Ex parte Bonbonus*, 8 Ves. jun. p. 540. Of the case of a partner raising money by the firm for his own use, Lord Chancellor Eldon says: 'This petition is presented upon a principle which it is very difficult to maintain—that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold that a man borrowing money upon a bill of exchange, pledging the partnership, without any knowledge in the bankers that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether *Hope v Cust* (see below) was not carried too far, yet that does not reach this transaction; nor *Sheriff v Wilks*, as to which I agree with Lord Kenyon, that as partners, whether they expressly provide against it in their articles (as they generally do, though unnecessarily) or not, do not act with good faith when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt.

'In *Fordyce's case* (*Hope v Cust*, 1 East 48; see below, note 4), Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted upon the danger of placing every man with whom the paper of a partnership is pledged at the mercy of one of the partners, with reference to the account he may afterwards give of the transaction. There is no doubt, now the law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *prima facie* it will not bind them; but it will, if you can show previous authority or subsequent approbation,—a strong case of subsequent approbation raising an inference of previous positive

authority. In many cases of partnership and different private concerns, it is frequently necessary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm.'

Lord Ellenborough said, in *Swan v Steel and others*, 7 East 210: 'It would be strange and novel doctrine, to hold it necessary for a person receiving a bill of exchange, endorsed by one of several partners, to apply to each of the other partners to know whether he assented to such endorsement, or otherwise that it should be void. There is no doubt that, in the absence of all fraud on the part of the endorsee, such endorsements would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are, and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void; but if it be taken *bona fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of Wood & Payne, and in the course of their dealings as partners received the bill in question; and it was competent to either of them, by his endorsement in the name of the firm, to pass their interest in the bill; and the plaintiffs, ignorant of any fraud at the time, take it by such endorsement from one of the partners. Then, if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such endorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should; because if the plaintiffs had been apprised at the time that the partner who endorsed the bill had no authority to do so, they might have obtained some other security for their demand.'

² *Ridley v Taylor*, 1810, 13 East 175.

³ *Galway v Mathew*, 1808, 10 East 264. Here there was notice of the limitation by advertisement communicated to the plaintiff.

⁴ See, in note 1, above, Lord Ellenborough's doctrine.

Wells v Masterman, 2 Esp. 731, where one having dealings

consent by the other partners, or subsequent approbation;¹ or, 2. That although the [617] debt is known to be the private debt of the partner, the joint security may *bona fide* appear to be the property of or fully at the disposal of such partner.²

with one partner, drew a bill of exchange upon the partnership on account of those dealings. See cases cited in Gow on Partnership, 59.

Blair Miller v Douglas, 22 Jan. 1811, Fac. Coll. Miller lent to Sturrock and Small £500, and got their bill for it. Sturrock failed, and Miller had a dividend from his estate; and from Small he received in security an acceptance under the firm of Ivory & Co., of which Small was a partner. The question arose on this acceptance (Small having first failed), Whether the company was bound to pay it? The Court were quite clear that, being an acceptance given in security of a private debt, with which the company had nothing to do, and this being necessarily known to Miller, and no communication having been made to Ivory & Co. or the other partners of that company, the company was not liable.

See **Prondfoot v Lindsay**, 1825, 3 S. 443. See also **Johnston, Sharp, & Co. v Phillips**, as decided in H. L., 1 Sh. App. Ca. 244.

Hope v Cust, 1774, Mr. Justice Buller's ms., 1 East 53. 'Mr. Fordyce, who traded very largely in his separate capacity, as well as in the business of a banker in partnership with others, having considerable dealings in his private capacity with Hope & Co. in Holland, did, for and in the names of himself and partners, give them a general guarantee for the money due from him in his separate capacity. Fordyce became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of Chancery by Hope & Co. in order to have the benefit of this guarantee, upon which that Court directed an issue to try the validity of it. Lord Mansfield, in summing up the evidence to the jury, said: There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners, it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantee from Fordyce himself in his own handwriting, without consulting the other partners, or having their privity, is not such gross negligence in the Hopes as will amount to a fraud or covin. Fordyce was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the name of the partnership for his own benefit. This case comes out of Chancery, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between Hope & Co. and Gurnal & Co. and Fordyce, the whole transactions are avowedly with Fordyce only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantee. It is clear that Fordyce's deposits and interest in the funds were both doubted, and then the Hopes tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantee was given in 1764, and that never had

been called in, and still existed. There was then no occasion for a new one; for the change of a partner, and taking in a new one, would not destroy a former guarantee. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore got this from Fordyce alone, clandestinely, without the knowledge of his partners. If the fact be clear, that Hope & Co. and Gurnal & Co. knew that this was done to cheat the partners of Fordyce, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, Whether it be not a gross negligence, especially as they knew at the time that Fordyce was acting in his separate capacity, and this security was intended to indemnify them against his separate debts. Verdict for defendant. Lord Mansfield afterwards, in his report to the Court of Chancery, on a motion being made for a new trial, said: Three things were established to the satisfaction of himself and the jury. *First*, That the transactions between Hope & Co. and Fordyce were wholly on Fordyce's account; *secondly*, That the partners of Fordyce derived no profit or benefit whatsoever from them; *thirdly*, That they had no notice of the guarantee, and consequently did not acquiesce in it. And Lord Mansfield said he left it to the jury whether, under these circumstances, the taking of these guarantees were, in respect of the partners, fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust Fordyce was guilty of in giving them.'

In the case of **Ardin v Sharpe**, 2 Esp. Ca. 523, a bill signed by the firm was taken by a partner (who himself signed it) to be discounted, with a request that the transaction should be concealed from his partner, which was assented to by the person who discounted it. Lord Kenyon, at Guildhall, held the bill not sufficient to ground assumpsit against the company.

In **Sheriff v Wilks**, 1 East 48, a bill was drawn on a partnership of three persons for the price of porter sold a year before that partnership began to two of the partners. The bill was accepted by the firm, signed by one of the two who had purchased. Action was refused against the company.

In **Green v Deakin**, 1818, 2 Starkie 347, Lord Ellenborough, conformably to these cases, held 'that the nature of the transaction, where a partner draws a bill in the name of the firm for discharge of his own private debt, is intrinsically notice; and he directed a nonsuit, on the ground that one partner has no right to bind another without his knowledge, by drawing a bill for his own private debt.' [**M'Nair & Co. v Gray**, Hume 753; **Matheson v Fraser**, Hume 558; **Macleod v Tosh**, 1836, 14 S. 1058.]

¹ *Ex parte Bonbonus*, etc., p. 504, note 1; and **Sandilands v Marsh**, below, p. 506, note 4.

² In **Ridley v Taylor**, 1810, 13 East 175, Lord Ellenborough, with concurrence of the rest of the Court of King's Bench, drew a distinction between such a case as that described in the text, and the above series of cases. In that case the bill appeared to have been drawn in the name of the firm to their own order eighteen days before the delivery of it to the

A partner has power in the same way to enter into common contracts for the company; and although he may secretly apply the proceeds of such contracts to his own use, yet if the transaction be entered into in *bona fide*, the company will be bound.¹

[618] It has been held that the company was bound where a partner signed the firm of the company to a guarantee, the receiver of it not having been aware that it was for the granter's behoof.² But it is a rule more consistent with the principles of copartnership, that, without a special authority from his copartners, one partner is not authorized to bind the partnership by guaranteeing the debt of a third party, such a power not being necessary or usual for carrying on a joint concern.³

Where the transaction is out of the strict line of the partnership trade, as settled in the contract, but still an ordinary dealing, and to all appearance a transaction of the partnership, entering into their books, so that either it is known, or should be known, to the other partners, it will be held within the scope of the authority, and will bind the firm.⁴

The company is liable even for the fraudulent acts of a partner acting in the line of the partnership.⁵

A partner has, in England, power to pledge contrary to the rule of that law relative to factors.⁶

Although a partner be thus empowered, by implied mandate, to bind the company and his copartners in acts of ordinary administration, and in the usual course of trade, he holds no such power to bind in extraordinary acts out of the usual course.⁷ Thus, a reference to

separate creditor, and to a larger amount than the separate debt. The endorsement of it was not made by the copartner in presence of the separate creditor; but it was drawn, endorsed, and accepted, before it was produced to him. It should carefully be observed, however, 1. That the Court held that, in the circumstances, 'it might reasonably be supposed by the party to whom it was given to be a partnership security, of which the partner in possession of it had, for some valuable consideration, or in virtue of some arrangement with the other partner, become the proprietor, so as to be authorized to deal with it as his own;' and, 2. That it mainly weighed with the Court that it was a case 'where positive evidence of the covin might have been given, had covin really existed.'

[In any case, a partner could not bind his copartners by granting a receipt without consideration; and where a receipt has been granted by a partner in the name of the firm, but without the knowledge of his copartners, such receipt is not conclusive in a question with the firm, but evidence is admissible to show that it was given fraudulently. *Farrar v Hutchinson*, 9 Ad. and El. 641.]

¹ *Bond v Gibson & Jephson*, 1 Camp. 185. The company were harness makers. Jephson bought of Bond, as for the company, a number of bits for bridles, but immediately pawned them for money for his own use. The defence rested on the goods never having gone into company stock, and on no credit on former dealings with the company. Lord Ellenborough said: 'Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purpose applied. I will take it that Jephson meant to cheat his partner; still the seller is not on that account to suffer. He is innocent, and he had a right to suppose this individual acting for the partnership.' Verdict for plaintiff.

² See *Hope v Cust*, above, p. 504, note 1. *Ex parte Gardom*, 16 Ves. jun. 386, where Lord Eldon said: 'The objec-

tion that the partnership is not bound by the signature of one partner is properly given up.'

[As to the effect of changes in the constitution of a company in relation to guarantees granted to or for the company, see 19 and 20 Vict. c. 60, sec. 7.]

³ *Duncan v Lowndes*, 1813, 3 Camp. 478. This was an action against a company on a guarantee given by Lowndes, one of the partners under the firm; and it was held that a guarantee is not usual for carrying on business in its ordinary course, or incidental to the general power of a partner to bind his copartners by such an instrument.

[The doctrine stated in the text is confirmed by *Brettell v Williams*, 3 Exch. 623, 19 L. J. Ex. 121; and see *Payne v Ives*, 3 D. and Ryl. 664.]

⁴ *Sandilands v Marsh*, 1819, 2 Barn. and Ald. 673. This was an annuity negotiated by one partner of a navy-agent partnership out of the line of their arrangement and usual course of dealing. But it entered the books, and must have been known to the other partner, who was held liable accordingly.

[*Atkinson v Mackreth*, 2 L. R. Eq. 570, 35 L. J. Ch. 624; *De Ribeyre v Barclay*, 23 Beav. 107, 26 L. J. Ch. 747.]

⁵ *Wallace v Campbell*, *supra*, p. 502, note 3.

Willet v Chambers, Cowp. 814. This was a partnership in conveyancing, in which one of the partners got a sum to lend on security, and forged a mortgage without the knowledge of the other. The innocent partner held liable.

See also *Jacaud v French*, 12 East 317; and *Rapp v Latham*, 2 Barn. and Ald. 795. [*Sawyer v Goodwin*, 36 L. J. Chan. 578; *Blair v Bromley*, 2 Ph. 354, 16 L. J. Chan. 495; *Sadler v Lee*, 6 Beav. 324.]

⁶ *Raba v Ryland*, 1 Gow 132; and *Tupper v Haythorne*, before Sir W. Grant, Master of the Rolls, *ibid.* 135, note. [*Read v Hollinshead*, 4 B. and C. 867. See *M'Kenna, ex parte*, 30 L. J. Bank. 20.]

⁷ [*Hasleham v Young*, 5 Q. B. 205, 13 L. J. Q. B. 205;

arbitration will not bind the company, if signed or agreed to by one of the partners,¹ unless expressly agreed to or homologated by the rest or by the company.²

A partner generally represents the company in bankruptcy; as in proving debts, in voting for a trustee, or in signing a discharge.³

SECTION III.

PERSONAL RESPONSIBILITY OF PARTNERS.

Partners are under a responsibility to the public, and to each other.

1. To third parties each partner is responsible for the whole debts of the concern. In legal language, they are liable *singuli in solidum*, and more as guarantors than as principals. But they are not, like cautioners, entitled to the benefit of discussion. The [619] non-payment on the part of the company at once raises their responsibility. Like other mercantile guarantors, they are conditional debtors, if the debt is not paid at the day.

2. The reciprocal obligations of the partners to account to each other according to their respective interests in the partnership, is an essential part of the contract. On the same principle, they must relieve each other of all advances or payments made beyond the amount of their respective proportions of loss. Under this point of the contract the company may become indebted to an individual partner, or a partner to the company, for money advanced beyond the stock or contribution of the other partners, or for stock not paid up. But, strictly speaking, this, in a question of division of stock, affects not the share of profit or of loss, but must be settled on the separate footing of debtor and creditor.⁴

SECTION IV.

COMPANY A SEPARATE PERSON IN LAW.

Some lawyers have considered the obligation of the company as only the joint and several obligations of the partners. But this is not correct in the law of Scotland. The partnership is held as in law a separate person, capable of maintaining independently the relations of debtor and creditor.⁵ As a separate person, the company is known and recog-

Bishop v Countess Jersey, 2 Drew 143, 23 L. J. Chan. 483. One partner has no implied authority to give consent to a judgment in an action against himself and his copartners. *Hambridge v De la Croué*, 3 C. B. 742, 16 L. J. C. P. 85. As to purchases of shares in other companies or undertakings, see *Balfour's Trs. v Edinburgh and Northern Railway Co.*, 1848, 10 D. 1240.]

¹ *Ersk. iii. 8. 20. Lumsden v Gordon*, 1728, M. 14567. [*Adams v Bankart*, 1 Cr. M. and R. 681; *Stead v Salt*, 3 Bing. 101; *Hatton v Boyle*, 3 H. and N. 500, 27 L. J. Ex. 486.]

² *Bo'ness Canal Co. v M'Alpine & Co.*, 1791, M. 14572.

³ *Ex parte Hodgkinson*, 19 Ves. 293.

⁴ [The obligation incumbent on a managing partner or director to account to his copartners or shareholders, has received its latest illustration in the numerous actions instituted by shareholders of insolvent companies against the directors, claiming compensation for losses attributable to mismanagement. The subject is a large one, and we merely indicate the authorities. *Tulloch v Davidson*, 1858, 20 D. 1045, 1319; 1860, 22 D. (H. L.) 7, 3 Macq. 783. *National*

Exchange Co. v Drew, 1860, 23 D. 1. *Western Bank v Baird and others*, 1862, 24 D. 859; 1867, 5 Macph. (H. L.) 93, 1 L. R. H. L. Sc. 170. Claims of damage, whether in respect of general mismanagement or in respect of the circulation of false reports inducing the shareholder to purchase stock, cannot be set off against a demand for calls on the part of the directors or liquidators of the company. *Turner v Molison*, 1833, 11 S. 669; *Caledonian Dairy Co. v Campbell*, 1834, 12 S. 394; *Inglis v Lumsden*, 1859, 21 D. 192; *Urie v Lumsden*, 1859, 22 D. 38. As to the mode of inquiry in actions founded on fraud and mismanagement, see *Collins v North British Bank*, 1850, 13 D. 349; *Western Bank v Baird*, *supra*.]

⁵ 'The creditor of a company,' says Lord Kilkerran, 'cannot pursue (prosecute) one of the partners for a company debt: his action lies against the company only.' 26 Feb. 1741, Kilk. 518. This is perhaps too absolutely laid down; for both action and diligence may proceed against a partner after manifest failure by the company to pay. [*Reid v Douglas*, 11 June 1814, F. C.; *Stevenson & Co. v M'Nair*, 1757, M. 14560.]

nised in obligations and contracts by its separate name or firm, as its personal appellation.¹ But it cannot hold feudal property in the social name.

It is a consequence of this separate existence of the company as a person, that an action cannot directly and in the first instance be maintained against a partner for the debt of the company. The demand must be made first against the company,² or the company must have failed to pay, or have dishonoured their bill, before the partner can be called on.

It also follows that the partners are guarantees or sureties for the company, not proper or principal debtors. And so, although diligence may proceed against the partners directly, the company having failed to pay according to their obligation; and although personal diligence necessarily can proceed only against the individuals, the estate of the partner can in bankruptcy be charged only with the balance remaining due after what may be drawn from the company estate.

Another consequence is, that the creditors of a partner, if they would attach his share, must arrest in the hands of the company as a separate person.³

Action or diligence seems to be legally competent by a company firm, or against the partnership by its firm; though personal execution, of course, is possible only against the individuals.⁴ But so many doubts have been raised of late on these points, that the safer course is to use the names of the partners. Sequestration of the company's estate proceeds in the name of the firm. See below, Of Joint-stock Companies.

[620] In England, a doctrine prevails which does not accord with the law of Scotland, and which, perhaps, is to be ascribed to a difference of principle on the point now under discussion. At law, in England, there can be no debt between two partnerships, of each of which one person is a partner; and this on the ground that 'no man can contract with himself, and therefore cannot bind himself in the society of one set of persons to another in which he is also a partner.' It is allowed that the contract is available in equity, but not in law.⁵ In Scotland, debts between companies in which the same individual is partner, are every day sustained as quite unexceptionable.⁶

SECTION V.

DELECTUS PERSONÆ.

The last point which requires, in this preliminary view, to be taken notice of, is the *delectus personæ*, inseparable from the nature of a contract of such exuberant trust. This

¹ *Culcreuch Cotton Co.*, 1822, 2 S. 47, N. E. 41.

² *Kilkerran* 518.

³ I find the following case in a ms. of Lord Pitfour's: 'An adjudication or arrestment of a subject belonging to a company for a proper debt of any of the copartners, is an *inhabile* and ineffectual diligence. For these subjects are not, in whole or in part, the property of any partner. But the copartnership is considered as a distinct person; and the creditors of a partner can only affect his share of the balance due to him after payment of the copartnership debts. This affectable by arrestment.' (*Creditors of Robertson*, 1744.)

'An *non* also by adjudication? *Baillie v Sharwood*, Jan. 1752.' Pitfour's ms. *voce* Society.

Compare with this the English cases of *Jacky v Butler*, 2 Lord Raym. 871; *Eddie v Davidson*, Doug. 650, etc.; *Watson on Partnership* 98. These cases exhibit a difference of principle which deserves attention.

⁴ *Thomson v A. Liddel & Co.*, 2 July 1812, Fac. Coll.

[An *incorporated* company may, on common law principles, sue and be sued by its distinctive name, without joining the names of any of the partners in the instance; and it is usual to design the company as 'incorporated by Act of Parliament,' without citing the Act. As to unincorporated companies, a distinction is now recognised between social and descriptive firms. A social firm (A B & Co.) may sue and be sued alone. *Aitchison & Co. v Barnside's Trs.*, 1832, 10 S. 296; *Forsyth v Hare & Co.*, 1834, 13 S. 42. A descriptive firm (*The C D Co.*) may sue and be sued in the name of the firm, with the addition of the names of three of the partners (or two, if there are no more). *Culcreuch Cotton Co. v Mathie*, 1822, *supra*; *London and Edinburgh Shipping Co. v M'Corkle*, 1841, 3 D. 1045.]

⁵ *Bosanquet v Wray*, 2 Marshall 319.

⁶ [This distinction is sometimes lost sight of by partners in their dealings with customers. A law agent, for example, accepts employment as the factor of a landed proprietor, and

produces some effects which will demand particular attention afterwards, in so far as it confers on the several partners a power to dissolve at any time, if no term be fixed for the duration of the connection, and also in so far as by the death, renunciation, incapacity, or failure of any one partner, the whole partnership is dissolved.

In the Roman law, so much was this personal confidence of the essence of the contract of society, that the parties could not effectually stipulate that the right of a person who should happen to die should descend to his heir.¹ But it is the opinion of one of the best of the commentators, that this rule, and the principle assigned for it, have more in them of subtilty than of good sense;² and the law of Scotland accords with this opinion. 1st, The *delectus personæ* implied in the nature of the contract bars the admission of new partners, either by succession or by alienation; but, 2dly, It is now settled law that the parties may stipulate that their heirs, or even their assignees, shall be adopted in their room.³ This is a matter of daily occurrence in public companies, but it may also be a part of a private contract.

But although, in a contract of partnership which admits heirs and assignees, there is less of *delectus personæ* than where they are excluded, still a confidence is mutually reposed in the members, that in assigning their shares they will be careful in selection; and at least it would appear that the company might object, on cause shown, to the partner proposed to be introduced, and that the power of assigning or selling the share must be qualified to this effect.

In public companies where the responsibility is limited to the stock, there is not the same *delectus personæ* as in private partnerships. The direction and administration of the company is vested in managers for the common behoof;⁴ the shades of individual character in the partners can produce comparatively little effect upon the general credit; for the credit of the establishment rests upon the joint stock, not upon the personal consideration or wealth of the members who may chance to have a pecuniary interest. Shares, [621] therefore, in public chartered banks, and in national companies, are alienable, and of course attachable by creditors.⁵

the benefit of the contract is taken by a firm of which he is a partner, the factory transactions being entered in the books of the firm. In such a case it may be the interest of the employer to treat the contract as a contract with the individual; and if he does so, he cannot be made liable to the firm without proof that he had recognised it as his agent or creditor. *Mabon v Christie*, 1844, 6 D. 619.]

¹ 'Adeo; morte socii, solvitur societas,' says Pomponius, 'ut nec ab initio pacisci possimus ut hæres etiam succedat societati.' Dig. lib. 17, tit. 2, l. 59.

² 'Cette raison,' says Pothier, 'ne me paroît pas bien decisive, et je crois qu'elle a plus de subtilité que de solidité.' And he adds that, by the law of France, a paction that the heir should succeed to his predecessor's share of the copartnery was available. 'C'est pourquoi je pense que dans notre droit, quoique régulièrement la société finisse par la mort de l'un des associés, et que son heretier ne lui succède pas aux droits de la société pour l'avenir, néanmoins la convention qu'il y succedera est valable. C'est l'avis de l'ancien praticien Masuer. Des Associations 28, N. 33. Les Jurisconsultes Romains,' he continues, 'admettoient eux-mêmes cette con-

vention dans la société pour la ferme des revenus publics. Pourquoi ne la pas admettre pareillement dans les sociétés ordinaires?' *Traité*, etc., tom. ii. 585. Du Cont. de Société, No. 145.

³ *Stair* i. 16. 5. *Warner v Cunningham*, 1798, M. 14603; aff. in House of Lords, 3 Dow's Rep. 76. [See *Irvine v Irvine*, 1851, 13 D. 1367; *Hill v Wylie*, 1865, 3 Macph. 541; *Beveridge v Beveridge*, 1869, 7 Macph. 1034; *Holland v King*, 6 C. B. 727.]

⁴ [It would seem that a power to purchase and sell lands may be given to the directors of a joint-stock company by implication, where the acquisition of land is an incident of the company's business or undertaking. *Fleming v Sir J. Campbell*, 1845, 7 D. 935. As to the powers of a committee appointed to assist the editor of a newspaper or periodical work, see *Heraud v Leaf*, 5 C. B. 157, 17 L. J. C. P. 57.]

⁵ Accordingly it was found, in the case of the *Royal Bank of Scotland v Fairholme*, 1770, Hamilt. 46, that the shares of that bank are adjudgable, although by the charter of erection it is declared that the shares shall not be liable to any arrestment or attachment.

CHAPTER II.

OF PARTNERSHIP PROPER.

PARTNERSHIPS, properly so called, are distinguishable on the one hand from public companies, and on the other from joint adventure. They are either avowed, being carried on and known by a firm or partnership name; or anonymous, in which the concern is carried on ostensibly by an individual, while there are secret, or sleeping, or dormant partners behind. The rules of both are the same when the partnership and the partners are disclosed, the difference being only in the latency of the partnership. There is a company stock, over which the partners of the company have a preference for the payment of company debts. There is also a universal responsibility or guarantee by the several partners, when discovered, for the whole engagements of the company.

SECTION I.

CONSTITUTION OF PRIVATE PARTNERSHIP.

Private partnership may be general or special. By GENERAL is not to be understood the *Societas Universorum Bonorum* of the Roman law, but a partnership in the whole trade or manufacture carried on by the parties. SPECIAL partnership is a concern limited to a particular branch, or the exclusion of a particular branch which, without special contract, would be held included in general partnership.¹ Such limitations every day occur in practice, and are effectual; and it will depend on the conduct of the parties, whether, whatever their private agreement may be, they are not to be held, with regard to strangers, as partners.

I. CONTRACT OF PARTNERSHIP.—Questions of evidence on partnership arise either with third parties, or between the partners themselves. In the former case, the only point of importance is to establish the general fact of partnership, from which necessarily results a preference on the common stock, and a general responsibility of those who are proved to be partners. In the latter case, it may be of importance, besides the general fact of partnership, to establish the special terms of the contract between the parties, and according to which their several interests are to be regulated.

The best evidence in all cases of the fact of partnership, is a written contract authenticated according to the rules of law.

This form is chiefly used where there are special stipulations to be made, and is indeed not necessary where there is neither an unequal contribution of stock, an unequal division of profit or loss, nor a special limitation of time. Where the contract does express [622] special conditions, it forms the law between the parties; but no power of words in the contract will limit the responsibility, which by the law itself is laid on copartners, to the public at large.

¹ This doctrine laid down by Lord Mansfield in *Willet v Chambers*, Cowper 814: 'Let us see, then, what was the nature of the partnership afterwards entered into, whether it was a general partnership in all Dodly's business, or confined to one particular branch of it only? For, to be sure, there may be such a confined partnership.' [Questions as to the

constitution of partnership most frequently arise in the form of objections on the part of alleged partners or shareholders of the company to contribute towards the liquidation of its liabilities. The English decisions, which are very numerous, will be found in the Digests, *voce* Contributory, and in Lindley on Partnership, pp. 1078-1135.]

It is not necessary that the contract should be constituted by a formal deed. An exchange of letters between the parties will be sufficient to fix the contract, and bind them to the terms of the agreement; and action may be maintained on such evidence, as well as upon a solemn and formal contract, provided the requisites of the stamp laws be observed.

Where the question at issue relates to the terms of the contract, and not the general fact of partnership only, articles drawn out as the basis of the agreement of parties will sufficiently ground an action on the special terms of those articles, although they have not been signed, if the parties have proceeded to trade on that footing, and *res non sunt integræ*. But frequently articles are thus drawn out, or a memorandum made of terms which finally the parties see reason to reject. It will not therefore be sufficient, where any important interest depends on the proof of the terms, that such memorandum or articles exist, and that the parties have carried on a partnership trade. It will further be required, that some precise sanction shall have been given to the articles, or the terms expressed in them. Thus, if they have been transcribed into the books; or if the parties shall be found to have conducted their connection on the peculiar stipulation in question; or if the contract, as contained in the articles, shall be identified by proof of the observance of some characteristic point in those articles; or if the parties shall have settled their accounts conformably to the articles,—such proofs may be sufficient to establish the contract according to those terms.

II. PAROLE OR CIRCUMSTANTIAL PROOF.—Where no written contract has been executed, the action will seldom have any other object than to establish the general fact of partnership, leaving the consequences of it to the disposition of the law. The evidence to be resorted to on such occasions is either PAROLE EVIDENCE, or CIRCUMSTANTIAL EVIDENCE; sometimes called Evidence *rebus ipsis et factis*.¹ The subscription of a firm, the use of a firm in purchasing articles, the making of entries in books kept for the concern, the conducting and superintending by a particular person of any part of the concern, the participation of profits,—all these are proofs of partnership.² And the evidence resorted to usually consists of letters of correspondence; jottings and entries in books; the oral testimony of clerks, agents, or other persons who know that the alleged partners have actually carried on business in partnership.³

If by such evidence either a direct connection as partners shall be established, or participation of profit, it will be sufficient to raise the responsibility as a partner.⁴ It often happens that a person possessed of capital wishes to employ it on mercantile profit, without being willing that his concern with the trade should be known. He may as a dormant partner accomplish his object; and while the trade is prosperous, his secret may be kept, and his object attained. But a reverse of fortune ought to lead to a disclosure. And when his interest is discovered, such dormant partner will be liable fully as a partner, whether he have joined himself to a concern trading by a firm, and so suggesting the idea of partners, on the hope of whose liability part of the credit may rest;⁵ or have engaged with an [623] individual who has been held out as the sole trader, on his individual credit.⁶ The rule rests on reasons of strict justice, as well as of policy and general expediency, since, by a bargain to take a part of the profit, the dormant partner becomes actually, or by possibility at least, participator of that fund on which the creditors rely for payment. He is either a partner, or guilty of a usurious contract, and has empowered another to act for him in a contract of loss and gain, to the consequences of which he must be responsible.⁷ This

¹ *Societas dividitur primo in Expressam, quæ expressa conventionione fit; et Tacitam, quæ re contrahi dicitur; dum rebus ipsis et factis, simul emendo, vendendo, lucra et damna dividendo, socii ineundæ societatis voluntatem declarant.* Voet, lib. 17, tit. 2, sec. 2.

² *Livingston v Gordon*, 1775, M. 14551. See 3 Starkie on Evid. 1066 et seq., and cases there quoted.

³ [See *Fraser v Hill*, 1854, 16 D. 789.]

⁴ See Gow on Partnership 15, and cases cited.

⁵ *Ex parte Gellar*, 1812, before Lord Chancellor Eldon, 1 Rose 297.

⁶ *Logy v Durham*, 1697, M. 14566. See *Saville v Robertson*, 1792, 4 Term. Rep. 720. See below, chap. 3.

⁷ *Grace v Smith*, 1775, 2 Blackst. 998; *Hoare v Dawes*, 1780, Doug. 371; *Coope v Eyre*, 1789, 1 H. Blackst. 37.

participation of profits will make one a partner to the world, although he should not be so in relation to the persons with whom he is so engaged. So a merchant in London, recommending consignments to one abroad, and agreeing with that person that the commission on all such consignments shall be divided, was held to constitute a partnership.¹ So a broker, stipulating a proportion of profits as a recompense, and agreeing to bear part of the loss, is held a partner in relation to third parties,² or agreeing to be a third interested with his employers.³ It is of no consequence, in the question of responsibility to third parties, what proportion of the profit or of the loss the dormant partner is in his private contract to sustain or be entitled to;⁴ neither will it bar responsibility that the person drawing profit has no interest in the capital.⁵

But, 1. It is not sufficient to make one liable as a dormant partner, that he is paid for his labour a sum proportioned to the profits, having no share of the capital:⁶ it is necessary for this purpose that he should have a specific interest in the profits themselves as profits.⁷ This distinction, though just and intelligible, is extremely thin and subtle. But it is not easy abstractly to state it in less equivocal terms. Wherever there is distinctly a contract of *locatio operis*, separate from partnership, and the wages are made proportionate to the profit only in order to ensure diligence and good work, the rule of partnership will not be applied.⁸ If a broker is to have such sum as he can make more than a certain price on the sale, or a workman is to have a proportion of the gross gains,⁹ or a sailor employed in the whale-fishery a proportion of the profits as wages,¹⁰ it is not partnership.¹¹

¹ *Arg. ex Cheap v Cramond*, 1821, 4 Barn. and Ald. 401.

² *Smith v Watson*, 2 Barn. and Cress. 401. [*Brett v Beckwith*, 26 L. J. Ch. 130.]

³ *Read v Hollinshead*, 4 Barn. and Cress. 867.

⁴ *Waugh v Carver*, 2 H. Blackst. 235; *Rich v Coe*, Cowp. 636; *Heaketh v Blanchard*, 4 East 146; *Coope v Eyre*, 1 H. Blackst. 57; *ex parte Hamper*, 1810, before Lord Eldon, 17 Ves. 412.

⁵ *Ex parte Norfolk*, 19 Ves. 457. [*M'Kinlay v Gillon*, 1830, 9 S. 90; 1831, 5 W. and S. 468.]

⁶ *Meyers v Sharpe*, 5 Taunt. 74.

⁷ See what Lord Chancellor Eldon says of this in *Hamper's* case, 1811, 17 Ves. jun. 404. See also *ex parte Rowlandson*, 1811, 1 Rose 89. [*Heyhoe v Burge*, 9 C. B. 431, 19 L. J. C. P. 243.]

⁸ See *Meyers v Sharpe*, 5 Taunt. 74. [A good illustration of the contract here defined is the case of an agreement between a publisher and an author, that the latter (without being liable for losses) shall receive half the profits of the publication. This has repeatedly been held not to constitute a partnership at common law. *Venables v Wood*, 1838, Macf. 44; *id.* 1839, 1 D. 659.]

⁹ *Benjamin v Porteous*, 2 H. Blackst. 690; *Dry v Boswell*, 1 Camp. 329; *Wish v Small*, 1 Camp. 331, in notes.

[*Pott v Eyton*, 3 C. B. 32, 15 L. J. C. P. 257. A contract of service for a sum equal to a certain proportion of *net profits*, does not make the employee a partner at common law, the test of partnership being not participation in profits, but authority express or implied to bind copartners. The leading modern cases are, *Harrington v Churchward*, 29 L. J. Chan. 521, and *Stockler v Brocklebank*, 3 Mac. and G. 250, 20 L. J. Chan. 401.]

¹⁰ *Wilkinson v Fraser*, 4 Espin. 182. See also *Mair v Glenhie*, 4 Maule and Selw. 240.

¹¹ [The importance of the common law rules as to the distinction between partnership and participation in profits is

very much lessened by the just and clear provisions of the Act 28 and 29 Vict. c. 86, which embrace all the usual cases of simple participation in profits. By sec. 1 of this statute it is enacted, that 'the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such.'

By sec. 2, 'No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, or give him the rights of a partner.'

By sec. 3, 'No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader;' and by sec. 4, 'No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt be deemed to be a partner of, or be subject to the liabilities of the person carrying on such business.'

By sec. 5, 'In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan; nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as

2. Where a person allows his name to be used as a partner, he is liable as such. The world is entitled to rely on the name and credit so held out; and on principles of general policy such person is responsible, to prevent the frauds that would be practised by means of false credit.¹ It is sufficient if the name be allowed to be used on bills of parcels or invoices, or to remain over the door;² but if every proper precaution has been taken [624] to prevent the use of the name, there will be no liability on the ground merely of having neglected to apply for an injunction³ or interdict.

It has sometimes been proposed among mercantile men in this country, that a record of partnerships should be established, in which the names of all the partners should appear. This regulation has been established in many of the continental states, though it does not appear to have been attended with very signal success. There always must be great difficulty in rendering such a regulation efficacious in cases where alone its efficacy can be of any consequence. A person who wishes not to appear as a trader will run the risk of all the consequences which may attend the omission of his name in the register. It is only in cases of bankruptcy, where the concern is broken up, and the confidence of the partners in each other is at an end, that any danger can occur of the matter becoming a subject of inquiry. And in all such cases, the more severe the penal regulations are, the more averse will a court be to adjudge a man to be a partner of a company, and the more difficult of course will the discovery of concealed partners become. When M. Colbert employed Savary to digest the Ordonnance de Commerce of 1673, that judicious merchant prepared a system of very anxious regulations for securing the publicity of all contracts of partnership.⁴ But all these regulations fell quickly into disuse;⁵ and throughout the Continent, the provisions for publishing the names of partners are almost universally a dead letter. Something of this kind has lately been attempted with us in joint-stock companies. See below, pp. 519, 520.

III. OF THE PERSONS WHO MAY BE PARTNERS.—Any person of sound mind may become a partner with others. It is necessary, however, to distinguish between the commencement and the continuance of such a contract. One who is incapable of consent—a pupil, an idiot, or a lunatic—cannot enter into partnership; but they may continue to enjoy the benefit of a share in a partnership which has pre-existed or has descended to them. Not only is a pupil incapable of becoming a partner; but even a father as administrator for his son, or the tutors of a minor for their ward, have no power to engage him in partnership. They may indeed acquire for him a share in a prosperous company; and the partners who enter with them into such a contract will be bound by it to give him all the benefit thence accruing. But the pupil cannot thus be subjected to the personal responsibility of a partner;⁶ and the

aforesaid until the claims of the other creditors of the said trader, for valuable consideration in money or money's worth, have been satisfied.' In the construction of the Act (sec. 6), the word 'person' is declared to include a partnership firm, a joint-stock company, and a corporation.]

¹ *Young v Axtill*, before Lord Mansfield, 1784, cited by Mr. J. Le Blanc from his ms., 2 H. Blackst. 242; *Waugh v Carver*, 2 H. Blackst. 242. See particularly Lord Chief Justice Eyre's opinion. See also *ex parte Norfolk*, 19 Ves. 457, for this point, that the use of the name alone, without any interest in the capital, will raise responsibility as a partner.

² *Williams v Keats*, 2 Starkie 290.

³ *Newsome v Coles*, 1811, 2 Camp. 617.

⁴ Ordon. de Commerce de 1673, tit. 4; *Conferences de Bornier*, tom. ii. p. 465; Savary, *Parf. Negociant*, l. 2, c. 1.

⁵ Pothier, vol. ii. pp. 563 and 567.

⁶ [Strictly speaking, a pupil or beneficiary is not made a partner by the act of his guardians or trustees, but the

persons in whose names the title to the shares or stock is taken are the actual partners; and the guardians or trustees, if acting within their powers, are entitled to relief. *Morrison*, 1870, 8 Macph. 500. In this sense it may be said that a pupil becomes liable to the extent of the value of his estate in fulfilment of the pecuniary obligations arising out of the partnership. The beneficiary, if a pupil or a married woman, is of course not liable to imprisonment, but is liable to real and personal diligence against the estate.

It is now settled, by decisions of the House of Lords, that trustees taking up shares or stock of a company which becomes insolvent are personally liable as contributories to the creditors of the company. *Lumsden v Buchanan*, 1865, 3 Macph. H. L. 89, 4 Macq. 950, reversing the judgment of a majority of the whole Court; *Graham v Western Bank Liquidators*, 1866, 4 Macph. 484. In the last cited case it was held that the trustees' subscription of a transfer bearing reference to the company's contract of copartnery was the same in

alienation implied in the contract, if heritage enter into the concern, will be ineffectual, while even the personal contract with the copartners will be reducible on lesion. In such cases it has been doubted whether the father or the tutor do not for himself undertake all the responsibility of the concern; and it rather seems to be law that they are to be held personally liable. So it has been found in three cases.¹

[625] One company frequently becomes a member of another company. This is quite legal, and the consequences are: 1. That the creditors of the greater company are preferable on the stock of that company to the creditors of the company entering it as a partner; and, 2. That after applying the company funds to the payment of its debts, the creditors have their claim, as creditors of the included partnership, for the balance unpaid, and not merely as creditors of the individuals who compose that partnership.

IV. WHETHER ONE PERSON CAN FORM A COMPANY.—When it is recollected how much weight is given to the credit raised by the use of a partnership firm, it may be questioned whether a single individual may not by the use of a firm make a partnership, which shall have the effect of entitling the creditors dealing with that firm to a preference over the stock of it? But the essential principles on which alone the separate character of a partnership, and the distinct appropriation of its funds rest, oppose this conclusion. So it was accordingly determined by the Court of Session, who refused to make any distinction in favour of the creditors of a firm set up by an individual, but massed together the whole of the debts of this firm, and of the individual.²

legal effect as signing the contract of copartnery itself. The rule applies to curators and judicial factors. *Lumsden v Peddie*, 1866, 5 Macph. 34. In a case of a private trust for behoof of creditors, where the trustee carried on a trade under the powers of the trust-deed, subject to an obligation to divide the profits amongst the creditors, it was held by the House of Lords that the creditors did not thereby become liable as partners for debts contracted by the trustee in carrying on the trade. *Wheatcroft v Hickman*, 8 H. L. Ca. 268, 30 L. J. C. P. 125; and see *Price v Groom*, 2 Exch. 542, 17 L. J. Exch. 346. In the case of a trustee appointed under the Bankruptcy Act continuing to carry on the business of the bankrupt, he does so at his own risk, unless the creditors guarantee him against loss, as the creditors by the Act itself are exempted from personal responsibility.]

¹ *Pettigrew Wilson's* case, referred to in subsequent cases, was a partnership in coal, in which a boy of fourteen was engaged by his guardians. It was held null, and the creditors not entitled to claim on it.

M'Aulay, Tr. for Gartly, M'Donald, & Co.'s Crs., v Renny, 15 Feb. 1803. Here Renny had signed a contract of partnership for his son, eleven years of age. The company traded for three years, and was then sequestrated. An action was then brought against the father, as having made himself a partner, his son being incapable; and he was held liable. The case was decided on the principle that the father had not merely allowed the boy to continue a partnership devolving on him as a lucrative succession, but had engaged him as his administrator in a hazardous contract to which he could not bind him, and that he must himself be liable. The Court confirmed this opinion on a review of their judgment; and although in a subsequent case the late Lord Meadowbank disclaimed his opinion, it was, according to my note at the time, very pointedly given against Renny, as responsible on the same ground as if he had engaged his son in a cautionary obligation, which must have subjected himself.

Calder v Downie, 11 Dec. 1811, 16 F. C. 390. This was somewhat similar to *Renny's* case. A father placed his son of ten years in a company. The boy died, the company failed, and an action was brought against the father, as himself the partner. The judges differed on the question of law, —Lords Justice-Clerk (Boyle), Glenlee, and Craigie holding *Renny's* case as a precedent; Lords Meadowbank and Gillies (with whom Lord Robertson inclined to concur) holding the father as not liable for *bona fide* placing his son in a company. The case was decided, on particular circumstances, against the father.

See *Glossop v Colman*, 1 Starkie 25.

² *Nairn v Sir William Forbes & Co.*, 25 Nov. 1795, n. r. The creditors of P. Forrester & Co. argued very strongly upon their *bona fides*; upon the impracticability, amidst the rapid transactions of trade, of inquiring into the private situation of a company; upon the legality of trusting to its apparent stock, its prosperity, and course of trade, etc.; that where there is a firm, it is impossible to prove that no partner was concerned; and that somebody was concerned who wishes to keep concealed, must be presumed: that even if it were proved that none else was engaged, it is a fraud of which neither the drawer himself nor his creditors can take advantage; and that the funds being vested (either in the shape of debts or stock of the concern), not in the individual, but in the firm, there is a right, in the nature of a trust, to be implied for the benefit of those who contract with the firm. But in answer it was maintained, 1. That as the creditors of P. Forrester, as an individual, must be held as attaching his funds by the appropriated diligence, it is a demand, on the part of a particular class of them, to strike out some of those effects as belonging to a company; and they must therefore prove the company's existence. 2. That the private creditors found not upon fraud, but merely take their debtor's funds; and it is the pretended company creditors whose claim of preference rests upon Peter Forrester's fraudulent use of a

V. WHETHER THE SAME PERSONS CAN FORM SEPARATE COMPANIES.—Although an individual cannot form different establishments in trade, having each a separate stock, and debts peculiar and distinct, a plurality of partners may so arrange their contracts, and constitute their mutual trusts, as to form several distinct companies, composed of the very same individuals. And these companies may hold separate estates, and be liable each to sequestration by itself, provided there is a real and perceptible distinction of trade and establishment between the several partnerships.

Two opposite classes of cases have occurred to confirm this doctrine: the one, of companies established, under different firms indeed, but having the same object and interest; the other, of companies differing in name, in trade, and in capital. In the former case the Court has decided that the funds and the debts are to be massed together;¹ in [626] the latter they held that the stock of each company must be reserved for its own engagements and creditors.²

firm. 3. That this doctrine of an individual company puts a dangerous power of acting unfairly in the debtor's hand: not only could he thus prevent compensation from being pleaded against him, but dispense with the troublesome restrictions of the statutes of 1621 and 1696. [See *Reid v Chalmers*, 1828, 6 S. 1120.]

¹ On stating those cases, with the result of them, to several eminent merchants, they informed me that the judgments there delivered are perfectly consistent with mercantile understanding and practice.

Bertram, Gardner, & Co., 25 Feb. 1795. By contract of copartnership, Messrs. Baillie, Gardner, Pocock, White, Ker, and Forrester, associated themselves for the purpose of conducting a joint trade of exchange, commerce, insurance, and merchandise in London and Edinburgh; and 'resolved that the firm of the said company should be Baillie, Pocock, White, & Co., at London; and at Edinburgh, should be Bertram, Gardner, & Co., either of which firms might be subscribed by any of the said partners,' etc. The companies accordingly began trade, and for many years carried it on to a great extent in London and Edinburgh under those different firms. A bankruptcy happened, and a question arose, Whether the creditors who held the firm of Baillie, Pocock, & Co. of London bound to them were not to be considered as alone entitled to be ranked upon the funds appearing in the London books; while those creditors who held the firm of Bertram, Gardner, & Co. were to be restricted to the Edinburgh funds? The Court found that there was no distinction between the companies, but that the debts and funds of both were to be massed together as one.

This case is not reported, but it was stated and relied on in the case of *Forrester*, when the same judges sat on the bench by whom it was decided.

Royal Bank of Scotland v Assignees of Stein, Smith, & Co., 20 Jan. 1813, Fac. Coll., 1 Rose's Ca. 462. Here there were two companies,—one in London, under the firm of Smith, Stein, & Co.; the other in Edinburgh, under the firm of Scott, Smith, Stein, & Co.,—but both being a banking concern, in which the same proprietors were interested, and the same line of trade pursued. The question was, Whether the companies were so identified that a commission of bankruptcy in England was to be held as superseding a Scottish sequestration? The Court held the company to be one and the same.

See also *Williams v Inglis, Borthwick, & Co.*, 13 June 1809, Fac. Coll.

² *Crs. of P. and F. Forrester v Sir W. Forbes & Co.*, 5 Feb. 1798, n. r. Peter Forrester and his brother Francis were engaged in a very extensive trade of hardware and Russian commodities, and several companies were established. Two, in particular, were carried on in Edinburgh; one under the firm of Peter and Francis Forrester, and another under the firm of Forrester & Co. The former was an export company, dealing in hardware, jewellery, etc.; the latter, a company that dealt in Russia sheetings, furs, etc. In the ranking a question arose, Whether those creditors who held the firm of Peter and Francis Forrester were entitled to claim upon the funds of the Russia warehouse?—a mode of ranking which the creditors of the Russian company were materially interested to oppose, as this company was really possessed of funds, while the other had nothing, and owed nearly £100,000 of debt. This question was taken to report upon memorials, in which the abstract point of law was shortly argued. The opinion of the Court in general was, that, in law, two or more companies can exist separately and independently of each other in debts and funds, although composed of the same individual partners; but that it is not sufficient to produce this effect that the firms be different—the companies must be essentially different. In this opinion two grounds chiefly were assigned by different judges. Some rested the decision upon the confidence placed by those who trade with a company in its stock, its line of trade, and its flourishing condition. Another ground was the principle of trusteeship in each of the partners for each other, and for the creditors of the firm; a principle which forbids not an infinite variety of distinct trusts and independent concerns, which it is the interest of the country to encourage. It was observed that the question was not fixed in the civil law, nor even in England, though the Lord Chancellor, who has much discretionary power in the marshalling of creditors, allows the creditors of a company to take place of all private creditors upon the company estate: that with us a distinction of cases must be made. Before the American war it was frequent for a company to have two branches, one in Glasgow or Greenock, and another in Virginia or Carolina, under different names and firms, connected with each other in the same line of trade, yet purchasing separately. In such a case, the apparent distinctness of the branches ought not to prevent a massing of their funds and debts. It is the very case of *Bertram, Gardner, & Co.* But often it happens that several merchants, engaged as a company in trade under a particular

[627] In this country it is extremely common for the same persons to have more than one establishment, of which the trade is the same, the firm being sometimes the same, sometimes a little varied; the separate establishments being intended to manage the several parts of the trade in different countries. Thus, a young man goes out to the West Indies or America to manage the consignments of a Scottish mercantile house abroad, and he is made a partner, either under the same firm, or with a different firm, to facilitate the drawing of bills for discount. If the partnership be real, and the trade distinct, the partner abroad not being admitted into the home company, it must be kept separate from the parent company in responsibility. If there is really no distinction, the partners in both being the same, the difference of firms will not serve as a ground of distinction. If the partners be different, but truly the trade the same, the law will construe it to be one company, where creditors have been deceived into a belief that they are the same.¹

Having already considered the effects of partnership once established, in creating a separate person recognised in law, acting by a firm or social name, bestowing on its creditors a preferable right to the stock or fund of the company as common property held in trust for them by the several partners, and finally, in pledging the personal credit of each partner for every engagement of the company; two points only demand further attention: 1. The distinction between the ordinary private partnership, distinguished by a private name or firm, and joint-stock companies under a descriptive name; and, 2. The doctrines relative to the dissolution of partnership.

SECTION II.

OF JOINT-STOCK COMPANIES, AND THE DISTINCTION BETWEEN A FIRM AND A DESCRIPTIVE NAME.²

Joint-stock companies are established with the view of raising, by the contribution of small transferable shares vendible in the market, a great capital for the accomplishment of

firm, enter into a manufacturing concern under another firm; an ironwork perhaps, or a coalwork, or a distillery. Perhaps the companies were originally different in their partners, and by death, resignation, etc., the partners come to be the same in both concerns. There is here a distinction that must bar any massing of the funds and debts of both concerns. Each company's stock must be reserved and saved for the creditors of that company; and when the company creditors come to rank on the estates of the individual partners, they come as creditors of the individual partners for the balance that is unpaid.

As to the particular case of *Forrester*, there was considerable difficulty, and a condescence of facts was ordered, upon advising which the Court found that there was no sufficient distinction. The grounds taken were peculiar to the case; for although it was observed as a general principle by one judge, that it was quite sufficient for any creditor who claimed upon a company fund to show that he was a creditor of every partner engaged in that company, yet the Court in general proceeded upon this plain ground in point of fact, that the *Russian Warehouse Co.* was a branch of the trade of an original company of *Peter & F. Forrester*, embodied into a separate concern by the adoption of a new partner; that this new company having been afterwards dissolved 'as if it had never existed,' and so advertised to the world, matters just fell back into their former condition; the mere circumstance of keeping up the firm of this new company not being

deemed sufficient to establish a solid distinction between the companies.

[See *Warner v Smith*, 1 De G. J. & S. 337, 32 L. J. Ch. 573; and compare *South Carolina Bank v Case*, 8 B. and C. 427, 3 Ross L. C. 508; *Emly v Lye*, 15 East 6, 3 Ross L. C. 552.]

¹ *Monach's Cra.*, 1804, M. 14614. Two views of this case were taken. One was, that *Monach* having made two companies, by sending out young men who had nothing, the debts incurred for goods sent to those companies, and bought on his credit, were truly the debts of the whole companies, which were merely fictitious. Another view was, that the goods being all bought and paid for by *Monach*, he had claims against the firms to the whole amount of the goods; and his sequestration operated as an assignment of these claims, and so led to a common massing of the whole debts. Perhaps it is to be regarded as a special case.

² [It may, perhaps, be expected that the editor should here give some account of the statutory law regulating joint-stock companies. But on mature consideration he has refrained from what he conceives would be an utterly fruitless expenditure of time and labour. Abstracts of statutes are of no use, except as a key to the Acts themselves; and for the voluminous legislation relating to joint-stock companies it is impossible to find space in a work of this kind. Their omission is of the less consequence, as within the last fifteen years the statutory law of joint-stock companies has been repeatedly

some extensive scheme of trade or manufacture, or the completion of some object of national or local importance, as the building of a bridge, the making of a canal or tunnel, or the working of a mine.. It differs in some essential particulars from the ordinary partnership: 1. By the credit raised with the public being placed entirely on the joint stock of the society, as indicated by a descriptive name. 2. By a difference in the management and operation of the association, as conducted not by the personal co-operation of the shareholders as partners in trade, but by the discretion and prudence of directors chosen by the association, and made known to the public by advertisement or otherwise. And, 3. By the transferable nature of the shares. From all these result a credit entirely different in nature and object from that which belongs to private partnership, a reliance on the stock of the company, a comparative disregard of the personal credit of the shareholders, an attention confined to the reality of the fund, and the good discretion of the management.

The law of Scotland has recognised a distinction grounded on these considerations, between the nature, character, and effect of such associations, and those of private [628] partnership; confining the responsibility of shareholders in such companies to the extent of their shares. This great question was tried about the middle of the last century, in the case of the Arran Fishing Company.¹ The doctrine established in that case was, that there is a

changed; and it is highly probable that before half the impression of this work is sold, the existing Acts may be superseded by a new Consolidation Act. The reader is referred to

Lindley on Partnership (English), and Clark on Partnership (Scotch). The following is a list of the Acts of Parliament relating to partnership now in force:—

PRINCIPAL ACTS NOW IN FORCE.

7 Geo. IV. c. 46, Banking Companies, (a)

7 Will. IV. and 1 Vict. c. 73. Companies empowered by Letters-patent to sue and be sued.

1 and 2 Vict. c. 118. Charging shares by judge's order,

4 and 5 Vict. c. 14. Spiritual persons.

8 and 9 Vict. cc. 16, 17. Companies' Clauses Consolidation Acts (England and Scotland),

13 and 14 Vict. c. 83. Winding-up Act for Railway Companies incorporated by special Acts of Parliament,

25 and 26 Vict. c. 89. The Companies Act 1862,

AMENDING ACTS.	
Amended {	Generally by { 1 and 2 Vict. c. 96. (b) 3 and 4 Vict. c. 111.
	As to issue of { 3 and 4 Will. IV. c. 83. notes, etc., by { 3 and 4 Will. IV. c. 98. 4 and 5 Vict. c. 50.
	{ 7 and 8 Vict. c. 32. 8 and 9 Vict. c. 76.
	{ 27 and 28 Vict. c. 32.
	Amended by 3 and 4 Vict. c. 82.
Amended by {	{ 26 and 27 Vict. c. 118. 32 and 33 Vict. c. 48.
	Amended by { 30 and 31 Vict. cc. 126, 127. 32 and 33 Vict. c. 114.
Amended by {	{ The Companies Act 1867 (30 and 31 Vict. c. 131).]

¹ *Stevenson & Co. v M'Nair*, 1757, M. 14667, 5 Br. Sup. 340. The Arran Fishing Co. was an association of about 40 persons, for the purpose of advancing the fishing trade at the mouth of the Clyde. The capital stock was £2000, subscribed in transferable shares of £50, no person to hold more than four shares. The trade was to be carried on by certain directors, whose orders were to bind the associates to the extent of their respective subscriptions; and it being stipu-

lated that the directors should have 'no power to compel any partner or subscriber to pay or contribute any more money to the stock than the sum by him subscribed.' *Stevenson & Co.*, of the Rope Work at Port-Glasgow, furnished to this association ropes to the value of £72, and for this sum brought an action against *M'Nair* and others, as members of the company. The defence was, 1. That all the members of the company were not called, nor the directors as representing

(a) [The 7 Geo. IV. c. 46 is still in force. But, having regard to the subsequent Acts, 7 and 8 Vict. c. 113, 20 and 21 Vict. c. 49, and 25 and 26 Vict. c. 89, those provisions of 7 Geo. IV. c. 46 which relate to the constitution of companies, and their powers of suing and being sued by public officers, appear to apply only to companies formed before May 1844,

and not registered under 20 and 21 Vict. c. 49, or 25 and 26 Vict. c. 89.]

(b) [The 1 and 2 Vict. c. 96 was continued by 2 and 3 Vict. c. 68, and 3 and 4 Vict. c. 111, and was made perpetual by 5 and 6 Vict. c. 85.]

clear distinction between the case of a joint-stock company and that of a company trading without relation to a stock: that in the former the managers are liable for the debt which they contract, while each partner is bound to make good his subscription: that there is no ground of further responsibility against shareholders, neither on their contract nor on any ground of mandate beyond their share; the very meaning of confining the trade to a joint stock being that each shall be liable for what he subscribes and no further:¹ that in ordinary partnership there is a universal mandate and joint *præpositura*, by which each partner is *institor* of the whole trade to an unlimited extent, each being liable *in solidum* for the company debts. When the case now alluded to was decided, a statute, to be immediately taken notice of, prohibiting the erection of companies with transferable stocks and limited responsibility, seems either to have been entirely forgot (as it also was in England till recently), or must have been supposed not to extend to Scotland. It certainly never was mentioned or alluded to in the argument of the case; and so the decision is to be taken as fixing the common law on the question.

It is not, however, to be overlooked, that there was practically great looseness in the constitution of such companies, and in the understanding of lawyers and of merchants as to their effects. The distinction between a descriptive name as pointing to the stock, and a personal firm as referring to the partners, was not always observed; and the deep responsibility which fell upon the partners of the Douglas Bank tended very much to confound all distinction. That was properly a trading company, under the personal firm of Douglas, Heron, & Co.; so that strictly, according to the law, all the members of that unfortunate concern were responsible for its debts to the utmost limit of their fortunes. But it was commonly known by the descriptive name of the Douglas Bank, or the Ayr Bank.² Perhaps this, operating with the distressed state of the country after the fall of the Douglas Bank, put a stop to joint-stock companies in Scotland, or restrained them to undertakings so safe and successful that no question arose upon them. But, at least in the reports of decisions, there is not any case in which this matter came again to be discussed till lately.

The extraordinary state of Europe after the close of the French war engendered a similar spirit of wild and absurd speculation with that which occurred in the early part of [629] last century; and the recurrence of some schemes of similar tendency brought to recollection the statute of 6 Geo. I. c. 18, commonly called the Bubble Act, by which in the

the society; 2. That the remedy lay against the company and the stock, the defenders not being liable in their private fortunes. There appear to have been two judgments pronounced: one on 14th November 1757, which assoilzied the defenders, in respect all parties having interest were not called into the field; and this only is reported in the Fac. Coll. of the above date (see M. 14560). Another decision on 14th December 1757, establishing the distinction between this case and private partnership, and holding the action to be groundless as against the partners, on the footing of personal responsibility beyond the shares. The judgment, as reported by Lord Kilkerran, 'found that the parties are not liable beyond their subscriptions, and that the action has not been properly brought, and remit to the Lord Ordinary to proceed accordingly.'

¹ [The distinction suggested by Professor Bell, on the authority of this case, has never been accepted by the profession; and it may safely be asserted that many hundred thousand pounds have since been paid by the shareholders of joint-stock companies, on the footing of there being no limitation of their responsibility to creditors. The true principle is, that a trader cannot limit his responsibility for debts, except by a special stipulation with his creditor in each case.

A general limitation of responsibility can only be conferred by incorporation under the authority of the Crown or of Parliament. The publication of the charter or act of incorporation is equivalent to notice to the creditor of the terms on which the company contracts, and any person who distrusts the security of the company may refrain from dealing with it. The limitation of liability which is thus conferred on railway and other companies incorporated by special Acts, was extended to other joint-stock companies by the general Act, 19 and 20 Vict. c. 47, on their complying with certain conditions, and obtaining a certificate of registration (as to which, see *Garpel Hæmatite Co. v Andrew*, 1866, 4 Macph. 617), and using the word 'Limited' as part of the name of the company in all communications, notices, etc. That Act, and its various amendments, are now merged in the Companies Acts, 1862 and 1867. The system of trading under limited liability, although well adapted to large public undertakings, has not been successful when applied to proper trading companies; and it would rather seem that the sense of danger induced by the risk of unlimited responsibility is necessary to keep the promoters of such companies within the bounds of prudence and fair dealing.]

² See *Douglas, Heron, & Co. v Hair*, 1778, M. 14605.

year 1720 the Legislature had attempted to repress excessive and fraudulent speculations. This Act had gone into entire oblivion; and indeed so unwisely or unhappily were its provisions drawn, that from the first moment of its existence it appears to have been inoperative. The general design of this Act was, to prevent those stockjobbing operations upon the purchase and sale of shares of companies which had in the year 1719 begun to prevail to a frightful excess in London. And the provisions were pointed chiefly, 1. Against all attempts to act as under a charter, or as a body corporate; and, 2. Against all attempts to raise a transferable stock, or to make transfers or assignments of shares. And the expedients for suppressing these evils were forfeitures and penalties. No proceedings took place on this Act for nearly a century; and it was not till lately that the attention of the judges was called to it. The Act has now been repealed by the Act of 6 Geo. iv. c. 91 (5th July 1825), which has restored the matter to the footing of the common law. On this footing the following points seem to be law:—

1. A joint-stock company, under a descriptive name, has no *persona standi* by its social appellation. And so, 1. That name cannot be subscribed or used by any of the partners as a firm to bind the society; 2. An action cannot be legitimately raised by or against the society by that appellation;¹ 3. Action may be maintained by the social name along with that of the partners, or against the society by its name only, if the partners be called.²

2. There seems to be no bar to prevent a joint-stock company from authorizing its directors, or any individual, to sign and contract, so as to bind them, or to sue or defend in their name; and when obligations are undertaken to a joint-stock company in name of an officer as acting for the society, action seems to be competent in the name of that officer.³ But doubts were so strongly entertained on this subject in the House of Lords, on occasion of several questions which had occurred in the course of appeals;⁴ and the policy of refusing encouragement to joint-stock companies was supposed so strongly to require that they should be compelled to sue or defend with all the inconvenient encumbrances of making the whole members of the association parties to the action, that a statute was thought necessary to authorize banking companies to sue or defend in the name of their manager, cashier, or principal officer, on duly observing certain conditions.⁵ Of this Act it may be observed, 1. That it looks very like a negative declaration of the law, that joint-stock companies with transferable shares cannot sue or be sued without the aid of this Act; although the preamble ought to have stated only the doubts which had arisen, and the expediency of providing a remedy for such companies carrying on banking. 2. The Act expressly is not to extend so as in any way to affect questions which may be in dependence before any court of law at the passing of the Act. 3. The privilege conferred is under the condition of the annual entry, upon oath, of the name or firm of the society, and of every partner, with his [630] place of residence, and of the name and abode of every manager, cashier, or other principal officer, at the Stamp Office in Edinburgh, where books are to be kept open to inspection;

¹ *Culcreuch Cotton Co. v Mathie*, 1822, 2 S. 47, N. E. 41; *Sea Insurance Co. of Scotland v Gavin & Co.*, 1827, 5 S. 375, N. E. 348. The ground of sustaining action in this case was, that individuals were called by whom the policies had been signed. See *Scott v Napier*, 1827, 5 S. 414, N. E. 393.

² *Shotts Iron Co. and Partners v Hopkirk*, 1828, 6 S. 399. [See also *London and Edinburgh Shipping Co. v M'Corkle*, 1841, 3 D. 1045, where it was suggested that the rule would be satisfied by calling the company under its descriptive appellation, together with three of the individual partners. The suggestion has since been acted on without objection, and may now be held to have the force of consuetudinary law.

Bond v Buchanan, 1855, 7 D. 461; *National Exchange Co. v Drew*, 1848, 11 D. 179.]

³ *Fisher v Syme & Stewart*, cashiers of the Perth Union Bank, 1827, 6 S. 216.

⁴ *Commercial Banking Co. v Pollock*; *Cabbell v Brock*, for the Glasgow Bank. See note in 6 S. 218.

⁵ 7 Geo. iv. c. 67. [See *Cheyne v Walker*, 1828, 7 S. 60; *Cheyne v Little*, 1828, 7 S. 110; *Drummond v Holliday*, 1831, 9 S. 284; *Thom v North British Bank*, 1848, 10 D. 1254; *Glasgow & Monklands Railway Co. v Tennent*, 1848, 11 D. 212. Joint-stock companies, whether limited or unlimited, are now universally registered under the Companies Acts, which entitles them to sue and be sued by their corporate names.]

and similar entries are to be made from time to time in the course of the year, of the changes of officers, and of those who shall have ceased to be or shall have become members. 4. The society or copartnership may then sue or be sued in the name of their officers; no more than one action being competent for one debt or demand, and judgment or decree taking effect in the same way as if every partner were specially called as a party to the action. 5. The regulations of the Act are enforced by penalties recoverable in Exchequer.

3. Whether the effect of a lawful contract entered into with the society is merely to confer a right against the common stock, or also to raise a personal responsibility against every partner, has never occurred to be determined since the case of the Arran Fishing Company already mentioned. But the impression very strongly is, that were such a question to be raised, the personal responsibility would be held unlimited. And to this impression the Act of 7 Geo. IV. c. 67, secs. 9 and 10, gives some countenance.¹

4. The sale of a share in a joint-stock company (if the partner be personally responsible) cannot be relied on as terminating that responsibility, unless it be accompanied by such precautions as are necessary in dissolving an ordinary partnership.²

SECTION III.

OF THE DISSOLUTION OF PARTNERSHIP.

In a contract of such exuberant confidence as partnership, where a man may, to the whole extent of his fortune, be made responsible for the obligations of others, the *delectus personæ* forms one of the most essential points. On this principle it is settled, on the one hand, that no one can be introduced as a partner without the consent of all the partners;³ on the other, that partners may at pleasure renounce the society, if not otherwise stipulated; and that by the death, renunciation, incapacity, or failure of any one, the whole partnership is dissolved. The principles on which this doctrine rests have been thus explained by a very high authority: 'That death should put an end to a partnership, or that it should be determined by notice, at a moment's warning, has been said in courts of justice to be an unreasonable doctrine. But it deserves much consideration before it can be so pronounced; for if the rule were otherwise, the effect would be, that partnership, like marriage, is to be entered into for better and for worse, for richer and for poorer; and whatever the fortune of the partnership may be, the parties must abide by it. But the rule as established is, that if they do not think proper to say by articles how long it shall endure, each party has an opportunity of dissolving the partnership, if circumstances should arise which may make it not only a prudent and necessary measure, but the only means of saving himself from ruin. And with respect to the death of a partner, when the consequences are considered of its not being a dissolution of the partnership, so that whoever may happen to

¹ [See note, p. 518, *supra*.]

² [The contracts or deeds of settlements of joint-stock companies frequently prescribe the forms to be observed in the sale or transfer of shares. The right of objecting to a transfer, on the ground of disconformity to the prescribed form, is held to be personal to the company; the transfer, although not made *prescriptis verbis*, being valid in a question between vendor and purchaser. *Turnbull v Allan & Son*, 1834, 7 W. and S. 281, affirming judgment of C. S. 11 S. 487; *Thomson v Fullerton*, 1842, 5 D. 379; *Robertson v Thom*, 1848, 11 D. 353. A similar decision was given where the contract gave a right of pre-emption to the company, and the shareholder had not made an offer of the shares to the company before selling. *Macandrew v Robertson*, 1828, 6 S. 950.

The company's right to object may, of course, be waived or excluded by homologation. *Drummond v Thomson's Trs.*, 1834, 12 S. 620. In the case of *Jardine's Trs. v Carron Co.*, 1864, 2 Macph. 1101, a sale to the company under a clause of pre-emption was set aside on proof of fraudulent concealment of the true value of the stock on the part of the office-bearers of the company.

In order to the completion of a purchaser's title to stock, intimation of the assignment is required by the common law, and it seems such intimation may be well given either to all the shareholders or to a manager holding general powers. *Hill v Lindsay*, 1846, 8 D. 472.]

³ See above, p. 508.

be the personal representative of the deceased partner were, at all events, to be introduced into the partnership; I doubt much whether, if the law was to be laid down now, it would not be laid down in conformity with the rule which now exists. For if a contrary rule should prevail, is the surviving partner to take the chance of having for his partners one or several executors, an administrator either in the person of the next of kin of the deceased, or of one of his creditors? And not only an executor, but the representatives of a surviving executor, might have to come in each for a share in the partnership, and of course in the conduct of the concern. The chance of having all such persons as, by intestacy or by will, might be immediately introduced into a partnership upon the death of a partner, if [631] the law were to be otherwise, is a risk which a prudent man would not like to incur. The doctrine, therefore, appears to me to be reasonable.¹

In considering this subject, it may be taken under two aspects: 1. Dissolution of partnership in relation to the partners themselves; and, 2. Dissolution of partnership in relation to third parties.

1. DISSOLUTION OF PARTNERSHIP IN RELATION TO THE PARTIES.

I. BY VOLUNTARY ACT OF THE PARTIES.—Partnership dissolves by the consent and mutual act of the parties, in terms of the contract, that is, by expiration of the term appointed for its duration. At the same time, it may be renewed or continued by tacit consent; not to the effect of engaging the parties again for a renewal of the original term, but to the effect of engaging them as partners for an indefinite time, and so dissoluble at pleasure.

The law of mutual contracts is, that they may be dissolved by mutual DISSENT; but in this peculiar contract of partnership a single partner may at any time dissolve the company, provided a fixed term has not been appointed for its duration. This involves two propositions: *First*, that he may *renounce*; and, *secondly*, that by such renunciation the society is *dissolved*. Where there is no limit in point of time to the duration of the contract, the presumption is for duration while the parties are in life and capacity to continue it.² That at any time a partner may fairly, and at a period not prejudicial, terminate *his* concern in the partnership, has never been doubted.³ But that this renunciation should also terminate the whole concern, or dissolve the company, admitted of more doubt. The effect of dissolving the company is different from that of mere renunciation; for, in the latter case, the partners willing to proceed with the contract would be left in possession of the premises, goodwill, etc., paying for them a price by valuation; while in the former case all these matters must be settled on the footing of the whole connection being dissolved. The rule, however, is fixed in the affirmative, conformably with the rule of the civil law, '*Dissociamur renunciatio*;' and the Institute thus expresses it, '*Cum aliquis renunciaverit societati solvitur societas*.'⁵

¹ Lord Chancellor Eldon in *Crawshay v Maule*, 1 Wilson 191.

² Vinnius in Inst. Com. 680; Pothier, Tr. de la Société, No. 65, vol. ii. p. 555.

³ Vinnius, *ut supra*, 634; Pothier, No. 149, p. 86; *Peacock v Peacock*, 16 Ves. jun. 49; *Featherstonhaugh v Fenwick*, 17 Ves. jun. 298.

⁴ Inst. lib. 8, tit. 26, sec. 4; Vinnius 679.

⁵ This doctrine was laid down pointedly in the English cases cited above, and others, and has been settled in Scotland by a recent case.

In *Peacock v Peacock*, 16 Ves. jun. 49, Lord Chancellor Eldon said: 'I have always taken the rule to be, that in the case of a partnership not existing as to its duration by contract between the parties, either party has the power of determining it when he thinks proper, subject to a qualification that I shall mention. There is, it is true, inconvenience

in this; but what would be more convenient?' He says afterwards: 'I have always understood the rule to be, that in the absence of express contract, the partnership may be determined when either party thinks proper; but not in this sense, that there is an end of the whole concern. All the subsisting engagements must be wound up. For that purpose they remain with a joint interest, but they cannot enter into new engagements. This being the impression upon my mind, I had some apprehension, from the tenor of the discussion here, that some different doctrine might have fallen from the Court at Guildhall. But upon inquiry from the Lord Chief Justice as to his conception of the rule, I have no reason to believe that, if this notice had been given before the trial, the jury would not have been directed to find that the partnership was, by the delivery of the paper, dissolved.'

Featherstonhaugh v Fenwick, 17 Ves. jun. 298. The

[632] If the limited term have expired, the tacit continuance of the partnership is on the footing of an indefinite duration, and it may be dissolved at any time; and so, where a year's notice was stipulated to be given during the term, notice was not held necessary during the tacit continuance.¹

The power of dissolution is, however, to be exercised in fairness, and so as not to injure the other partners.

On this footing, the first doubt was, whether reasonable notice was required? But this is not held necessary. The ground for the dissolution may be a suspicion that some of the partners may intend to abuse their power, and notice would increase the risk. In Scotland, accordingly, notice was not held necessary, neither has it lately been required in England.²

The dissolution must not be fraudulent, nor at such a time as to injure the other partners. '*Debet esse facta bona fide et tempestive*,' says the Roman law. 'A partner shall not renounce from unfair or interested views,' says Erskine.³ But there seems to be comprehended in such texts a greater licence of arbitrary determination than can safely be granted. It will not be permitted to a partner, by dissolving a partnership, to gain for himself a purchase which the company was about to make,⁴ or to secure the benefit of a lease held by the company, and about to expire.⁵ For although in such cases the dissolution cannot be pre-

Master of the Rolls (Sir W. Grant) said: 'A partnership for an indefinite period may be dissolved at the will of the parties, subject to the question afterwards made, by what notice that will must be declared.'

Crawshay v Maule, 1 Wilson 191 and 197, and 1 Swanston 508. Lord Chancellor Eldon said: 'The general rules respecting partnership are well settled. Where persons enter into partnership, and no term is limited for its duration, the partnership may be put an end to at a moment's notice by either party; and the partnership is then dissolved, to this intent, that the Court will direct the party to continue its existence only for winding up the concern, and to act as if it continued for that purpose alone.' He afterwards adds: 'The general doctrine with respect to a trading partnership is, that when there is no agreement for its duration, any partner may put an end to it when he pleases; and although much inconvenience may attend that doctrine, much would also attend a contrary rule, and it is very questionable whether a better rule could now be settled. But the law being settled, it is for those who enter into partnerships to guard themselves against inconveniences by entering into express stipulations on the subject.' P. 197.

In the Scottish case of *Marshall v Marshall*, 20 Jan. 1815, Fac. Coll., the Court of Session held that 'the pursuer was entitled to withdraw from the company, and that the effect of his doing so must be to dissolve it.'

Same case, 23 Feb. 1816, Fac. Coll. The cause having been remitted to the Lord Ordinary to settle the effect of the dissolution, it was contended by the partner not wishing to dissolve, that the other must take his departure, and leave him in possession of the shop at a valuation. But the Lord Ordinary ordered the lease to be disposed of by public sale; and to this the Court adhered.

¹ *Featherstonhaugh v Fenwick*, 17 Ves. 298. [In *Clark v Leach*, 1 De G. J. and S. 409, 32 L. J. Chan. 290, it was laid down, that when a partnership for a term is continued after its expiration without express renewal, although the presumption is that it is continued on the same general footing as before, this only extends to such of the stipulations as are

properly applicable to the new contract. The new contract being, by the mode of its constitution, a partnership at will, the stipulations of the original contract relative to the dissolution by notice are not applicable to the partnership subsisting by tacit continuance. In *Parsons v Hayward*, 31 L. J. Chan. 666, the right of a dormant partner to participation of profits was held to subsist by tacit continuance after the expiration of the term, the business having been carried on under the name of the acting partner as before, and no steps having been taken to dissolve the partnership, or to wind up its affairs. See also *Const v Harris*, 1 Turn. and Russ. 517.]

² Sir William Grant said, in *Featherstonhaugh's* case: 'Until a very recent period, it had been, I believe, understood that a reasonable notice should be given; but upon the question, What is reasonable notice? much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say that a partnership shall be dissolved on a given day; on the other, it may be extremely difficult for a Court of equity, by a general rule, to ascertain what is reasonable notice; and the question, whether the particular notice was reasonable or convenient, would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of this sort, I believe, have led to a different rule, that in the case of a partnership such as this, subsisting without articles, and for an indefinite period, any partner may say, "It is my pleasure on this day to dissolve the partnership." See preceding note.

³ Ersk. iii. 3. 26.

⁴ '*Si quis callide in hoc renunciaverit societati ut obveniatis aliquod lucrum solus habeat*' (Inst. *ut supra*). And the examples given by the Roman lawyers are repeated by all the commentators: as, 1. Purchasing for himself what the company was intending to buy; or, 2. Renouncing, in contemplation of a succession falling, the society being universal. Vinnius 680; Pothier, Tr. de la Société, No. 150; Ersk. iii. 3. 26.

⁵ [*Aitken's Trs. v Shanks*, 1830, 8 S. 753; *M'Whannel v Dobbie*, 1830, 8 S. 914; *Clegg v Edmondson*, 8 De G. M. and

vented, the beneficial effects of it will be communicated to the partnership:¹ the acquisition will be held as partnership property at the time of the dissolution.² The effect of the dissolution is to bring all to a sale, the parties being on a footing of perfect equality; and [633] it will not be held sufficient to distinguish the case as an exception from this general rule, that the private fortune of one of the partners has by accidental increase given him an advantage in the purchase of the goodwill, shop, house of business, or stock in trade.³

Where a certain term has been fixed for the duration of the partnership, it can be dissolved only on cause shown; or a majority also may dissolve a partnership or joint trade, though undertaken for a term certain, provided the dissolution be made *in bona fide*, and justifiable on rational grounds.⁴

The term is properly to be fixed only by the contract. But it has sometimes been questioned, whether other indications of a term of duration may not be received. The company, for example, has established its trade in certain premises rented and possessed by them, on a lease of definite duration: shall that not be held to have fixed a term of duration? If not, and the company be at any time dissolvable, the goodwill of the business must either go unequally to one, or must be sold for their joint behoof. But this is a difficulty to be disposed of otherwise, as by the fair sale of the lease.⁵ And it is held that a lease is not alone such an indication of a term of duration as to regulate the subsistence of the company. But there may be added stipulations which may establish a term of duration. Thus it seems very doubtful whether, if the lease to the company exclude assignees and subtenants, and so may be considered as annihilated by a premature dissolution of the partnership, this would not infer a term of duration of the partnership itself. Perhaps this may be taken as a case of that sort to which Lord Eldon has alluded in his opinion in *Crawshay v Maule*, cited below.⁶

G. 787; *Burden v Barkus*, 31 L. J. Chan. 521, 4 De G. F. and J. 42, affirming 3 Giff. 412.]

¹ 'Cogitur hoc lucrum communicare' (Inst. *ubi cit.*); Ersk. iii. 3. 26.

² The case of *Featherstonhaugh* contains some valuable doctrine on this subject. In particular, a point arose on these facts:—Two of the partners had obtained in their own name a renewal of the lease of the premises occupied by the company, without having given any notice to their copartners of their intention to apply for it. This was a year before the expiration of the old lease; and the society being dissolvable in twelve months, when they soon after gave their partners notice of dissolution, the question was, Whether, on the supposition that the company was properly dissolved, the renewed lease was a right which the two individuals who had obtained it were entitled to hold, or whether it was not to be considered as company property? Sir William Grant 'held it a lease taken for the benefit of the partnership, and therefore partnership property at the time of dissolution.' 17 Ves. jun. 298.

³ In *Marshall's* case (*supra*, p. 521, note 5), it was strongly urged that the dissolution was self-interested; the party renouncing having it in view merely to purchase the goodwill, and, by the power of augmented wealth, to get the other partner excluded from the possession. But the Court would not listen to that, and ordered the lease of the shop to be exposed to sale.

⁴ *Montgomery v Forrester & Co.*, 1791, M. 14583.

Barr v Speirs, 18 May 1802, where a partnership for three years by three persons was agreed to, and buildings erected in prosecution of the design. But two of the three finding

that still large advances were necessary, and the event problematical, they were held entitled to dissolve.

⁵ See *Aitken's Trs. v Shanks*, and *M'Whannel v Dobbie*, *supra*.

⁶ *Marshall v Marshall*, 23 Feb. 1816, Fac. Coll. It was here urged that the parties had taken a lease for several years of the shop in which their trade was carried on, and that they thereby declared their contract to endure for that space. But the Court repelled this plea.

In *Crawshay v Maule*, 1818, 1 Wilson's Chan. Rep. 181 et seq., Lord Ch. Eldon says: 'There may undoubtedly be cases in which, though no written contract provides for the duration of the partnership, there may be an implied contract as to the term of its duration. But I am yet to learn that, in a partnership concern, the purchase of leasehold estates of any given duration is a circumstance from which it is to be implied that the parties are to continue the partnership during that term. It might with equal reason be contended that the parties, by purchasing an estate in fee-simple, were to continue partners for ever. It has been repeatedly decided, that if there is nothing more than a purchase of lands for the purpose of carrying on trade, the interests so purchased are neither more nor less than capital of the partnership trade, and disposed of accordingly. I remember a few years ago there was much discussion of this subject in a case in the House of Lords.' P. 191. He afterwards says: 'I do not say that there may not be cases of a party purchasing a lease, in which there may not be evidence of an intention to carry on the partnership as long as the lease endures; but, as a general doctrine, it is quite impossible to say, that because parties are interested in a leasehold estate, they thereby become contractors to continue together in partnership as long as the lease shall endure. The

[634] The Court will on dissolution appoint, if necessary, a neutral person to wind up the concern. But it will not interfere to manage the concern for the parties, unless there be either a dissolution prayed for, or a breach of contract alleged.¹

II. DISSOLUTION BY DEATH.—The whole society is dissolved by the death of one or more of the partners.² If the heir be entitled by the contract to take the place of his ancestor, or if the partnership be declared to subsist notwithstanding the death of any one, there is no dissolution. But otherwise the heir is, on the one hand, entitled to take his ancestor's share of the stock and profits, after deducting the responsibilities of the company; as he will, on the other, be liable, in representing his ancestor, to all the debts of the concern as at his ancestor's death. And the fixing of a definite term of duration for the partnership will not continue it, after the death of a partner, without special stipulation.³ The accounts of the partnership are taken, down to the time of the partner's death.⁴

There are sometimes stipulations that one or any of the partners may, in contemplation of his death, appoint a person to succeed him; and this will be effectual to give right to the person named. But where such person does not choose to accept, the death of the person so making the appointment operates as the dissolution.⁵

The effect of death, and the necessity of notice of that event, in so far as third parties are concerned, will demand attention hereafter.⁶

III. CHANGE ON THE CONDITION OR STATUS OF PARTNERS.—A material change on the condition or status of a partner may be founded on as a ground or pretence to dissolve a partnership. Generally speaking, this contract, though one of exuberant trust, must be understood subject to the common accidents of life, temporary illness, or even insanity. But when such alteration of condition becomes inconsistent with the engagements of the party, it seems to be a good ground on which judicially the contract may be dissolved.

1. The marriage of a female partner of a company seems a change so important, that it should form a ground for dissolving the partnership.

2. Incapacity may be by bankruptcy or by disease.

Insolvency of a partner does not alone dissolve a partnership. It does not operate as a transfer, nor tie up the hands of the partner. Neither has bankruptcy under the Act 1696, c. 5, any effect of this sort; and it may be doubted whether it would dissolve a partnership.⁷ But bankruptcy by sequestration, which transfers to the creditors all the partner's rights, will unquestionably have this effect. So, it would appear, would a trust-deed for the benefit of creditors.

lease is only part of the capital stock of the concern, and may be sold; nor would the purchase of a freehold estate make any difference on this point, when it is considered as part of the stock of the concern. I am therefore of opinion, that it is impossible to say that this is to be a partnership for the duration of the leases, or of the longest of the leases, which belonged to the partnership.' P. 196.

¹ See *Waters v Taylor*, 15 Ves. 10, and 2 Ves. and Beames 299; *Carlen v Drury*, 1 Ves. and Beames 153; *Forman v Homfray*, 2 Ves. and Beames 329. [*Fullarton v Dickson*, 1834, 12 S. 750; *Collins v Young*, 1853, 1 Macq. 385.]

² See Lord Eldon's doctrine in *Vulliamy v Noble*, 3 Merivale 614.

³ *Gillespie v Hamilton*, 3 Madd. 251. [See *Aitken's Trs. v Shanks*, 1830, 8 S. 753.]

⁴ *Kinder v Taylor*, Gow 240. [*Aytoun v Dundee Bank*, 1844, 6 D. 1409.]

⁵ *Kershaw v Mathews*, 1826, 2 Russell 67.

[The doctrine stated in the last sentence is obviously open to grave objections, and little reliance can be placed upon it. On the subject generally, see *Holland v King*, 6 C. B. 727;

Irvine v Irvine, 1851, 13 D. 1367; *Hill v Wylie*, 1865, 3 Macph. 541; *Beveridge v Beveridge*, 1869, 6 Macph. 1034; *Morrison*, 1870, 8 Macph. 500.]

⁶ See below, p. 529.

⁷ See *Monro v Cowan & Co.*, 6 June 1813, 17 F. C. 354; above, vol. ii. p. 153.

[The articles of association of banking and other joint-stock companies sometimes contain a clause providing that the company estate shall be wound up in the event of a certain proportion of the subscribed capital being lost. In such a case, any shareholder may take proceedings to declare the company dissolved on the ground of losses, notwithstanding that the balances prepared by the directors showed the contrary, these balances being alleged to be false and fraudulent. *North British Bank v Collins*, 1852, 1 Macq. 369, 15 D. (H. L.) 29, affirming judgment in C. S. 13 D. 349. The amount of the capital of a joint-stock company is a fundamental article of association, and cannot be altered without the consent of all the partners, unless the contract contains a special clause confirming that power on a majority. *Monro v Edinburgh Cemetery Co.*, 1851, 13 D. 595.]

Incapacity by disease. 1. If the partnership proceed in reliance on such aid from a partner, as any bodily illness he may be affected with may prevent, it would seem to be a justifiable cause for having the partnership judicially dissolved, or for renouncing the partnership, although there should be a fixed term of duration not yet arrived. 2. [635] Insanity has the effect not only of depriving the partner of the power of aiding the partnership by his exertions, but it prevents him from controlling for his own safety the proceedings of his copartners. And accordingly, where there are two partners, both of whom are to contribute their skill and industry, the insanity of one of them, by which he is rendered incapable of contributing that skill and industry, seems to be a good ground to put an end to the partnership.¹ At the same time, it may be observed that these are cases of infinite delicacy. There is no line of distinction by which it shall be ascertained how long a term of inability shall justify measures of this description. A broken leg or an accidental blow may incapacitate a partner for a time as much as insanity, and the one may be as temporary as the other; and perhaps the nearest approximation to be made to a rule on the subject is, that a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends.² 3. Cases may be supposed of danger so imminent, from bad health, lunacy, habits of intoxication, etc., as to make the continuance of the partnership likely to prove ruinous to all concerned; as in the case of uncontrollable habits of intoxication in the partner of a gunpowder manufactory. In cases of this description, there can be no doubt that such perils will afford ground for judicial interference to dissolve the company. But it may be doubted whether they would not justify the other partners in entering an act of dissolution in the books, to be followed up as soon as possible by judicial measures; for such a state of things may occur at the commencement of a long vacation, when no proper opportunity can be had of dissolving by judicial interposition.

IV. DISSOLUTION BY CHANGES ON THE PARTNERSHIP.—Partnership is not necessarily dissolved by partial alterations; by the adoption of new, or the dropping of old partners. This question arises sometimes on contracts and bonds of indemnity or of credit, whether

¹ In *Sayer v Bennet*, 1784, Montagu on Partnerships, vol. i., notes, p. 16, Lord Kenyon, as Master of the Rolls, said: 'This I will venture to lay down as a general rule: Where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, not by the authority of either of the partners, but by application to a court of justice; and this for the sake of the partner who is rendered incapable, as well as of the other: for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. If this, then, were the case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership, and to make a precedent, for I confess I have not been able to find any. It is said that equity should appoint some person to carry on the business for the benefit of the lunatic, as they would have done for an infant; but I say, God forbid. Mr. Sayer would certainly never have entered into this partnership if he had conceived that by so doing he should, in any event, have subjected his business to the management and control of a court of equity.'

[The insanity of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution if the other partner or partners apply to the Court for decree of

dissolution on that ground. *Jones v Noy*, 2 My. and K. 125. Notice of dissolution, pursuant to agreement, has been held effectual where the partner receiving the notice was insane at the time it was given. *Robertson v Lockie*, 15 Sim. 285, 15 L. J. Chan. 379.]

² In the *Opera Cases*, *Waters v Taylor*, 2 Ves. and Beames 303, Lord Chancellor Eldon said: 'The question whether lunacy is to be considered a dissolution, is not before me. If a case had arisen in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it that he could not perform his contract, there could be no damages for the breach in consequence of the act of God. But it would be very difficult for a court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it. It will be quite time enough to determine that case when it shall arise: for, as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short, and the degree may admit of great variety. I would not therefore lay down any general rule by anticipation, speculating upon such circumstances. I agree with Lord Thurlow that the jurisdiction is most difficult and delicate, and to be exercised with great caution.'

[636] they endure to the benefit of the altered company. This point has already been slightly alluded to in speaking of cash-credits.¹ It may further be observed,—

1. That securities for clerks, etc., taken to an individual, will not be available to a partnership formed by that individual, though the trade be the same; for the character of the principal may be entirely changed, the vigilance to which the sureties trust different, the whole relations of the undertaking varied.² So it is with guarantees and surety bonds for accounts to be opened with a bank on similar principles.³

2. The intention of the parties will be studied in the decision of such cases, where the obligation is undertaken to a firm, whether it was meant to be limited to the *partners* at the time, or to be extended to the *house* under all the changes it might undergo.⁴ On this ground there does not seem to be any doubt, that in a question with a public company, though not chartered, a bond of suretyship, credit, etc. would be held as made to the company under all its changes of administration; and that the same would hold as to such private companies as by the local understanding are held to act as a permanent company, unaffected by the changes of individual partners, the coming in of new, or the retiring or death of old partners.⁵

3. If a broker have sold goods as for three persons in partnership, when, in truth, by a recent alteration, the company consisted only of two of them, the purchaser will not be at liberty to avoid the contract on this account, unless he shall suffer prejudice by the altera-

¹ See above, vol. i. p. 387.

² In *Wright v Russell*, 1774, 2 Blackst. 394, De Grey, Chief Justice, laid it down that a surety bond for the fidelity of a clerk, granted to an individual, did not accrue to the benefit of a partnership when that individual assumed a partner; and this on the ground of difference in the trust, change of the vigilance and personal character on which the surety relied, and similar grounds that are obvious.

This doctrine, though once doubted, is confirmed by Lord Kenyon and Mr. Justice Grose (*Myers v Edge*, 7 Term. Rep. 254), and by Lord Ellenborough (*Strange v Lee*, 3 East 484). [See *Bowie v Watson & Co.*, 1840, 2 D. 1061.]

³ In case of guarantee the doctrine was applied. *Myers v Edge*, 1797, 7 Term. Rep. 254.

In a credit bond the same rule was followed. *Strange v Lee*, 3 East 484. Walwyn & Co. were bankers in New Bond Street; and on Blyth opening an account with them, Lee, the defendant, granted to the several partners of the concern a bond with him for such balance as might arise. Walwyn, one of the partners, died, at which time there was a small balance due. The company then continued to trade as bankers, and on Blyth's failure a balance to a considerably greater amount was due. For this an action was raised against Lee. The Court of King's Bench held Lee, the surety, not liable. But they appear to have proceeded in a great measure on the ground that this was a bond to the individuals, one of whom was gone, and that perhaps the very person chiefly relied on. The judges all admitted that such a bond might be so taken as to subsist through all the changes of the company; as, if taken to the house, and those then constituting the company and their successors; or not only to the present, but to all future partners in the house.

⁴ In *Strange v Lee* (*supra*, note 3), Lord Ellenborough said: 'The Court will, no doubt, construe the words of the obligation according to the intent of the parties to be collected from them.'

In *Barclay v Lucas*, 1 Term. Rep. 291, Lord Mansfield said: 'The question in this case depends upon the intention of the

parties at the time of entering into the contract. In questions upon intention, we must look to the subject-matter of the contract. It is notorious that there are many banking houses in the city which continue for generations. This can only be by a constant succession of partners; and even if they should not bear the same name with the first proprietors, yet still the house frequently continues under the original firm.

[Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing, and receive payment of part of the debts out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. *Bank of Australasia v Flower*, 1 L. R. P. C. 27, 35 L. J. P. C. 13. See also, on this subject, *Miller v Thorburn*, 1861, 23 D. 359; *M'Keand v Laird*, 1861, 23 D. 846. In *Muir v Collet*, 1862, 24 D. 1119, it was held that a creditor was entitled to proceed against an individual partner of a dissolved firm, who had come within the jurisdiction, without constituting the debt against the firm, or calling the other partners, who were not within the jurisdiction. As to interest in settling accounts between the new and the old firm, see *Findlay, Bannatyne, & Co. v Donaldson*, 1865, 2 Macph. (H. L.) 86.]

⁵ [By 19 and 20 Vict. c. 60, sec. 7, 'No guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this Act, to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done, or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made, unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance, shall continue to be binding notwithstanding such change, shall appear, either by express stipulation, or by necessary implication from the nature of the firm, or otherwise.']

tion, as by exclusion from a set-off on which he had relied, especially if he shall anyhow be made aware of the change.¹

The representatives of a deceased partner, or the trustee of a bankrupt partner, are not strictly partners with the survivor or solvent partners; but still, in either of those cases, that community of interest remains which is necessary until the affairs are wound up.²

Where acts are attempted to be done beyond the proper object and purpose of winding up the concern, the Court will interfere, and, on the application of the proper party, [637] either interdict those who remain in the management, or appoint a neutral person to wind up the concern.³

V. OF WINDING UP, AND THE NECESSARY PROLONGATION OF THE PARTNERSHIP.—Partnership subsists after dissolution for the purpose of winding up the concern.⁴

1. The partnership is dissolved in so far as the power of contracting new debts is concerned; but continued to the effect of levying the debts, paying the engagements of the company, and calling on the partners to answer the demands.⁵

2. It does not, however, seem to exist to the effect of enabling any partner, even he that is entrusted with the winding up, to endorse the notes of the company.⁶

¹ *Mitchell v La Page*, Holt's Rep. 253.

² Dict. Lord Eldon in *Williams ex parte*, 11 Ves. 5. See also *Wilson v Greenwood*, 1 Swanston 480.

³ [The jurisdiction of the courts to dissolve a partnership, and to appoint a receiver or judicial factor to wind up, is one of great delicacy, and which is only exercised where a very clear case for interposition has arisen. To dissolve a partnership or appoint a factor on account of a mere squabble or explosion of bad feeling amongst the partners, would be to punish all for, it might be, the fault of one; and it would rather seem that, to justify an application to the Court, the partner complaining must show a case of fraud or abuse of power on the part of the defenders. In the following amongst other cases the Court of Chancery pronounced decree of dissolution in respect of the conduct of parties:—*Baring v Dix*, 1 Cox 213; *Waters v Taylor*, 2 Ves. and Bea. 299; *Smith v Jeyes*, 4 Beav. 503; *Watney v Wells*, 30 Beav. 56; *Essell v Hayward*, 30 Beav. 158. In *Collins v Young*, 1853, 1 Macq. 385, the House of Lords recalled the appointment of a judicial factor on the estates of a partnership dissolved by the death of one of the partners, on the ground that there was no averment of fraud or unreasonable delay on the part of the surviving partner, and that he was the proper party to superintend the winding up of the estate. The powers of a surviving or continuing partner in relation to the winding up are not assignable. *Fraser v Kershaw*, 2 Kay and J. 496, 24 L. J. Ch. 445.]

⁴ In England it was ruled, so early as the time of Lord Nottingham in 1674–5, that if two merchants trade in partnership, and one dies, yet the partnership continues until the debts are paid and recovered, and until the cargoes are brought in and returned, and until all things can be separated. 3 Swanston 627.

⁵ *Grant v Chalmers*, 1771, M. 14581.

Douglas, Heron, & Co. v Gordon of Culvenan, 16 June 1792, Fac. Coll. This action was brought in name of the company for several contributions ordered by the committee to be levied on the several shares of stock, in order to pay the debts. There were objections to the course of proceedings, as it was said that, by realizing the proper funds of the company, this might be saved, while by neglecting that course

repeated bankruptcies of partners made things worse. But the defender also objected to the title of the company to pursue so many years after the company had given up trade. The Lord Ordinary found 'that every copartnership must, from its nature, subsist after it has been dissolved, or the term for which it was entered into expired, to the effect of winding up its affairs, although there were no provision in the contract constituting it for that purpose; and that the contract in question does contain such a proviso, which has been followed out by naming persons as directed therein.' Affirmed in the House of Lords, who 'ordered that the said action do proceed in the Court below between the appellant (*Gordon*) and the respondents (*Douglas, Heron, & Co.*, and their factor).' And the cause was remitted, with instructions to investigate the appellant's proportion of loss, as the result of an account to be taken.

Douglas, Heron, & Co. v Heirs and Reps. of R. Lowthian, 10 July 1800, was a case somewhat similar, decided on the same principles.

⁶ *Kilgour v Finlayson*, 1 H. Blackst. 158, where, after a dissolution advertised, *Finlayson*, a partner, who was announced as empowered to receive and discharge the debts, drew by the firm on a debtor of the company, and, after acceptance, endorsed it to *Kilgour* for value. Action against all the partners on this bill was sustained, but afterwards a new trial granted, and this although the value was applied to pay debts of the company.

The same rule followed in *Abel v Sutton*, 3 Esp. Ca. 108, where Lord Kenyon laid it down that, after dissolution, all the partners must join in the endorsement. 'The moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undisposed of from that period; and if they send any securities which did belong to the partnership into the world after such a dissolution, all must join in doing so. I even doubt much, if an endorsement were actually made on a bill or note before the dissolution, but the bill or note was not sent into the world until afterwards, that such endorsement would be valid.'

[A contrary decision has since been given in *Lewis v Reilly*, 1 Q. B. 349, and the endorsee was held entitled to

3. If the company, having ordered goods, shall dissolve, leaving some of the partners to wind up, and the goods shall be delivered to those partners, all will be liable for the price. So will they be liable for the freight or charges necessary for the transmission of the goods so ordered.¹

4. It is generally settled at the dissolution, that one or more of the partners, or a neutral person, shall have power to levy debts, sell effects, and pay off creditors. Sometimes it is settled even in the contract of partnership, that in case of death the partnership shall subsist only for a definite time in the persons of the survivors, for the purpose of winding up. Where there is no agreement, the surviving partners, in case of death, have the power of winding up; the company subsisting for that purpose notwithstanding the death. The [638] right of action for debts of the company is in the survivors;² and where the representatives of the deceased partner are not satisfied with the credit or fidelity of the survivors, their remedy is to apply to the Court to have a factor appointed for the benefit of all concerned. See below, pp. 533-4.

2. DISSOLUTION OF PARTNERSHIP IN RELATION TO THIRD PARTIES.

The question of chief importance relative to the Dissolution of Partnership arises with third parties; for there may be a complete dissolution as between the partners, and yet they may all continue responsible to the public. Our next inquiry then is, What are the requisites of a dissolution which shall be available against third parties as well as in relation to the partners?

1. EFFECT OF DISSOLUTION ON SUBSISTING RESPONSIBILITIES TO THIRD PARTIES.—No dissolution can take place, either by death, bankruptcy, or agreement among the partners, so as to discharge any one of their number, or his representatives, from responsibility to third parties already incurred. Any agreement may bind the parties themselves, and entitle him or those who are intended to be freed to an action of relief against the co-partners; but to strangers the responsibility continues undischarged.³ Even where the retiring partner has paid to the rest as much as will suffice to answer the debt of the stranger, it will avail him nothing in discharge of his liability.⁴

But it has been questioned whether persons continuing to deal with a partnership, and proceeding with their transactions after the death of a partner, are to be held as discharging the representatives of the deceased from the debt due at their death?⁵ It has, in particular,

recover, although he had notice of the dissolution; and where a new firm accepted a renewal of a bill granted by a dissolved firm to which it had succeeded, on behalf of the dissolved firm it was held that the retiring partners were liable. *Spenceley v Greenwood*, 1 F. and F. 297.]

¹ The case of *Pinders v Wilks*, where the reverse of this found as to freight (1 Marsh. Rep. 284, 5 Taunt. 612), seems to proceed on some peculiarity of English practice. [The authority of this case is doubted by Collyer, *Partnership*, 372.]

² This settled by many cases in England. 1 Montagu on *Partnership* 167. Much confusion and expense are often produced in the Court of Session by requiring a title from the representatives of the deceased partner.

[See *Douglas, Heron, & Co. v Gordon*, 1792, 3 Pat. 428; *Roger v Jamieson*, 1838, 16 S. 418; *Thom v North British Bank*, 1850, 13 D. 134; *Collins v Young*, 1 Macq. 385.]

³ *Smith v Jameson*, 5 Term. Rep. 601. This doctrine (if it required authority) is laid down both by Lord Kenyon, and by Mr. J. Buller and Mr. J. Grose.

[It would seem that where a company, constituted on the footing of a partnership at will, engage the services of a

manager or agent for a fixed period, the engagement is subject to the implied condition that the partnership shall not be sooner dissolved by death. *Tasker v Shepherd*, 6 H. and N. 575, 30 L. J. Exch. 207. It has not been determined whether a voluntary dissolution of partnership is *per se* a breach of a contract by the firm to employ a person in their service; but if the employee, after the dissolution, elect to serve the person or firm succeeding to the business of the firm by whom he was engaged, he thereby discharges the dissolved partnership from liability on their contract for the period subsequent to the dissolution. *Hobson v Cowley*, 27 L. J. Exch. 205. But see *Dobbin v Foster*, 1 B. and K. 323. As to liability for the expenses of proceedings taken by a surviving or continuing partner in the name of a dissolved firm, see *Kinnear v Thomson*, 1830, 8 S. 512.]

⁴ *Crawford v Milligan*, 23 Feb. 1803.

⁵ [A person who continues to deal with a mercantile house after a change in its constitution, without opening a new account, or expressly reserving his claim against retiring partners or representatives of those deceased, will in general be held to accept the new firm as his debtor, and to discharge his claim against the old; and the distinctions stated in the text

been contended that in a case of this sort occurring in relation to a banking company, there is a strong and peculiar ground for holding the representatives discharged. In a series of judgments delivered by Sir William Grant in the case of *Devaynes*, this question, in all its aspects and relations, is determined upon its true principle. This eminent judge has held, on the most satisfactory grounds, 1. That where a balance is due at the death, and there is no subsequent operation but by drafts to reduce it, the representatives of the deceased continue liable for what remains.¹ 2. That where, in the course of subsequent operations, the balance has been fully paid, a new balance resulting afterwards cannot be viewed as a debt against the representatives of the deceased partner.² 3. That where a balance [639] is due at the death, which the subsequent operations increase, but which is never reduced, the representatives are liable.³ 4. That where stock is entrusted to a company, and managed with its own stock, in name of one of the partners, who sells it and applies the money to the partnership, the representatives of the deceasing partner are liable.⁴ 5. That on the deposit of bills or Indian bonds with the company, which are extant at the death, and sold by the surviving partners, there is no demand against the representatives of the deceased partner.⁵

II. NOTICE OF DISSOLUTION BY DEATH.—It has been much doubted whether dissolution by death requires notice to the world, or to the customers of the company, in order to stop the responsibility of the deceased partner's representatives for debts arising under a continuance of the firm? Lord Eldon on this question says: 'I conceive that the death of a partner of itself works a dissolution of the partnership; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners, for want of notice of such a dissolution.'⁶ The opinion has certainly prevailed very generally, that no notice is necessary; that the partnership, according to the common course of the law, is dissolved by death; that those who deal with the company are held to know the state of their debtor; and that the publication of all deaths, according to the common custom of the world, places this sort of information within the reach of ordinary care and vigilance.⁷

appear to be only properly applicable to transactions with bankers. *Hart v Alexander*, 2 M. and W. 484, 7 C. and P. 746; *Bank of Australasia v Flower*, 1 L. R. P. C. 27, 35 L. J. P. C. 13. But see, *contra*, *David v Ellice*, 5 B. and C. 196, 1 C. and P. 368; *Kirwan v Kirwan*, 2 C. and M. 617.]

¹ *Devaynes v Noble*, 1 Merivale 530. The general nature of the case was this:—Devaynes, Daws, Noble, & Co. were bankers, with whom Miss Sleech had an account. Devaynes died, and at his death the company was due Miss Sleech a balance of £366. The business continued under the old firm, and Miss Sleech, two months after Devaynes' death, drew a check for £50, which was paid. The company then failed, and she claimed as a creditor the balance on the estate of Devaynes. The question was, whether that estate was discharged by her continuing to deal with the company after she knew of Devaynes' death. The Master of the Rolls held: 1. That the short delay between the death and the bankruptcy had not forfeited her remedy to Miss Sleech. 2. That there is no ground for a distinction in the case of bankers, as if the customer had made a deposit,—the nature of the transaction being truly a debt for money paid; and the money being allowed to remain, stands just on the former security, without any *novatio debiti* or new contract. 3. That there is no ground of convenience or expediency for holding the customers of a banking-house to have waived their recourse unless they make their demand immediately. And, 4. That the check

drawn was no acknowledgment of the exclusive responsibility of the survivors, whether she knew of the death or not.

[See *Houston's Exrs. v Speirs*, 4 S. N. E. 573, 3 W. and S. 392, 13 S. 945; *Christie v Royal Bank*, 1 D. 475, 2 Rob. 118.]

² *Clayton's case*, 1 Merivale 604. Here a balance of £1713, due at Devaynes' death, had, by moneys drawn out, paid in, and again drawn out, been extinguished, so that the question was, Whether a debt could be revived against the representatives? The Master of the Rolls distinguishes, in the doctrine of indefinite payments, the peculiar case of a cash or banker's account, and shows that by the nature of the dealings there is an appropriation which operates as an extinction of the original balance. [*Bodenham v Purchas*, 2 Barn. and Ald. 39.]

³ *Palmer's case*, *ib.* 623.

⁴ *Baring's case*, *ib.* 612.

⁵ *Houlton's case*, and *Price's case*, *ib.* 616, 622.

⁶ *Vulliamy v Noble*, 3 Merivale 614.

⁷ *Kemp v Allan*, 1824, 3 S. 153, N. E. 104. This was a guarantee by the copartnership of Andrew and Alexander Allan for the intrusions of a clerk. Andrew died in March 1817. His death was advertised in the Edinburgh and provincial newspapers, and notice published in the Gazette of the dissolution of the company by that event. At the time of the death nothing was due under the guarantee. In June 1819 a sum of £167 was due for intrusions subsequent to the dissolution of the company. The Court held that the letter of

III. DISSOLUTION BY BANKRUPTCY.—The partnership is as effectually dissolved by sequestration as by death. And although the bankruptcy of the Act 1696, c. 5, called notour bankruptcy, is truly not published, the bankruptcy of sequestration, which is advertised in the Gazette and in the other newspapers, is made as public as any fact can be. See above, pp. 524 and 285.

IV. DISSOLUTION BY RENUNCIATION.—Where a partner retires from the company, though the partnership may be dissolved in relation to the partners themselves, it will not be effectually dissolved, in so far as the public is concerned, without due notice given.¹ And it [640] is not sufficient to discharge the necessity of notice, that the partnership has reached its natural termination; for the public have nothing to do with the previous contract of the parties, and are not supposed to be acquainted with the stipulated term of its duration.²

What, in different circumstances, shall be considered as sufficient notice, is a most important question, in fixing which, it is of consequence to distinguish between those who have already dealt with the company, and those who have not had any transactions on the credit of the partnership.

1. NOTICE TO CUSTOMERS.—A credit already raised on the faith of the partnership is presumed to be continued on the same footing, unless special notice of a change shall be given. This must be direct notice. 1. Intimation made in writing, by special note or circular letter, traced to the possession of the customer or to the post office, with a proper address, is good notice.³ At least such proof would compel the person against whom it were established to show that, by some such accident as the robbery of the mail, the notice had not reached him. 2. An obvious change of firm is notice, for it puts the creditor on his guard to inquire as at first.⁴ So the alteration of the checks or notes of a banking-house, or of

guarantee was not vacated without an express declaration of the surviving creditor's withdrawing, and that the Gazette and newspaper notices were not sufficient to put an end to the subsisting obligations of the company.

[The rule stated in the text was confirmed in *Christie v Royal Bank of Scotland*, 1839, 1 D. 745; 1841, 2 Rob. App. Ca. 118. See also *Aytoun v Dundee Bank*, 1844, 6 D. 1409.]

¹ *Bolton v Mansfield, Hunter, & Co.*, 21 Nov. 1786, Fac. Coll. In 1750 a contract of partnership was entered into for fifty years, to be carried on at Prestonpans under the firm of Roebuck & Garbet. In 1765 a contract was made between the partners, assuming a new partner, appointing a new place of trade, borrowing loans under a new firm, and leaving it doubtful whether Roebuck continued a partner. The business at the old place was carried on as before; and Mansfield, Hunter, & Co., the bankers of the original company, continued to make advances after the new contract without any change. On the bankruptcy of Roebuck and of Garbet, Mansfield, Hunter, & Co. claimed a preference on the funds of the company at Prestonpans; while persons who had advanced money to Garbet contended that the contract in 1765 dissolved the original company, and left Garbet the sole proprietor. It was answered, 1. No such dissolution. 2. No intimation of it, and therefore ineffectual. The Court, in respect that the contract in 1765 was a latent deed, and secret, unknown to Mansfield, Hunter, & Co., found them preferable on the subjects and funds *in medio* to the private creditors of Garbet.

See also *Armour v Gibson*, below, note 2, and *Dalglish & Fleming v Sorly*, 1791, in both which cases the dissolution at a particular day was a part of the original contract of partnership. M. 14595, Bell's Oct. Ca. 487.

² *Armour v Gibson*, 1774, M. 14575. Bell & Gibson was a partnership as cloth merchants in Glasgow, to subsist for seven years, with a power to any of the partners to withdraw at the end of three years. Gibson accordingly, by an agreement entered in the books, withdrew. The company proceeded for four years more, and then failed; and diligence was issued against Gibson as responsible for two bills of the company. The Court of Session held the defence of Gibson to be good, and suspended the diligence.

But the doctrine of this case is entirely given up. And both in the case of *Bolton*, *supra*, note 1, and in *Dalglish & Fleming v Sorly*, 1791, M. 14595, and Bell's Oct. Ca. 487, a different decision was given; the Court holding the partnership still to subsist in relation to the public when due notice had not been given of dissolution, although the stipulated term of the contract had expired.

[*Western Bank of Scotland v Needell*, 1 F. and F. 464.]

³ *Jenkins v Blizard*, 1 Starkie 418, where Lord Ellenborough observed that in such cases the usual and most prudent course was to send circular letters to all with whom the parties had dealings.

⁴ *Dunbar v Rimington*, 10 March 1810, Fac. Coll. Miss M'Pherson had, along with Crawford, entered into partnership in a haberdashery concern, which, after having proceeded for some years, was dissolved by mutual consent. Crawford adopted a new partner, and a change was made on the firm. Instead of Maurice Crawford, which was Crawford's name, and the firm of the original concern, the trade was now carried on under the firm of Crawford & Co. It did not appear that there was any notification to the dealers with the concern, or any public advertisement. But the Court held that the change in the firm threw the risk on the public of whatever that change included; that the credit of the concern set out

invoices, etc., is good notice to creditors using those checks or invoices.¹ 3. A Gazette notice alone, or accompanied by advertisements in other newspapers, is not, in [641] questions with persons having previous dealings with the company, sufficient to save from responsibility those who have retired, without being brought home to the creditor's knowledge. The creditor is entitled to rely on the credit of the company, as he formerly dealt with it, until notice be sent to him of an alteration.² And the same rule has been applied, as continuing the responsibility of a guarantee by a company after dissolution and advertisement. In such a case, no notice having been sent to the person holding the guarantee, the Court of Session held it insufficient that the dissolution was advertised in the Gazette, and in several provincial newspapers.³ 4. It was held by Lord Ellenborough, that if notice is published in the Gazette, and there was delivered at the party's house a newspaper containing the advertisement of dissolution, this is evidence to be left to the jury to say whether, in the whole circumstances, there be sufficient notice.⁴ But juries do not hold, nor is there any direction to the contrary, that this sort of evidence is sufficient in relation to customers of the company, unless the notice itself is traced to the party.⁵

2. NOTICE TO STRANGERS.—In regard to those who have not formerly dealt with the company, as it is impossible to give actual notice to all the world, the law seems to be

thenceforward upon a new footing, which creditors were bound to inquire into.

See *M'Iver v Humble*, 16 East 169, where a change of firm and circular letters to the correspondents held good notice.

¹ *Barfoot v Goodal*, 1811, 3 Camp. 147. Lord Ellenborough: 'I think the change in the partnership was sufficiently notified by the change in the check. It is the habit of banking-houses to intimate in this manner that a partner has been introduced or has retired. When the testator had been accustomed to draw upon checks furnished him with the name of Fisher, and others were sent him with the name of Fisher omitted, before using these it became him to inquire what change had really taken place; and when he did continue to use them, I must presume that he was perfectly well aware Fisher had retired, and that he continued to deal with the house upon the credit of the other partners. A circular letter to the customers might be more regular; but I think a change of check is sufficient notice of the dissolution of partnership to those who have drawn checks addressed to the new firm.'

² *Graham v Hope*, 1793, Peake's N. P. 154. 'The defendants had been in partnership, and the plaintiffs had sold them goods as partners. The partnership was dissolved, and notice given in the Gazette; and after this notice the plaintiff had resold and delivered the goods for which the present action was brought. The defendants called witnesses to prove that a notice had been given to the agent of the plaintiff that the partnership was dissolved. The agent, on the contrary, positively swore that he had received no such notice. Lord Kenyon told the jury that the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The Gazette, he thought, was not of itself sufficient notice to the plaintiff of the dissolution of partnership. His Lordship said he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a Gazette to the day of their deaths; and very mischievous would be the consequences if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership to send

notice of such dissolution to all the persons with whom they had dealing in partnership.'

³ *Kemp v Allan*, 1824, 3 S. 153, N. E. 104. The only circumstance which can raise any scruple about this decision is, that the dissolution of the company was by the death of one of the partners.

⁴ *Jenkins v Blizard*, 1 Starkie 418. This was an action for goods delivered by warehousemen to the warehouse of merchants; the pass-book, which was sent as usual with the title of Blizard & Co., being left unaltered at taking delivery, and the words Blizard & Co. still remaining in front of the shop. The defence was grounded on a notice in the Gazette, and a similar advertisement once in the Morning Chronicle, which was proved by the newsman to have been delivered at the house of the plaintiff. It was objected that this notice could not be read in evidence, as not proved to have reached the plaintiff. Lord Ellenborough held it admissible. He said he would leave it to the jury to say, whether the attention of a tradesman, on reading a newspaper, was not likely to be attracted by notices of the dissolution of partnership, to which the attention of others might not be directed. And he afterwards left it to the jury to say whether, under all the circumstances of the case, the plaintiffs had actually received notice of the dissolution; observing that, in such cases, the usual and most prudent course was to send circular letters to all with whom the parties had dealings. The jury held there was not sufficient evidence of notice, and gave verdict for the plaintiff.

See also *Williams v Keats*, below, p. 532, note 4. [*Padon v Bank of Scotland*, 1826, 5 S. N. E. 160; *Campbell & Co. v M'Lintock*, 1803, Hume 755.]

⁵ See *Sawers v Tradestown Victualling Society*, below, p. 532, note 1.

[The fact that one of the continuing partners was a director of a joint-stock banking company with which the firm kept an account, was held not to amount to notice to the banking company of the retirement of a partner, so as to discharge the retiring partner in respect of a debt accruing after his retirement. *Powles v Page*, 3 C. B. 16, 15 L. J. C. P. 217.]

satisfied with a Gazette advertisement, accompanied by a notice in the newspaper of the place of the company's trade, or such other fair means taken as may publish as widely as possible the fact of dissolution. But, 1. A Gazette advertisement seems not sufficient alone, since all men do not read the Gazette, and cannot rationally be bound to take notice of it without a legislative requisition. The Gazette is good evidence of a proclamation, because it is published by authority of Government, and those who are interested in proclamations ought there to look for them; so it is good notice of bankruptcy, because the advertisements in bankruptcy are by statute ordered to be inserted in the Gazette. But such notice does not seem fairly to amount to anything more than a circumstance of evidence in the announcing of partnership; and in England it is, as such, left to the jury.¹ 2. It is not sufficient that the dissolution is advertised in a provincial, or in several provincial papers, being omitted in the Gazette, for there is a manifest neglect in omitting to give notice in that which, as a sort of record, tradesmen commonly refer to;² but if it be proved that the party took in the newspaper in which the notice was inserted, it is admissible in evidence as a circumstance, although the notice did not appear in the Gazette.³ If a man have, along with a Gazette notice, taken all reasonable or possible precautions to make known the dissolution, he will be free from future responsibility to strangers. There being thus no fault or neglect on his part, the ordinary rule holds, *Unusquisque debet esse gnarus conditionis ejus cum quo contrahit*. 3. Gazette or other advertisements, however, not being notice of dissolution to all the world, but only a medium of knowledge, may be counteracted by circumstances indicative of a continued connection with the concern on the part of an individual; as if one of two partners allow his name to continue on the premises, carts, checks, invoices, etc. of the company after the partnership with the other has been dissolved.⁴ But where there is no act or negligence giving sanction to the use of

¹ *Godfrey v Turnbull*, 1795, 1 Esp. Ca. 371. An action was brought on a note made after dissolution of a partnership notified in the Gazette. The question, whether notice in the Gazette was sufficient to exonerate Turnbull? Lord Kenyon: If the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least with those who have no previous dealing with the partners, it seems sufficient at least to be left to the jury, from thence to infer notice. In many cases notice in the Gazette is sufficient to subject a party to penalties, as in cases of smuggling and outlawries. So in cases of bankrupts, notice in the Gazette is sufficient for every purpose. In the present instance there is no proof of any actual notice to Mr. Godfrey, the plaintiff; but the publication in the Gazette is proved, antecedent to his taking the note. The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every Gazette of the dissolution of partnerships, which seems to point out that as the mode adopted by the world for notifications of this sort; and therefore every prudent man in business ought to consult them. The jury found a verdict for the defendant Turnbull.

See above, *Graham v Hope*, for the doctrine relative to those having former dealings with the company.

In *Sawers v Tradestown Victualling Society*, 24 Feb. 1815, Fac. Coll., the Court of Session deliberated much on this point. They held, on the one hand, that a Gazette notice is not absolutely necessary; on the other, that it is not sufficient in all cases. They held it to be always a question of reasonable notice. It is now a jury question.

In *Williams v Keats* (note), Lord Ellenborough said:

'Notice in the Gazette is not to be considered as notice of the dissolution of partnership to all the world; it is a medium of knowledge, but not equivalent to actual notice.' [*Wright v Palham*, 2 Chit. 121; *Heath v Sansom*, 4 B. and Ad. 172.]

² *Gorham v Thomson*, 1791, Peake's N. P. 42. '*Assumpsit*—The defendants had been partners seven years since, and had dissolved the partnership; but no notice had been inserted in the Gazette, nor did the plaintiffs know it. The dissolution was generally known in the neighbourhood. Lord Kenyon said: To discharge the partner retiring, there must be an advertisement in the Gazette; or at least the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. It would be the hardest measure imaginable upon the creditor were the law otherwise; for while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demand, he might be trusting a beggar. Verdict for the plaintiff.'

³ See *Booth v Quin*, 1819, 7 Price 193; *Thomson*, cashier for the Royal Bank, v *Speirs*, 1822, 1 S. 554. See above, vol. i. p. 387. A point of this kind was raised, but the question did not turn upon it. That was a demand against cautioners in a cash-credit bond for a company. The company had been dissolved, and so advertised in Glasgow newspapers, which it was said were taken in by the bank. The Court held it sufficient that the account was operated upon in precise conformity to the stipulation in the bond.

⁴ *Williams v Keats*, 1817, 2 Starkie 290. Here a partnership between Keats and Archer was agreed, on 13th January 1817, to be dissolved; and notice was given in the Gazette of 17th January 1817, announcing the dissolution as on 31st

a firm, or authority to continue the old credit, a notice in the Gazette has been held [643] sufficient, notwithstanding the remaining partner having used the firm.¹ 4. It is no ground of continued responsibility, that the retiring partner has not judicially or otherwise prevented the other partners from continuing the use of the firm.² 5. It is said in the English books to have been held by Lord Kenyon, that there is no necessity for advertising the dissolution of a secret partnership.³ But in the only case of the kind which has occurred in Scotland, it was held that in anonymous partnership, if known to any one person, publication is necessary.⁴ 6. There is a manifest distinction between the evidence of an agreement to dissolve a partnership, and notice of that dissolution. If the dissolution is by agreement, the agreement cannot be given in evidence without being stamped.⁵ But the Gazette notice is good evidence to be laid before a jury without any stamp, since it does not purport to be an agreement for dissolution, but a mere recital of the fact. 7. At the Gazette office a written notice signed is required before admitting the advertisement. This is quite correct. But it should be observed, that the Gazette writer is not entitled to refuse an advertisement subscribed by a partner intimating his own retirement; for that is a right which he is entitled at a moment's notice to exercise, and by which alone he can in some cases save himself from ruin.

V. POWERS OF PARTNERS AFTER DISSOLUTION.—When a partnership expires, whether by death, or by lapse of time, or by bankruptcy, the partnership is considered in one sense as determined, but in a sense also as continued, that is, continued till all the affairs are settled. After this no act can be effectually done, or contract entered into, in the name of the firm as in partnership, but every act of administration which is necessary for winding up the concern may effectually be done. See above, p. 527.

December preceding. The names of Keats, Archer, & Co. remained over the doors of the premises till April, when the name of Colman was substituted for Archer's. Lord Ellenborough held, that in an action by the holder of a bill, accepted in February 1817, by Keats signing the firm and antedating the bill, it was necessary in the above circumstances for Archer to bring home notice to the plaintiff, having imprudently suffered notice to be given of the continuance of the partnership by permitting his name to remain over the door of the premises.

¹ *Newson v Coles*, 1811, 2 Camp. 617. T. Coles and his three sons carried on trade under the firm of T. Coles & Sons. After the father's death, the trade was continued by the sons under the same firm. Two of the sons withdrew in 1808, and gave notice in the Gazette, and by circulars to the correspondents of the house. The other son continued the trade under the old firm. One who had not had dealings while the three sons were in partnership, took a bill accepted by the son who remained under the old firm, and he did not know that the partnership under that firm had been dissolved. Two questions were raised: 1. Whether there was sufficient notice? 2. Whether the retiring partners were responsible for not having prevented the use of the firm? Lord Ellenborough held the notice ample, and that the two retiring partners never having interfered, or by any act whatever sanctioned the use of the firm under which they had traded together, were not responsible. Ample notice had been given of the dissolution of the partnership, and after that it was the duty of persons taking securities in the name of Thomas Coles & Sons to inquire who were designated by that firm. The plaintiff might not know of the dissolution, but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not

bound to apply to the Lord Chancellor for an inquisition, or to take any notice of the firm which their brother might happen to use. They were discharged from all liability for his acts by the dissolution of the partnership, and the notice which was given of that event.

² See the above case of *Newson v Coles*.

³ 1 Montagu 106; 1 Comyn on Contracts 293; *Evans v Drummond*, 1801, 4 Esp. 89. [See *Carter v Whalley*, 1 Barn. and Ald. 11, 3 Ross L. C. 635.]

⁴ *Kay v Pollock*, 27 Jan. 1809, n. r. Adamson, when setting out for New York, made a secret agreement with Pollock, 'to run half gainers and half losers in all the goods to be sent out.' This trade went on for some time, there being no firm, and the connection being little if at all known. Three years after, the partners agreed to dissolve their connection, which they did by letter. The trade was carried on by Adamson without any alteration for some years, and he then failed. The creditors claimed payment of their debts from Pollock, having discovered, after the bankruptcy, his secret connection. There were two questions: 1. Whether there was here a partnership? and, 2. Whether, in a partnership carried on without a firm, notice of dissolution is necessary to free a partner retiring from the concern? On both questions, the Court was clearly of opinion that Pollock was liable. (This case is reported, Fac. Coll., under the name of *Hay v Mair and others*.) [This also appears to be the law in England. *Farrar v Deffinne*, 1 Car. and K. 580; *Powles v Page*, 3 C. B. 16. It is sufficient that notice is given to those who know that he is a partner. *Smith*, Merc. Law, 7th ed. 49.]

⁵ *May v Smith*, 1 Esp. 283. This was a question between two partners for an account, as on an agreement to dissolve. The Gazette notice was proffered, but held by Lord Kenyon not to be evidence of the agreement, unless stamped.

[644] 1. A receipt to a debtor of the company, by the signature of the firm, seems to be valid, if no other mode of settling the affairs has been appointed and made known.

2. If by the dissolution and notice the debts are to be paid to a particular person, partner, or other receiver, no other can validly discharge the debt, especially if there be any evident marks of collusion, as paying by an offset against the partner who grants the receipt.¹

3. After dissolution, no valid draft, acceptance, or endorsement can be made by the firm;² and it is no authority to do so if one partner is in the notice empowered to receive and pay the debts of the company.³ The endorsement, draft, or acceptance must be done by all the partners, or by one specially empowered so to act for them.

4. If, after dissolution, a partner accept a bill in the name of the company, bearing date before the dissolution, it has been held in England that the other partners are not bound.⁴ But a distinction has been taken where before the dissolution skeleton or blank bills have been signed by the firm, and those are filled up subsequently to the dissolution, but a date inserted prior to the dissolution: in that case the bill has been held effectual to bind the partners.⁵ Such a case occurred in Scotland, but it has not yet been decided, in which, after the dissolution, it appeared that certain skeleton bills which the company had been in use of granting, were filled up and antedated so as to fall within the period of partnership.

VI. RETIRING WITH A SHARE OF PROFITS, OR ANNUITY.—There are two grounds on which responsibility as a partner may rest: Ostensible right raising a credit with the world, and participation of profit.⁶ Although a person may have ostensibly retired from the partnership, it will be sufficient to make him still answerable for the company debts if he continue to draw a share of the profits of the concern: 1. It is not participation of profits, if the retiring partner sell his interest in the company for an annuity, which is nothing more than the partnership buying up his stock, or borrowing money on annuity.⁷ But, 2. If, besides legal interest for his money, or the price of his interest in the company, he receive an annuity in lieu of profits for a certain time, he will continue a partner.⁸ Or, 3. If he receive an annuity to be proportioned to the profits, this is held as profits, and he is a partner.⁹

¹ *Henderson v Wild*, 2 Camp. 561.

² *Kilgour v Finlayson*, 1 H. Blackst. 155, where Lord Kenyon said: If a bill is sent into circulation after the dissolution of the partnership, all the partners must join in the endorsement, and one, by putting the partnership name, cannot bind the rest.

See also *Abel v Sutton*, 3 Esp. Rep. 108, where Lord Kenyon even doubts whether endorsement made before dissolution, but not sent into the world till after, would be valid.

³ [The rule laid down in the text is correct in regard to new obligations undertaken by bill or note. *Snodgrass v Hair*, 1848, 8 D. 398; *Gordon v McCubbin*, 1851, 13 D. 1154. It does not seem to be properly applicable to the endorsement or renewal of bills to which the dissolved firm was a party. See *Lewis v Reilly*, 1 Q. B. 349; *Spencely v Greenwood*, 1 F. and F. 297; *Muir v Dickson*, 1860, 22 D. 1070. If a partner charged with the winding up of the dissolved company's affairs, discounts its bills and applies the proceeds in the liquidation of its liabilities, and one of these bills is afterwards returned dishonoured, the retired partners ought in equity to be liable on their agent's endorsement.]

⁴ *Wrightson v Pullan*, 1 Starkie 375. Here a bill was accepted by a firm, and then endorsed by the drawer for value. It was dated 1st February 1815. The company was dissolved on 13th February, and notice in the Gazette 14th, after which time it was drawn and accepted. Lord Ellenborough held, that as the partnership had actually been dis-

solved before the drawing of the bill, the defendant, a retiring partner, could not be charged by the subsequent act of his partner. And verdict having been given accordingly, the Court of King's Bench refused a new trial.

⁵ *Usher v Dauncey*, 4 Camp. 97. Here the partnership of the Tamar Brewery had been in the habit of drawing bills on Hallet & Hardie in London, by the name of Dauncey, Cock, & Co., for the purpose of raising money. They were drawn blank, and filled up as occasion required. Frederick Dauncey had so drawn and endorsed a number of blank bills, which he gave to a clerk to be filled up for the use of the partnership. He died in March, and by his death the partnership was dissolved; and a month afterwards the clerk filled up the bill, as of date 27th February, and it was accepted by Hallet & Hardie, and afterwards discounted. Lord Ellenborough, at the trial, held that the power must be considered as having emanated from the partnership; and that therefore, after Frederick Dauncey's death, the bill might be filled up so as to bind the company. The Court of King's Bench refused to set aside this verdict.

⁶ *Ex parte Norfolk*, 19 Ves. 455 et seq.

⁷ *Waugh v Carver*, 2 H. Blackst. 235.

⁸ *Bloxam v Pell*, 2 Blackst. 999. See also *Grace v Smith*, *ib.* 998.

⁹ *Ex parte Wilson v Tod*, 1 Buck. Cases 48. [The distinctions stated in the text have ceased to be applicable by the passing of the Act 28 and 29 Vict. c. 86; see secs. 3 and 4, cited *supra*, p. 512, note 11.]

3. FINAL SETTLEMENT OF THE AFFAIRS OF THE COMPANY ON DISSOLUTION.

Until the final settlement of the partnership affairs, and the payment of the joint [645] debts and distribution of the joint property, it cannot correctly be said that the partnership is determined.

1. On the dissolution of partnership, the property is common, to be divided according to the shares of the partners after the payment of debts. This consists of the following particulars: 1. The stock-in-trade as originally contributed, with all the additions made to it. 2. Real estates acquired by the company; leases of premises for the use of the company;¹ ships purchased or freighted on time. 3. The goodwill of a mercantile or literary establishment seems to form a part of the common stock.²

2. The partners, or either of them, may insist on a sale as the best criterion of the value of the property;³ and this the Court may order, without waiting the final adjustment of interests, where it is manifest that there must be a dissolution.

3. The common property thus converted, with the pecuniary funds when collected, forms a fund over which the creditors of the concern have a primary and preferable claim; and it must be so applied, in the first place, before any partner or his assignee or representatives can claim a share.

4. In taking an account between the partners themselves, the state of the stock is to be taken as at the dissolution (death, for instance), and the proceeds thereof until it is got in; and each is to be allowed whatever he has advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out more than his just proportion. The partners are to be allowed equal shares of the profit and stock, if there be no other arrangement settled. But a different arrangement may be established either by contract or by the books and usage of the company.⁴

5. The surviving partners are to wind up the affairs, unless some fault or abuse is chargeable against them, or some danger from their intromissions, which may require the appointment of a neutral person, or the requisition of caution.⁵

6. The same confidence which was placed in the partner is not necessarily reposed in his representatives; and therefore, where both or all the partners die, the Court will appoint a receiver.

SECTION IV.

RIGHTS OF PARTNERS BY PARTICULAR STIPULATIONS.

It has been already stated, that in respect to the world at large (both strangers and those with whom the company has been accustomed to have dealings), the private stipula-

¹ [Aitken's Trs. v Shanks, 1830, 8 S. 753; M'Whannel v Dobbie, 1830, 8 S. 914.]

² Crawshaw v Collins, 15 Ves. 227; Crutwell v Lye, 17 Ves. 335, and 1 Rose's Cases 123; M'Cormick v M'Cubbin, 1822, 1 S. 541, N. E. 496.

[Where, on the winding up of the estate of a partnership or joint-stock company, the state of affairs shows not a profit, but a loss, the liability to contribute for the purpose of making good the loss will of course be determined by the same conditions as the right to share the profits, always assuming that the persons entitled to participate in the division of profits are partners. As a general rule, an illiquid claim by a partner against the company estate cannot be used to compensate a claim of contribution. The shareholder must in the first instance contribute to the fund for division amongst the creditors of the company, and from that fund he will be

entitled to receive the amount of the claim which he may establish against the concern. On this subject reference is made to the following cases:—Turner v Molison, 1833, 11 S. 669; Caledonian Dairy Co. v Campbell, 1834, 12 S. 394; National Exchange Co. of Glasgow v Robertson, 1854, 16 D. 1083; Urie v Lumsden, 1859, 22 D. 38. In the last cited case, the distinction between liquid and illiquid claims in this question was formally recognised.]

³ [Stewart v Simpson, 1835, 14 S. 72; M'Whannel v Dobbie, *supra*. A factor or curator will be empowered to concur in a sale of property of a dissolved company. Ellis, 1836, 15 S. 262. The name or style of the firm is an asset of the company. Banks v Gibson, 34 Beav. 566, 34 L. J. Chan. 591.]

⁴ Anderson Blair v Russell, 1828, 6 S. 836.

⁵ [See pp. 527–8, and notes.]

tions of the partners, however precise or strongly expressed, will have no sort of effect, in so far as relates to the responsibility of the partners. The rights, however, which each partner may be entitled to claim against his copartners, will of course regulate the interest which that partner's creditors may have in the stock or profits of the company; the special conditions of the contract superseding the legal construction of the rights of the partners, and implicitly ruling their interests, provided they be consistent with law, morality, and public policy.

I propose, in the present section, to consider the effects of special stipulations on the rights and powers of the several partners.

[646] I. CONTRIBUTIONS OF STOCK AND REGULATION OF PROFITS.—1. The stock may be contributed in all the possible variety of proportions and modes: in money, in goods, in the premises to be used, in skill and attendance, or even in personal influence. It may also be declared divisible on dissolution, as the parties choose to settle.

2. The PROFITS may also be shared as the parties may appoint, but within certain equities, which forbid what the Roman lawyers figuratively called SOCIETAS LEONINA,—that gross inequality which exposes a man to loss without entitling him also to profit. ‘Iniquissimum enim genus Societatis est,’ says Ulpian, ‘ex qua quis damnum non etiam lucrum spectet.’¹ There is no legal impediment, however, to an agreement whereby one of the partners shall be free from loss, and entitled to profit. Such an agreement is frequently essential to the success of a difficult concern, where the operative man is quite unable to sustain loss, while the other partners may be so wealthy that the whole loss may fairly be laid on them.² But such agreement, though effectual between the partners, will not free the partner from responsibility to third parties. Where there is gross inequality, accomplished by fraud, the contract will not stand.³

3. The share of each partner is a portion of the *universitas*: it forms a debt or demand against the company, so as to be arrestable in the hands of the company.⁴

4. If a partner fail to advance his stipulated share of stock, he is a debtor to the company for the amount. If he advance beyond his share, he is a creditor of the company, entitled to demand his debt from the common fund, but barred from competing against the company creditors. He is also a creditor of the several partners, and may make a demand against them, but only *pro rata portionis*; not as a stranger creditor may, against any one partner as liable *in solidum*.⁵

5. The *actio pro socio* of the Roman law was an action for an account by any one or more of the partners against the rest. Where a partner fails in his duty to account with the rest, he may be called in an action to account; and, if necessary, there may be conjoined with this action a declarator of dissolution of the society. In this action, an application may be made for the appointment of a neutral person to wind up the affairs.

II. STIPULATIONS AS TO DISSOLUTION, AND RELATIVE ARRANGEMENTS.—There is no situation in which parties are so apt to fall into misunderstanding and contest as on the termination, especially when sudden and premature, of a contract of mutual profit and loss. And to provide for this many stipulations are commonly entered in contracts of partnership.

When the partnership is dissolved by the death, incapacity, or failure of a partner, doubts may arise as to the precise time at which the profits shall be held divisible. To

¹ Dig. Pro Socio, l. 49, sec. 2, lib. 17, tit. 2.

² Ita coiri Societatem posse, ut nullius partem damni alter sentiat, lucrum vero commune sit. *Ib.* sec. 1.

³ *Hay v Sinclair*, 3 July 1800. Here there was a contract of partnership entered into, which Sinclair held to be unequal and unjust, ill considered, and leading to inequitable consequences. But Lord Cullen found it binding upon the parties, and the rule of accounting between them; in respect it was not alleged, nor offered to be proved, that it was brought

about by fraud and circumvention on the part of the pursuer, and that it was not only acquiesced in, but for a long period of time acted upon and homologated by the parties. This question having been brought under review of the Court, they held that ‘the contract, though it might not be equal, was a lawful contract; and, though informal, was binding, as having been acted upon.’

⁴ *Neilson*, 19 Nov. 1742, Kilk. 40. See above, pp. 507–8.

⁵ *Tait v M'Ghie's Crs.*, 18 Nov. 1795, Fac. Coll.

settle this question, a particular stipulation is commonly introduced into the articles or contract of partnership; but on the construction of such a clause the questions have been almost as numerous as on the general rule of law.

1. Independently of stipulation, the rules seem to be, 1. That, in general, the [647] moment of the dissolution of the partnership is the moment of division of the profit, where that is practicable. 2. That the representatives or creditors of the deceased or retiring partner shall have a share in the subsequent profit and loss, only where they are the necessary result of what had already been done or commenced before the dissolution; of which it may be said that the risk is already depending at the period of dissolution.¹ 3. That if an order has been given or answered; or a transaction, contract, or speculation has *bona fide* been undertaken; or a payment or furnishing to a partner for the company has been made in ignorance of the death or other dissolving act,—it shall be effectual for and against all the partners and their stock.²

2. It is common to stipulate, that the interest of any partner retiring shall be regulated by the preceding balance, and correlatively to provide that the books shall be balanced at regular intervals. This sort of stipulation is of course made prospectively, and before the company has begun its operations. It is intended to provide against the embarrassment of making sudden balances, or of disclosing the state of the company at any given time. But in practice it is often found impracticable to bring the books to a periodical settlement; or the partners neglect this, and no balance takes place for years. Out of this many questions arise, sometimes from the ambiguity of the terms made use of, sometimes from the irregular practice of the partnership. And, 1. If it be provided that, on the death of a partner, the heir shall be obliged to receive his share in the stock and profits as the same stood at the preceding balance, and the company has become insolvent before the death, it has been doubted whether the heir be entitled to resort to the previous balance as fixing his right. The Court of Session justly held the insolvency to supersede the operation of the stipulation in a case of this sort.³ 2. Bankruptcy is, in this country, a term somewhat ambiguous; and where it is stipulated that, in case of the death or bankruptcy of a partner, that partner's share in the company shall be extinct, and his heirs or creditors shall take according to the preceding balance, there is much room to doubt whether this applies to absolute insolvency, though no proceedings have taken place, or to bankruptcy under the Act 1696, or to the introduction of a new person to claim the share, as by sequestration, trust-deed, or diligence.⁴ In the construction of all such clauses, the true intention of the parties must be studied: for example, if it be stipulated that, in case of the bankruptcy of a partner, his creditors shall take his share according to the preceding balance struck; and it should happen that, by general distress in the commercial world, or by some particular [648] misfortune, the whole credit of the company is shaken or undermined; and that, although the company may be able for a short time to continue the struggle, while one of the partners

¹ 'Hæres socii,' says Pomponius, 'quamvis socius non est tamen ea quæ per defunctum inchoata sunt per heredem explicari debent.' Dig. lib. 16, tit. 2. Pro Socio, l. 40.

² Si quidem ignota fuerit mors valeat societas, si minus non valeat. Ulpian, l. 65, sec. 10.

³ *Aiton & Co. v Cheap*, 11 March 1769, Fac. Coll. Revd. in H. L. 2 Pat. 283. This appears to have been a special case. It is extremely ill reported.

⁴ *Blair v Douglas, Heron, & Co.*, 1776, M. 14577; aff. in H. L. 15 April 1777, 6 Pat. 796. Here Blair, a partner of Douglas, Heron, & Co., died in October 1772. The company's books were balanced in November 1771. But in the intermediate space of time the company had become clearly insolvent; and though by temporary expedients bankruptcy was avoided for a short time, it had received its death-wound

in 1772. The heir of Blair demanded the amount of his share as at November 1771. But the Court of Session decided that, as it was not denied that between the balancing of the books in November 1771 and Mr. Blair's death in October 1772, the company became totally insolvent, therefore the company is not accountable to the respondent for the value of his brother's share as ascertained by the balancing of the books in November 1771.

⁴ These difficulties were much discussed in *Monro v J. Cowan & Co.*, 8 June 1813, Fac. Coll. But the Court held the accompanying expressions to fix the interpretation to be the bankruptcy of the Act 1696. And this sort of bankruptcy not having taken place, the Court held the insolvent partners entitled to the profits of the trade subsequent to the appointed balance.

is forced to declare his bankruptcy, the company also fails in the end from causes previous to the private failure,—it would rather appear that the creditors of the individual could not, in such case, be entitled to resort to the last balance, and so escape the general calamity.¹

3. If the company, in practice, have neglected to make a regular balance, the clause will not entitle either party, under the designation of the preceding balance, to go back perhaps for years. In such a case, the Court of Session ordered a balance to be struck as at the preceding term.² The rules laid down by the Lord Chancellor in a recent case of this sort were these: *1st*, That where there is no special agreement, the accounts must be taken on the ordinary footing; *2d*, That where there are special agreements, they must be abided by, if they appear to have been acted on by the parties; and, *3d*, That if they appear not to have been acted on, the articles must be viewed as if they contained no such stipulations.³

4. It is often stipulated that, on death or retirement, the interest of the partner or his representatives shall be ascertained according to a valuation to be made by persons mutually chosen or named in the deed. Such a mode of settlement seems to be legitimate and effectual when the parties at the same time choose an umpire; but an agreement of this sort seems not to be an effectual reference, if the parties differ about the person to decide between them. And this leads to an observation of some importance. For, 5. Contracts of partnership commonly include an obligation to refer any dispute that may arise to arbitration. In France this was enjoined by law; and where omitted, it might judicially be supplied on the motion of either party in the action *pro socio*, arbiters being named by the parties, or failing them by the judge.⁴ But with us, such a clause, unless it contain a specific reference to persons named, will not be effectual.⁵

CHAPTER III.

OF JOINT ADVENTURE.

[649] JOINT ADVENTURE, or joint trade, is a limited partnership, and may take place either with unknown and dormant partners, or with partners who are known, but who use no firm

¹ This was the principle of the decision in *Blair's case*, where the dissolution was by death. See p. 537, note 3.

² *Buchanan v Muirhead and others*, 1800. In a contract of copartnership, of which Buchanan was a partner, it was provided that a balance should be struck annually on the 1st of May; and that in case of death or insolvency, the heirs or creditors should be obliged to withdraw the share of the deceased or insolvent partner, 'as fixed by the balance immediately preceding the death or insolvency.' Corse, one of the partners, died on 21st May 1797. A balance had taken place on the 1st of May 1796, but none upon the 1st of May 1797. Corse's executor claimed the share appearing on the balance-sheet of 1st May 1796, although in the intermediate time great losses had been sustained. The Lord Ordinary held, 'That the share which belonged to Mr. Robert Corse, the deceased partner, is to be ascertained by a balance of the books of the company, as they stood on the 1st May 1797 preceding his death, as the books may still be balanced as at that date.' The Court affirmed this judgment. See M. 14593.

³ *Jackson v Sedgwick*, 1 Wilson's Rep. 297. This was a company of ship agents and brokers. A balance was to be made annually, and the profit or loss carried to each

partner's account; and in case of death, the right of the heir should be fixed by the balance immediately preceding. The annual balancing had been neglected; sometimes a sketch of a balance made up at a subsequent period; but oftener neglected entirely. One of the partners died, and the object of the demand which was made by the surviving partners was to have the claim of the heir limited to the balance as at the death, charging the result of all the depending transactions. The heir contended for the rule of the balance as it ought to have been made according to the articles. The Lord Chancellor held the heir entitled only to have an account as at the time of the partner's death.

⁴ Ordon. 1673, tit. 4, art. 9; Pothier, Tr. de Société, No. 136, vol. ii. p. 583.

⁵ So, an obligation to refer any dispute to two neutral persons was held insufficient to bar an action. *Mags. of Edinburgh v Wylie*, 18 Jan. 1770, aff. in H. L. 15 Feb. 1770.

A clause in a contract of partnership, referring all future disputes to the chairman, etc. of the Chamber of Commerce of Glasgow for the time, was held ineffectual, the reference not being to an individual, and the reference as well as the point to be decided being indefinite at the date of the contract. *Buchanan v Muirhead*, 1799, M. 14593.

or social name. It is limited to a particular adventure, or voyage, or course of trade. To the extent to which it reaches, it differs not in its effects from proper partnership; but there is no firm, and no general responsibility beyond the limited agreement of the parties.¹ Erskine has attempted to draw a distinction between proper partnership and joint trade. A partnership he describes as 'a collective and permanent society, in which all the *socii* are, in regard to strangers, considered as one person, and consequently are bound *singuli in solidum* for the company's debts.' 'A joint trade,' he says, 'is only a momentary contract, where two or more persons agree to put a sum of money into a common stock, to be employed as an adventure in a particular course of trade, the produce of which, after the trading voyage is finished, is to be divided among them according to their several shares in the adventure.'² It is only by considering joint trade as a limited partnership, that the errors can be avoided to which Erskine's doctrine has sometimes led. As in partnership, so in joint trade, the stock and property of the adventure are common, so as to confer a preference on the creditors of the concern. The partners are responsible *singuli in solidum*, each being bound, as by mandate express or presumed, for the engagements of the active partners; and on occasion of bankruptcy, the creditors have their claim on the estate of the adventure, with a demand against the individuals only for the balance, after deducting what they receive from the common stock.

The great peculiarity in the doctrine of joint trade (and which is worthy of especial notice) is, that unless where the joint concern is avowed, and a credit raised on the combined responsibility, the liability being the result of the discovery of a partnership which was not relied on as regulating the credit, the limits of the contract are fixed by the actual agreement between the parties;³ whereas in partnership there is a universal responsibility for every engagement *bona fide* relied on, and not beyond the limits of the company's line of trade. Respecting the operation of this principle, it may be proper to observe,—

1. If the parties have formed their agreement and arranged their joint interest, and, in pursuance of the adventure, authorize goods to be purchased, they will be jointly responsible for the price. It is a purchase by the society, whatever credit may have been relied on. This is the settled doctrine both of the Scottish and of the English law. In a very early case in Scotland, wine purchased in joint adventure was held to form a partnership; and after the bankruptcy of the partner, who had gone to market, and whose credit alone was relied on, the action of the seller of the wines for the price was sustained against the copartner, although he had settled with the other.⁴ In more recent cases the same principle has ruled the decision. Thus, in an adventure to Carolina, in which several mercantile [650] houses were concerned, the Court of Session held it a case to be regulated as a limited partnership; and the distinction between that and proper partnership was stated (in correction of Erskine's doctrine) to be, 'that in proper copartnery *socii* are liable for the actings of one

¹ [In the case of *Orr & Co. v Pollock*, 1840, 2 D. 1092, it was held that an association of millowners, for the purpose of maintaining reservoirs, etc., was a species of joint adventure, and that the power of assessing the members proportionally for the expense incurred is implied in the nature and purposes of such an association.]

² Ersk. iii. 3. 29; and he proceeds to deduce from this definition certain consequences not to be admitted.

³ [Thus, where A, B, and C agreed that each should furnish £3000 worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments, it was held that this did not constitute a partnership between the three, so as to make B and C responsible for goods bought by A to furnish his quota of the cargo. *Heap v Dobson*, 15 C. B. N. S. 460; *Smith v Craven*, 1 C. and J. 500, 1 Tyr. 300; *White v Macintyre*, 1841, 3 D. 334. But

see *British Linen Co. v Alexander*, 1853, 15 D. 277; *North British Bank v Ayrshire Iron Co.*, 1853, 15 D. 782.]

⁴ *Logy v Durham*, 1697, M. 14566. This doctrine was well applied. Here five hogsheads of wine were bought by James Moncreiff; and he having failed, the vendor brought his action against Adolphus as a partner in the concern; and on reference to Adolphus' book, it appeared 'that Moncreiff and Adolphus were in copartnery at the time of the buying of these wines, and these very individual hogsheads were bought into the society and divided between them, and that they are posted down as bought from Thomas Logy (the vendor), although they are stated as in account with Moncreiff, and as paid by balance of the accounts. The Court held this to be a partnership; that Adolphus' count-book proved they were in a copartnery *quoad* these wines, and made them both liable, and found Durham liable *ex natura societatis*.'

another, even where not *in rem versum*, while joint adventurers are so liable only for furnishings actually made to the concern.¹

¹ *Withers, Birch, & Co. v Cowan*, 16 Nov. 1790, n. r. William Anderson, of London, wrote to Cowan (24th June 1780): 'My brother and some friends are preparing to send out an adventure to Carolina with a person well acquainted in that business. We take £2000 share. The whole amount of the cargo will be about £8000 to £10,000. If you choose to take share in the adventure, I think it may turn out well. It is a conjunct adventure,' etc. In a second letter (26th June 1780) he wrote that he would keep £1000 share open for his answer. 'My brother and I are to have the sole direction of this adventure. The only advance at present will be freight and shipping charges. All the goods at four, six, and nine months' credit; some for money down.' Cowan enclosed these letters (1st July), and said: 'I agree to hold one-tenth of the adventure, not to exceed £1000 the one-tenth, or £50 more, as it may happen, on the supposition I am not to be put to any advance, as that would not suit my engagements here.' The cargo sent out was a general cargo of all goods. Other letters, containing the details of the concern, were addressed John Cowan & Co. Cowan carried on trade as an individual, and also as a partner of John Cowan & Co. John Cowan & Co., in letters they had occasion to write, correct the mistake of addressing *them*, stating that it is John Cowan alone who is engaged. William Anderson came to Scotland, and Cowan advanced £500 to account of the adventure. Anderson afterwards urged the advance of the other £500; but Cowan refused, and dishonoured his drafts. Henry Anderson, the brother of William, failed (18th December 1781); and in communicating this to Cowan, acknowledged his having advanced £500, and that, on his paying also the other £500, he was entitled to his proportion of the remittances when they should come. William Anderson wrote to Cowan (18th January 1782), that £4000 was remitted, and was in the hands of his brother's assignees, on whom he advised Cowan to claim. He also stated that Withers, Birch, & Co. had a claim for goods furnished, £400, and that they had got a legal opinion to the effect that they had a good claim on the *socii*, and the *socii* relief against the funds of the adventure. Withers, Birch, & Co. wrote to Cowan (17th August 1782), 'claiming £528 as the price of goods bought by Henry Anderson, "which, he said, was for a mercantile adventure to Charleston, in a joint account with your house and several others, whose terms he gave in to us also at the same time."' A draft of the following articles of agreement was recovered, bearing the terms of their joint adventure:— 'London, 22d June 1780.—We, the undersigned, having taken into consideration a plan for shipping a cargo of goods as an adventure to Charleston, etc., hereby agree that Mr. H. Anderson of this place shall manage purchasing of cargo, etc., and that he shall take a concern to the extent of £1000, and each of the subscribing parties to have a concern to the amount of the sums subscribed in their respective names. The whole cargo not to exceed £10,000 or thereabouts, and to be a conjunct concern, etc. Agree to give management of cargo to Primrose as supercargo; and as it is necessary to freight a vessel immediately, empower H. Anderson to do so; also empower him to purchase goods, as a majority shall direct: And each of us binds and obliges ourselves to pay

such sum or sums, as they may fall due, for freight and advance on goods, etc., upon said cargo; and we hereby agree and empower the said Nicol Primrose to remit the whole of the amount of said cargo in good bills on London,' etc. Withers, Birch, & Co. took bills for their goods from Henry Anderson alone, thus: 'I promise to pay to Messrs. Withers, Birch, & Co. £300 value in goods per Favourite Betsey. (Signed) HENRY ANDERSON.' Another for £228, 10s. Withers, Birch, & Co. say that he signed those bills as acting partner of the concern. They claimed in Henry Anderson's bankruptcy as against him alone, and swore they held no security but the above notes. A claim was made in the bankruptcy for a preference to the creditors furnishing goods to the adventure; but the assignees refused it, as no evidence was produced satisfactory to them of a company. Withers, Birch, & Co.'s ledger bore Henry Anderson & Co., but their day-book was amissing. This was an action brought against Cowan for payment of the price as one of the joint adventurers.

1. *Pleaded for Cowan*.—No partnership finally agreed on and executed. So the commissioners of bankruptcy in England held. If a joint trade, creditors preferable on the funds; but all parties acquiesced in the decision of the commissioners of bankruptcy, which made those funds part of Henry Anderson's estate. *Answer*.—Evidence of partnership clear; no judicial determination in England. *Assignees* divide as much as they can; and respondents gave notice to Cowan to attend to his interest. Besides, partnership not bankrupt; only one of the partners debtor to the company had failed; and perhaps the company creditors no preference on funds in his hands.

2. *Pleaded for Cowan*.—The goods not furnished on his credit; therefore Withers, Birch, & Co. have not that equity to rely on. And as to the contract, it cannot bind him, as signed only for John Cowan & Co., and as containing conditions to which he never agreed; also, as it was to be extended on stamped paper, and as some persons mentioned to him as partners never had any share. *Answer*.—The goods were furnished on his credit. See letter 17th August. A person bound in partnership *rebus ipsis et factis*. Non-compliance with the conditions cannot hurt third parties.

3. *Pleaded for Cowan*.—Fraud and deception by the Andersons; and though Withers, Birch, & Co. may have been deceived, *potior est conditio possidentis*. Not enough to make one liable that he shares in profits. A sub-contract gives a share of profits without responsibility. *Answer*.—The goods furnished to the adventure, and, if prosperous, Cowan entitled to a share. Fraud, as between the partners, cannot hurt third parties. The case put is that of a sub-contract accurately defined in the Roman law; different from this: *Socius socii mei meus socius non est*. It is a new society, having its profits or its losses distinct. The Lord Ordinary (Stonefield), in respect it is proved by the letters in process that the defender was a partner in the adventure libelled to the amount of £1000, and that the triennial prescription does not apply to the case, decerns against the defender. The Court adhered, reserving to the petitioners still to be heard before the Lord Ordinary upon this point, how far the goods, or any part thereof, were not applied for the use and behoof of the joint

The next case that occurred was a special case; but so far as depended on matter [651] of law, the rule was followed, as already stated. A joint adventure was held as a limited society, having the same qualities in law: whoever deals with one, was held to deal with all; and each adventurer, before he settled with another, was held bound to see that the creditors of the adventure were paid.¹ And this doctrine has been settled by the determination of the House of Lords, in a case which was the stronger on the point, that there [652] might in that case be some doubt whether the goods which became the subject of the adventure had not already been purchased by an individual before the joint adventure had existence.²

concern. On the case being again brought under review, the Court unanimously adhered. The following is the note preserved by the late Lord President Sir Ilay Campbell of his opinion: 'Mr. Cowan seems clearly to have bound himself by his letters, and even advancing £500 to the concern. Yet it is said that the commissioners of bankruptcy in England held that there was no copartnery; and an argument is founded upon Mr. Withers' oath when he claimed on Anderson's estate. But these difficulties are fully obviated and explained. This case must be regulated by the principle which obtains with regard to joint adventures in general. See Dict. Society et Solidum et pro rata. See Burrow's Rep. vol. v. p. 2613; Douglas' Reports, p. 356. No doubt that a sleeping partner is liable when discovered, because he would otherwise receive usurious interest without any risk. Case of *Hoare v Davis*; *Kinnear (Ancrum's Creditors) v Cunningham*. See below, note 2. Each partner concerned in an adventure must be liable *in solidum*, though not *socius* in a strict sense. Contrary not found in the case of *Donaldson*, e.g. for the price of goods actually furnished. Erskine's distinction means that, in proper copartnery, *socii* liable for actings of one another, even where not *in rem versum*, while joint adventurers are so liable only for furnishings actually made to the concern.'

¹ *Wilkie v Greig*, 1799, n. r. Here the same doctrine was followed out. The case was a good deal involved in circumstances, and perplexed with correspondence, on the specialties of which the judgment of the Court of Session was reversed in the House of Lords. But the general complexion of the case, as it appeared to the Court here, was that of a joint trade undertaken for the mutual behoof of Hutchison in Glasgow, and Wilkie in Jamaica. The action was brought against Wilkie by the furnishers of the goods; and they pleaded, 1. A partnership *rebus et factis*; and, 2. A joint adventure. The Court here was of opinion that a joint adventure was in truth a limited partnership, of which a latent partner is liable as much as if the partnership were general, or the partner known and ostensible; and that misapplication of the price must fall on the person trusting the *præpositus negotiis*. It was intimated by the Lord Chancellor, on moving for a reversal, that it proceeded not on the general law of the case, but on specialties which he stated. The following is a note of the opinions delivered by the Court of Session:—Craig: Adhere. 1. Goods purchased for the joint adventure. 2. Wilkie got the goods, and is liable on that ground. Hermand: Differ. No copartnery; only a joint adventure, which is different. Even that way of dealing altered in this case. Vendor of the goods had no reason to believe Wilkie bound. Books of later correspondence against it. Meadowbank: Difficult case. In general case, foreign merchant getting

goods by agent or commissioner not liable to furnisher, unless in so far as he is debtor to the agent at time furnisher demands his payment. A different doctrine hurtful. But Court, and House of Lords too, have held a joint adventure to be a limited society, having the same qualities in law. Each adventurer, before he settles with another, is bound to see that the furnishers are paid. Whoever deals with one, deals with all. Here a succession of adventurers, and Hutchison *præpositus*. Had power to bind Wilkie, and Wilkie bound to see furnishers paid before settling with Hutchison. Wilkie, in August 1794, knew that goods furnished on his credit, and, if so, bound to see furnishers paid before settling with Hutchison. Balmuto: Joint adventure and society the same, except in extent. Besides, mandant liable as well as the commissioner. Wilkie knew footing on which goods bespoke. Should have remitted to furnisher, not to Hutchison. Armadale agrees. Ruled by the case of *Cunningham*. President Campbell agrees. Doubt as to foreign commissioner, whether mercantile law frees mandant. Goods so furnished will be set down in books to mandant. Though he settles with mandant, that won't relieve him from second payment to furnisher.

This case much stronger. Successive dealings. New footing of trade agreed on, but not notified to furnishers. If told them that Wilkie not to be liable, would not have furnished. In respect (furnishers' books) goods set down to joint account. Bill given accordingly. Commission given to Hutchison of no moment, since the goods sent to Wilkie, and on his account. If goods got on Hutchison's account, and Wilkie had got commission for selling goods, that would have been more favourable. Methven: On the particular case, for adhering; but as to general rule in case of commissions, doubt if mandant liable to furnisher, unless latter inter-pels mandant from paying. Cullen: Won't enter on general question; but adhere on the case. Hermand alone dissenting.

² *Kinnear, etc. v Cunningham*, 1764. Ancrum of Edinburgh was engaged in the West India trade. The goods in question were furnished to him by dealers in Edinburgh, and Kinnear insured them. After the purchase of goods, Ancrum applied to particular persons to take shares of his adventure; and Cunningham, on such application, took one-third of one cargo, one-fourth of another, and one-half of other two. After the goods were on board, Ancrum made the invoice as of goods shipped by him on joint account and risk of A. Cunningham, Ancrum, and T. Murray, consigned to the latter. The other invoices in the same state. Ancrum died; and action was brought against Cunningham for the price of the goods. Defence: That goods purchased by Ancrum in his own name and credit some months before he knew that

In England the same doctrine is settled as law. 'If all agree,' says Lord Ellenborough, 'to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose (responsibility) as if all the names had been announced to the seller; and therefore all are liable for the value of them.'¹

2. If the parties have purchased or acquired goods previously to the contract, and afterwards enter into the concern in possession of the goods, there is no joint responsibility for the price. The property being acquired by the individuals on their own account, not only ostensibly, but actually, the transfer to the concern is by the commutative operation of partnership, not by sale and mandate.²

[653] 3. The stipulated limits of the joint concern have been held conclusive, where, according to the ordinary rules of partnership, there would have been a universal responsibility. So it was held in the case of a furnishing of corn and hay to horses on a particular stage in the run of a stage-coach; the object of the action being to subject the whole of the joint concern of the coach for the price. It was at first regarded as part of the joint concern, all the proprietors on the different stages having benefit by the horses of this stage. But afterwards it was held, that as, by the precise limits of the agreement, the 'horsing' of each stage was left to individuals, they were at liberty to hire to the concern, the liability being only with the proprietors of the horses.³ So also it was held as to the rent of a coach-office taken by one of such an association, and used by him for selling tickets.⁴

Cunningham had acceded to his proposal; that, in temporary adventures, the purchaser of the goods is alone liable, unless the others have induced a belief of their liability. *Answered*: That the goods were sold and entered in Ancrum's name, believing him to act for the adventure; but that Cunningham, though only afterwards discovered, yet having a share in goods purchased for the company's use, and brought into the company's stock, was liable. Lord Auchinleck 'found it fully instructed that Cunningham was a partner in the different adventures; that the furnishings and the insurances were made and brought to the account or use of the company wherein Cunningham was a partner; that Ancrum, now dead, in purchasing and in ordering insurance, and receiving the returns from abroad, acted as *præpositus negotiis* of the said company; and that the engagements he came under for behoof of the said companies affect the companies as a copartnership debt, and Cunningham as a copartner.' The Court unanimously confirmed this judgment, 16th February 1764. And the House of Lords affirmed, with £80 costs, 27th March 1765, 2 Pat. 114.

¹ See below, *Gouthwaite v Duckworth*, next note (2).

² The distinction is well illustrated by the contrast of two English cases.

1. *Saville v Robertson*, 4 Term. Rep. 720. Here several persons who had no general partnership formed an adventure to the East Indies. The outfit of the vessel was a joint concern. Each ordered what goods he thought proper; and their agreement declared that one is not to be bound for the goods ordered by the others. The outfit of the ship and the price of the cargo were to be paid separately. Pearce, the ship's husband, and one of the parties, was to have liberty to ship what goods were suitable, over and above the ship and outfit. Pearce ordered and received on board copper to the value of £900. An action was brought by the furnisher of the copper against Robertson and Hutchison, two of the parties, after Pearce's bankruptcy, on the ground that they were partners,

and also that they had accepted a bill for the price. The defence was, that they were not partners at the time the goods were purchased by Pearce. Held, 1st, That if there was really a partnership at the time of the sale, Robertson and Hutchison would be liable; 2dly, That if the partnership commenced only after that date, they could not be liable except on their bill; and, 3dly, That acts subsequent to the delivery of the goods might be received in evidence of the existence of a partnership at that moment.

2. *Gouthwaite v Duckworth*, 12 East 421. A and B, partners, agreed with C to make a joint adventure; they to purchase the goods and pay for them, and the returns to go to C in liquidation of a debt due to him; but C to bear share of loss, and receive share of profit. Held a partnership at the time of purchasing the goods for the adventure, though C did not go with them to the purchase, or authorize them to buy on joint account. Lord Ellenborough points out the distinction between these cases thus: The case of *Saville v Robertson* does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure, on board the ship; and till that admixture the partnership in goods did not arise. But here the goods in question were purchased in pursuance of the agreement, for the adventure of which it had before been settled that Duckworth was to have a moiety.

There may be some doubt whether the above case of *Kinnear* did not fall under this rule.

³ *Barton v Hanson*, 2 Camp. 97. Lord Chief Baron McDonald's direction, holding it as part of the joint concern, was corrected by the Court of Common Pleas in the same case. 2 Taunt. 49.

⁴ *Jardine v M'Farlane*, 1828, 6 S. 564. [See *Venables & Co. v Wood*, 1839, 1 D. 659; *White v M'Intyre*, 1841, 3 D. 374.]

4. Joint trade may, like proper partnership, be entered into not only by individuals, but by companies. Every day there may be seen in the books of mercantile partnerships, joint adventures entered into between the company and an individual, or another company. When mercantile enterprise runs high, agreements of this sort are frequent; and the termination of that long and disastrous war which had closed the Continent against British manufactures and colonial produce, excited an insane spirit of adventure, which gave birth to many connections of this sort. Speculations were entered into which were far beyond the reach of the funds of any one house, and requiring combinations of vigilance, skill, and personal superintendence, which it was impossible for an individual or any regular company to bestow. In the formation of these adventures, a wish for concealment often led to the most complicated forms of joint concern.

This may be sufficient to illustrate the principle, that in joint trade the responsibility follows the precise nature of the agreement. But it may be of importance to consider a little more particularly the analogy and discrimination between this and partnership proper:—

1. The stock of the joint concern is common property, as in proper partnership. What shall be included in the stock, must be determined by the limits of the concern as settled between the parties. But whatever it is, the joint adventurers hold it as common property, to the effect of giving a preference to the creditors of the concern, and of affording a lien to the partners for their advances.¹ This produces a consequence in certain cases which at first sight does not readily occur to observation, and which has been already [654] mentioned relative to proper partnership. It entitles the creditors of a joint adventure, in which a partnership has engaged as a party, to a preference on the stock of the joint concern over the proper creditors of the company. But this consequence, while it necessarily follows on the adoption of the principle above laid down, stands justified as against the creditors of the firm or proper partnership, by this consideration, that the creditors of a company, while they rely on its credit, must lay their account with the legitimate result of every contract into which the partnership may enter. And here the distinction already stated must apply,—namely, that the price of goods purchased after the combined interest is arranged, and in prosecution of the design, will form a debt against the concern, while that of goods bought before will form a debt merely against the individual, or the firm which buys them.

2. In this limited partnership, as well as in proper partnership, the partners who act for the society in purchasing goods, etc., are *præpositi*, and have an express or tacit authority to bind them for the whole furnishings made to the concern.² There does not seem to

¹ The following cases illustrate the rule in both its parts:—

Crs. of M'Caul v Ramsay, 1740, M. 14608. This case arose in the tobacco trade, in which, according to the custom of that day, 'there were no proper partnership, but only a property *pro indiviso*, resulting from a particular adventure carried on by several merchants joining together, and contributing for the purchase of the outward cargo, and with the proceeds thereof purchasing the tobaccos by their factor or supercargo, which, upon the return of the cargo, they divide according to their several proportions, and are proprietors thereof *pro indiviso*. The Lords found that, till division, they are each in possession of the whole *pro indiviso*, and therefore each entitled to retain possession until he is relieved of his engagement on account of the cargo, and is thereby for his relief preferable to the extraneous creditors of the other parties concerned.'

Crooks v Tawse, 1779, M. 14596. Porteous and Young were jointly concerned in house-building. Young and Por-

teous afterwards failed; Young's trustees for his children having in the meanwhile given their own security for the price of articles furnished. The question in these circumstances arose, whether the creditors of Young were entitled to one-half of the price of the houses, leaving the creditors of the concern to claim as general creditors? or whether the trustees for Porteous, who had guaranteed the company's debts, were not entitled to have the whole price applied, in the first place, towards those debts? The Court found the creditors in debts contracted by the *socii* for carrying on the joint adventure in building the houses are preferable on the price of the said houses to the creditors in separate debts contracted by any of the *socii*.

For further illustrations, all the cases quoted above, note, p. 540, may be consulted.

² [The solvent partner of a joint adventure is entitled to recover and discharge debts due to the joint adventure. *Thom v North British Bank*, 1850, 13 D. 134.]

be any solid ground for a distinction between the purchase of goods and the borrowing of money for the use of the society. In both cases the buyer or the borrower acts for the rest by mandate, tacit or express. And although there may be no proper means of identifying the money, yet if the proof be clear that the society has profited by the application of the money, there seems to be no doubt of the responsibility of the concern in its stock, and of the personal liability of the partners.

JOINT PURCHASE is to be distinguished from joint trade. This is not even a limited partnership. There must, to the effect of partnership, be a contribution for the purpose of joint profit.¹ Thus, where persons join in purchasing tea at the India House in a large lot, to be afterwards divided, there is no partnership or joint trade. Lord Mansfield established this doctrine in England, that to make one liable in such a case for the firm, he must either have agreed with the ostensible party to share jointly in profit and loss, or he must have permitted him to make use of his credit, and hold him out as jointly answerable with himself;² and the same doctrine was long ago settled in Scotland. '*Emptio rei facta a pluribus eumentibus*' infers no society, where there is no '*contributio lucri et damni*.'³

SUB-CONTRACT.—The *delectus personæ* so essential to partnership prevents the introduction of a new partner by contract with a single partner, or any number of partners less than the whole. But there may be a sub-contract, by which a stranger may be admitted to divide with any of the partners his share of the profits. The other partners are not bound to take notice of this sub-contract; nor is there any responsibility attached to it, by which the stranger, as sharing in the profit of the concern, becomes liable for the debts of the partnership.⁴

CHAPTER IV.

OF PART OWNERSHIP.

[655] PART OWNERS are different from partners. They hold not a joint, but a common property. They are PRO INDIVISO PROPRIETORS, which corresponds with the English doctrine of TENANCY IN COMMON, as contradistinguished from JOINT TENANCY.

This distinction between joint owners and partners is chiefly useful in relation to ships. In the doctrine relating to the rights and powers and responsibilities of joint owners of ships, difficulties occur chiefly on the nature of the right and title of each owner, the management of the common property, the supply of necessaries, the responsibility of owners

¹ [On this principle, a member of a club formed by contributions of money is not liable for goods furnished on the orders of the managers of the club, unless they had authority to pledge his personal credit. *Fleyming v Hector*, 2 Mees. and W. 172. But see *Delauney v Strickland*, 2 Stark. 416, as to the case where money is not contributed by the members of the club, and goods are furnished.]

² *Hoare, etc. v Dawes*, 1780, Doug. 356.

³ *Neilson v M'Dougall*, 1682, M. 14551.

⁴ *Ersk. iii. 3. 21. Fairholm v Marjoribanks*, 1725, M. 14558.

[Certainly *socius mei socii non est meus socius* in a question between ourselves. But it deserves reconsideration, whether I can enter into a sub-partnership with a partner of a concern, in his share of that concern, without incurring the same responsibility for the debts of the concern as he incurs. It is

true I only participate in his profits after they are made by him, and not directly in the profits of the concern. But he is my agent, and carries on upon my behalf a certain business, or portion of a business, which may subject him in liability for the debts of it; and upon what ground shall I, as his principal, escape liability for the responsibility which he incurs? It is assumed here, of course, that the sub-contract is one of partnership, and not a mere advance of capital to enable the other to enter into the principal partnership on his own account, under an obligation to pay me a share of his profits, or a sum proportioned to his profits, in lieu of interest. There do occur in business genuine sub-partnerships of this kind, but it is very questionable whether the sub-partner is not liable *in solidum* for the whole extent of his partner's liability, i.e. for the whole debts of the concern.]

to third parties, and the attachment by the creditors of the several owners of their shares for their separate debt. In regard to these points, the distinction between this sort of connection and that of partnership proper, or joint adventure, will appear from what has already been stated as to the property of ships. But one or two remarks may be useful.

1. OF THE TITLE AND RIGHT OF THE SEVERAL OWNERS.—1. Each part owner must be registered as such, otherwise he can have no title to the ship, or any share of it;¹ nor can his creditors attach his right. 2. The right so created and constituted is a right of property *pro indiviso*. 3. The right of each part owner is separate and independent; it descends as such to his representatives, it may be assigned at any time without control of the co-proprietors,² and may be attached by their separate creditors. 4. The ship is not to be considered as a moveable used in partnership, and liable as partnership effects to pay all debts to which the part owners are liable on account of the ship, nor the part owners as holding a lien for what they may have paid for the ship. At one time in England it was held that such lien did exist to the several partners for the balances due to them: this was supported by the great authority of Lord Hardwicke.³ But (with a deference such as the authority of a determination by so eminent a judge required) the present Lord Chief Justice of the King's Bench expressed great doubts of that case;⁴ and Lord Chancellor Eldon has, after great consideration, adopted that doubt, and finally decided that there is no such lien.⁵

2. RESPONSIBILITY TO THIRD PARTIES.—A furnisher of necessary repairs, on the order of a part owner or shipshusband, may sue the part owners *in solidum* to the extent of the share.⁶

A part owner cannot, to the same effect, order things not necessary for the common property, as insurance.⁷ But the part owners may apply the common subject to a [656] partnership use, as in a voyage of adventure, and then the powers of partnership will validate an insurance.⁸

3. PART OWNER'S CREDITORS MAY ATTACH THE SHARE.—The creditors of a part owner may proceed with separate diligence against his share, and this arrestment may be loosed on security for the value of the share.⁹

CHAPTER V.

OF PUBLIC COMPANIES HAVING PRIVILEGE BY CHARTER OR ACT OF PARLIAMENT.¹⁰

It has now been explained how far private association can go in producing important changes on the operations and credit of traders and manufacturers, creating a trust with a

¹ See vol. i. pp. 157, 159.

² Abbot 99.

³ *Doddington v Hallet*, 1 Ves. 497.

⁴ Abbot 99.

⁵ *Ex parte Young*, 2 Ves. and Beames 242; *ex parte Harrison*, 2 Rose 76. See also *Brent v Hay*, Belt's Sup. to Ves. 205.

⁶ *M'Givan v Blackburn*, 1725, M. 14672.

⁷ *French v Backhouse*, *supra*, vol. i. p. 553, note 2. See also the case of *Bell v Humphries*, 2 Starkie 345, where Lord Ellenborough said: 'Managing owners have a right to order everything to be done which was necessary for the ship; but a share in a ship was the distinct property of each individual part owner, whose business it is to protect it by insurance, and the insurance of another cannot be binding upon such proprietors without some evidence importing an authority by them.'

⁸ *Hooper v Lusby*, 4 Camp. 66.

⁹ *Gault v M'Aulay*, 31 Jan. 1821, n. r. Brown was joint owner of a ship lying at Greenock. Gault, a creditor of Brown, arrested the ship to the extent of Brown's interest, which was a third, and refused to loose it till caution was found to make the ship forthcoming to that extent. M'Aulay, owner of the other two-thirds, applied to the Judge-Admiral to have the arrestment of the ship for the debt of a part owner declared illegal; but in order to free the ship he offered caution, in the event of the arrestment being held legal. The Judge-Admiral held the arrest illegal; but the Court reversed this, holding that the arrestment was effectual till caution was found to make the ship forthcoming, not indefinitely, nor for the debt, but to the extent of Brown's interest.

¹⁰ [See pp. 516-7 for a list of the public statutes at present in force.]

common fund, and so a preference to the creditors of the company, and establishing a universal responsibility by the partners for all the debts of the concern. To carry matters further in altering the responsibilities of the common law, requires the aid of privileges conferred by public authority.

Public companies are of two kinds: those which hold the character of a corporation, or the privilege of limited responsibility under a royal charter; and those which enjoy a still higher privilege—viz. monopoly—requiring parliamentary authority.

I. CHARTERED COMPANIES.—A royal charter is necessary to enable a company to hold lands, make bye-laws, and enjoy the other privileges of a corporation; but a charter to a trading or manufacturing company is procured for the purpose chiefly of limiting the risk of the partners. It has sometimes been doubted whether this privilege can be granted by royal charter; but the king by his charter may create fraternities or companies for trade, and the limited responsibility is not a privilege inconsistent with the common law, or with the rights of His Majesty's other subjects. It is a natural consequence of the creation of a separate legal person, and is nothing more than the sanction of a contract by which the company and the public deal on the credit of the stock and property of the corporation.

1. As a corporation, the company acts only by its constitutional organs, whether committee of directors or appointed officers; while in private partnership the obligations of a single member or number of members, by the subscription of the firm, will bind the society.

2. The partnership continues undissolved by the death of partners, the company subsisting in perpetual succession; and the shares of stock, the responsible fund, not being subject to be withdrawn, but only sold, to the effect of the assignees or representatives of the proprietors taking the place of the original proprietors.

3. The shares are transferable, according to certain regulations laid down in the charter, or established by the bye-laws of the corporation.

[657] 4. In England there could formerly be no public company for banking, either incorporated or unincorporated, except the Bank of England; nor could more than six persons unite in partnership for banking.¹ This was intended to secure a monopoly to the Bank of England, but it did not extend to Scotland, and is now recalled to a certain extent even in England.²

In England also, there was formerly a similar monopoly given to the two insurance companies of London,—the Royal Exchange Assurance Company and the London Assurance Company. This monopoly was purchased by certain advances made to Government, and by assurances given that a large capital was to be invested for insuring and lending money on bottomry. It was not a complete monopoly, for insurance and bottomry were as open to individuals as ever; but the privilege consisted in preventing any larger capitals than those which might belong to individuals from coming into competition with those companies.³ This monopoly is now abolished with the repeal of the Act of 6 Geo. I. While it subsisted, it did not extend to Scotland.

II. PUBLIC COMPANIES ESTABLISHED BY ACT OF PARLIAMENT.—To give to a public company the privilege of a monopoly encroaching on the common right of the king's subjects, requires legislative authority. Such a monopoly was that conferred on the Bank of England, and on the two Metropolitan Assurance Companies above referred to.⁴ Such also is the monopoly conferred on the East India Company.

¹ 6 Anne, c. 22, sec. 9; 7 Anne, c. 7, sec. 61; 3 Geo. I. c. 8, sec. 44; 15 Geo. II. c. 13, sec. 5; 21 Geo. III. c. 60, sec. 12; 39 and 40 Geo. III. c. 28.

Wigan v Fowler, 1 Starkie 459; *Broughton v Manchester and Salford Water Works*, 3 Barn. and Ald. 1; *Stark v Highgate Archway Co.*, 5 Taunt. 792.

² 7 Geo. IV. c. 46.

³ 6 Geo. I. c. 18, sec. 12. The policy of this Act was doubted in England; as well it might! *Watts v Brooks*, 3 Ves. jun. 612.

⁴ See above, text.

CHAPTER VI.

OF CLAIMS ARISING ON THE BANKRUPTCY OF COMPANIES, OR OF PARTNERS OF COMPANIES.

It may be proper to consider, 1. The bankruptcy of the partner of a company which remains solvent; 2. The bankruptcy of a company, the partners remaining solvent; and, 3. The bankruptcy both of the company and of the partners.

SECTION I.

CLAIMS ARISING ON BANKRUPTCY OF A PARTNER, THE COMPANY REMAINING SOLVENT.

The partner becoming a bankrupt may either be a creditor of the company or a debtor to the company.

I. WHERE THE PARTNER IS A CREDITOR OF THE COMPANY.—The creditors of a partner in a solvent company, who becomes a bankrupt, are entitled to demand from the company his share of the stock and profit, or the amount of any advances which he may have made to the company. To that extent he is a creditor of the company, and his creditors are his assignees. But as they come into his place, they take his right, such as it is. And so the debts of the company must first be deducted; neither the partner nor his creditors having any right to enter into competition with the creditors of the company. Being responsible for the company debts, the maxim applies, '*Frustra petis quod mox restitutus.*'

1. If no stipulation has been made regulating the interests of the partners on [658] bankruptcy, or providing for the failure of one of the partners, the company must be wound up, and the debts paid; or at least a balance must be struck, so as to show the funds of the partnership to be sufficient for the debts, before any claim can be made by the trustee or creditors of the partner.

2. If there has been a stipulation for settling according to a preceding balance, the rules already laid down will regulate it. See p. 535.

3. The creditors of the partner who fails can attach, as a fund of division, nothing but the share of the stock and profits to which their debtor has right.¹ In ascertaining this fund, three things may be observed: 1st, That although the stock of the company consists of the bonds, bills, houses, ships, merchandise, etc., which they jointly hold, the stock of a partner which his creditors can attach, or which he may assign to them, is his share only of the *jus incorporale* or company fund, after the deduction of debts,² and that this is to be held as a moveable estate.³ 2d, That the right of the partner, by whose death or bankruptcy the dissolution of the company takes place, is fixed as at the moment of dissolution; neither to be enlarged by the success nor diminished by the failure of any adventure or

¹ Ersk. iii. 3. 24.

² *Corrie & Son v Calder's Crs.*, 1761, M. 14596; *Rae v Neilson*, 1742, M. 14565, Elch. Society, No. 7; *Selkirk v Davies*, in House of Lords, Lord Ch. Eldon, 2 Dow 243.

³ *Young v Campbell*, 1790, M. 5495, held as moveable in a question between widow and representatives.

Corse, 1802, M. App. Her. and Mov. No. 2, held moveable in succession.

Sime v Balfour, 1804, in H. of L., 20 July 1811, M. App. Her. and Mov. No. 3, where there is a note of Lord Chancellor Eldon's opinion. 'This point,' he says, 'is of great

consequence to all partnerships. I think the better rule of decision would be to say, that the partners in a case like this hold the property as trustees for creditors, and that the whole becomes personal estate.' He then says that there had been a case decided adverse to this, which alone prevented him from moving a determination on the above principle. 'Till the case decided by Lord Thurlow, we lawyers always considered the real estate belonging to a partnership as personal in point of succession.' A remit was proposed to the Court of Session, but the case has not been determined. [*See Minto v Kirkpatrick*, 1833, 11 S. 622.]

contract undertaken afterwards.¹ Where the dissolution is by death, the rule now laid down can admit of little doubt; but where the dissolution is by bankruptcy, there is a difficulty to be resolved on the principle already laid down.²

II. WHERE THE PARTNER IS INDEBTED TO THE COMPANY.—Where the company is creditor to the partner, they are entitled, as any other creditors, to enter a claim on his bankrupt estate for the balance, after giving the separate estate credit for the share of stock and profits due to the partner.

III. OF COMPENSATION BETWEEN THE COMPANY AND PRIVATE DEBTS.—The chief difficulty in these situations relates to Compensation.

1. Where the company has a claim against the partner, but the partner has a claim against another partner who is solvent, it may be questioned whether there be place for the plea of compensation. It appears that there is not, for there is no concurrence. The company is the proper creditor of the bankrupt partner, and must make their claim against his estate; [659] and the solvent partner is the proper debtor to him who is bankrupt, who must answer the demand made by the trustee by paying the debt. The company, therefore, cannot have any right to demand payment of their debt from the solvent partner, without having an assignation, express or tacit, from the insolvent partner; neither can the solvent partner, without an assignation from the company, offer a discharge of the company debt in payment of the demand against himself. Whatever may be done in the way of accommodating each other while all parties are solvent, the bankruptcy of the partner indebted to the company seems to forbid any transaction which shall have the effect of conferring a preference on the company. The converse of this case will be taken notice of below, with certain cases which have been determined on this point.³

2. Where the bankrupt partner has a claim against the company, and a partner of the company has a claim against the bankrupt partner, can the one claim be compensated by the other? The effect would be to confer a preference on the solvent partner, by enabling him to receive payment in full from the company, instead of drawing only a dividend from the partner's estate, while the creditors of the insolvent partner would suffer the loss of the difference between the dividend and full payment. But these effects can proceed only from an assignation, express or tacit, by the solvent partner to the company, of his debt against the insolvent partner; and after bankruptcy, a creditor cannot acquire debts for the purpose of attaining a preference by compensation or retention.⁴

SECTION II.

CLAIMS ARISING ON BANKRUPTCY OF THE COMPANY, THE PARTNER REMAINING SOLVENT.

1. The several partners are liable, *singuli in solidum*, for the whole debts of the company, being entitled to relief from each other rateably according to their stipulated responsibilities.

¹ Lord Kames, in reporting the case of *Neilson and Rae*, 1742, M. 14565, says: 'The Court was not of opinion that an arrestor was entitled to be a partner in place of his debtor. Hence it may be inferred that an arrestment of a partner's stock will not carry the benefit of any new adventure begun after the date of the arrestment.'

It has been decided in the House of Lords (by reversal of a decree of the Court of Session), that a commission given by one of the partners of a company for goods, after the death of the other partner, was not binding on the representative of the deceased partner, though he died abroad, and the admini-

strator of the company affairs at home was ignorant of his death. *Aiton & Co. v Exrs. of Cheap*, 1769, reversed in H. L. 11 Dec. 1772, M. 14573.

² See above, p. 537.

³ See below, p. 549.

⁴ *Galdie v Gray*, 1774, M. 14598. Anderson was partner with Gray and others, under the firm of Brown, Carrick, & Co.; and the contract contained a mutual assignation by the partners of their share and interest, for security of any debts for which they should be engaged for each other. Gray was creditor to Anderson—and the company indebted to Ander-

2. If a solvent partner pay all the debts of the partnership, and have to claim against insolvent copartners, he will be entitled to come against their estates as in a case of joint cautionry.

3. If one has bargained with another for a certain sum, payable by instalments, to admit him into partnership, and he has accordingly been admitted, and then the company has failed, the subsequent and unpaid instalments will still form a debt against the partner thus admitted;¹ bankruptcy being a contingency incident to every partnership.

SECTION III.

CLAIMS ARISING ON THE BANKRUPTCY OF THE COMPANY AND OF ITS PARTNERS.

On the bankruptcy of a partnership, accompanied by the bankruptcy of its partners, claims may be entered by the creditors of the company against the estates of the company, and also against the separate estates of the partners. But it may first be proper to [660] attend to one or two preliminary observations.

1. The trustee for the creditors of the company has a good claim against the estate of a partner for debt due to the company stock by such partner:² for that debt the ranking will be in full, like that of an ordinary creditor. Where the partner has dealt as a separate trader with the company, and furnished goods as such, the debt thence arising has in England been held as a proper debt of the company, and is sustained in competition with the company creditors on the funds of the company.³

2. The creditors of the company have right to the funds and estate of the insolvent company, to the entire exclusion of the separate creditors of the partners. They have, besides, a right to claim against the estates of the several partners (as guarantees of the credit of the company) the balance that shall remain, after deducting the sums drawn or to be drawn from the estate of the company.⁴ This is quite consistent with the principles of law; but a very different result has been applied in England by the operation of equity.

In England, each estate is, by the equitable direction of the Lord Chancellor, ordered to be taken in the first place for payment of its own debts; the residue only being liable to the creditors of the other estate for any deficiency in their payments.

Originally, and according to the principles of the English law, a separate creditor of a partner might take either the separate property of his debtor, or his debtor's share in the joint property, or both if necessary; and a creditor of the partnership might take the whole joint property, or the whole separate property of any one partner. But as bankruptcy falls under the immediate jurisdiction of the Lord Chancellor, he introduced a mode of distribution founded upon equity and the general intention of the bankrupt statutes: namely, That all creditors should have an equal satisfaction, by which each estate should be applied exclusively in the first instance to the payment of its own creditors; the joint estate to the

son for profits. Gray claimed retention on the debt due by the company to Anderson, in security or extinction of the debt Anderson was due to him, both at common law and by form of the contract. The Court repelled the claim, holding the assignation to be ineffectual, as the subject was a nonentity at the time; and on common law, holding that there was no right of retaining or compensating independent of assignation. *Fac. Coll.* 297.

¹ *Akhurst v Jackson*, 1 Wilson 47.

² *Dunlop v Spiers*, 1776, M. 14610, aff. H. L. 9 May 1777, 2 Pat. 437.

This claim will not supersede a demand by creditors of the

company against the individual partners, as guarantee of the company's credit, for the balance of debts due by the company's creditors; but the company creditors cannot draw more than the amount of the balance wanting of their debts.

³ 'Where several persons,' says Mr. Cooke, 'are partners in trade, and some of them carry on a distinct trade, and in such character deal with and become creditors of the other firm, and a joint commission issues, proof may be made for such debt as if they had dealt with strangers' (Cooke's B. L. 551). And for this doctrine he quotes three cases. *Cullen* 468.

⁴ [See 19 and 20 Vict. c. 79, secs. 61-66.]

joint creditors, and the separate to the separate; and that neither the joint creditors should come upon the separate estate, nor the separate upon the joint, but only upon the surplus of each that shall remain, after each has fully satisfied its own creditors respectively.¹

In Scotland, the creditors of a company have set apart, as held in trust exclusively for them, the partnership estate, for payment of their debts against the company; and they have a right to be ranked as creditors for the balance unpaid on the private estates of the partners.

The Scottish rule, as already observed, seems to proceed correctly enough on the strict principles of law. The English, modelled on the principles of equity, seems to be more just and reasonable, since persons frequently deal to a great extent as sole traders, and have credit accordingly, while they are altogether unknown as partners of a company. The Scottish rule seems more consistent with the policy of an age in which little capital is employed in trade, and in which all the facilities and encouragements for the investing of the funds of moneyed men in commercial speculations are highly beneficial; the English [661] more natural to a country which has made great advances in commerce, in which large capitals are freely embarked in all kinds of trading enterprise, and in which the necessity of encouraging this sort of investment is not sufficiently strong to pervert the natural suggestions of equity.

I. CLAIMS ON THE ESTATE OF THE COMPANY.—The claim of the company creditors on the company funds is for the whole debt, undiminished (both as to ranking and as to the qualification to vote) by any right of claiming from the separate estate.

But although it be in general true that the creditors of the company have exclusive right to the funds of the company, there may be among those creditors a distinction worthy of observation. 1. They may be creditors of the company, either as a company, or as the members of another concern or joint trade, in which the partnership may have engaged with another company, or with individuals. In this case there may be demanded exclusively, for the creditors of that other concern, the separation of all the funds which belong to it, and which may happen to be in possession of the partnership. 2. If, on the other hand, there be no part of the stock of the separate company or joint concern in the possession of the partnership, the proper creditors of that joint concern will not be entitled to rank otherwise on the funds of the partnership, as a member of the joint concern, than as company creditors rank on the separate estate of a partner; that is to say, for the balance after exhausting the stock of the joint adventure. 3. They will have also the subordinate claim of ranking on the separate estates of the individual partners of the company, for such part of the balance of the debt of the joint concern as the partnership may not pay. This was a complicated sort of case, which arose frequently of late amidst the wild speculations of returning peace. In ordinary times it occurs only in relation to a single adventure, where the rule now laid down excites no surprise, and raises no sense of injustice or hardship. But when millions of money come to be engaged in separate adventures of this sort, the proper creditors of the company that enters into such concern, naturally complain of the hardship or injustice of the whole funds of the company being swept away by the overruling influence of such a secret adventure.

II. CLAIMS ON THE SEPARATE ESTATE OF THE PARTNERS.—The creditors of the company are entitled to claim against the separate estates of the partners, the balance left unpaid from the funds of the company. This doctrine was fixed by the case quoted below, affirmed in the House of Lords.²

¹ Cullen's Prin. of Bankrupt Law 459.

² *Tr. for Carlyle & Co.'s Crs. v Tr. for Dunlop's Crs.*, 4 July 1776, M. 14610. James Dunlop failed, being indebted to Carlyle & Co. (as an individual, and as partner of another company) in the sum of £12,000. He was also a partner of

Carlyle & Co., whose debt on their failure was £17,000. The trustees on Carlyle & Co.'s estate made a claim on Dunlop's estate, 1. For the debt of £12,000; and, 2. For the amount of the company debt, being £17,000. It was held, 1. That the trustee for the company was entitled to claim the

This rule being fixed, the next difficulty is how the ranking is to be conducted, while yet the company estate is undivided. Two methods have been suggested and put in practice: one previous to any legislative provision for the valuation of contingent claims or [662] liens; another under those provisions. 1. Previous to the statute of 33 Geo. III. c. 74, the claimants were ordered to compute and deduct the dividend from the company estate;¹ and this seems the only practicable way of managing the matter, where the rules of that or the subsequent statutes do not apply, unless those interested should adopt the analogy of the statute. 2. The rule of the statute of 33 Geo. III. has since been materially improved. In a case which occurred about three years after the 33 Geo. III., the Court held that the true method was to adopt the rule proposed for contingent claims.² The rule now settled is, that either of the modes of valuation for contingent claims or for real liens shall be adopted, which may seem best to reach the justice of the case.³

III. EFFECT OF THE CROWN'S EXTENT AGAINST THE COMPANY.—Although the partner of a company, or his creditors, can have no claim against the company, preferably to the creditors of the company, but, on the contrary, are entitled to claim only his share *deductis debitis societatis*, an attempt has lately been made to establish a preference over the creditors of a company, on the part of the Crown or the Crown's assignee, as creditor of the partners. This has been rested on the principle on which extents in aid are grounded,⁴ whereby a debtor to the Crown is held entitled to a preference over the creditors of his debtor, in order to make good his debt to the Crown. But this attempt has hitherto proved unsuccessful. The question has been tried in both countries.

1. In England it has been held, that if an extent issue against *a member* of a firm for his own debt, and a commission of bankruptcy afterwards issue against the firm, and the

debt due by Dunlop to the company; and, 2. That, in ranking on Dunlop's separate estate as a partner of Carlyle & Co., the trustee must compute and deduct the dividend on the debt of £12,000 due to the company, as well as the whole dividends to be paid from the company funds already divided or undivided, and to rank on Dunlop's estate only for the balance.

This judgment was affirmed in the House of Lords, 9th May 1777, with this addition, that no dividend fairly made before notice of this claim ought to be disturbed, but the respondent (trustee for the company creditors) to be paid up equal to the other creditors before the other creditors receive any more. *M. Society*, App. 2; 2 Pat. 437.

See *Nicol v Christie*, 1827, 5 S. 882, N. E. 819. [19 and 20 Vict. c. 79, sec. 66.]

¹ This was done in *Carlyle & Co.*'s case already referred to. See above, p. 550, note 2.

² The following account of this decision is stated on high authority in a note to the late Act of Sederunt, 14th December 1805:—

In the case of *Campbell v Blaikie*, 1796, M. 14612, the Court, in the first place, unanimously found, “That the company creditors could only be ranked on the private estates of the partners for the balance remaining due after deducting what they had drawn, or might draw, from the estate of the company.” In applying this judgment, the question next occurred, Which of the two rules should be followed, that of the 38th or that of the 39th section? The latter was thought in some respects to be preferable, as the business of the sequestration might be thereby more speedily ended; but, in a petition from the trustee, it was set forth that, in the circumstances of the case, there would be some inconveniences attending that mode of proceeding: for, “if the company

creditors should accept of the estimated values, the creditors of the individual partners may not be able to pay the company creditors in cash; and should they find the means of advancing the money, it must be under a certain great hardship, because the number of the private creditors, and the amount of their claims, as well as their funds, are small when compared to the company creditors' debts and funds, and so far they are not in a capacity to meet the company creditors on an equal footing; and this inconvenience would make it necessary for the trustee and commissioners to estimate that part of the company's funds beneath their real value, by which a loss would be brought on the creditors of the individual partners.” Upon this the Court (30th November 1796) found, “That the petitioner falls to consider the claims of the creditors, Ramsay, Smith, Graham, & Co., as a company, on the estates of the individual partners merely as contingent ones; and ordain him, agreeably to the 38th section of the bankrupt statute, passed in the 33d of His Majesty's reign, to deposit a sum equal to the interim dividends which he is about to pay from the private estates, corresponding to the balance of the company debts after deduction of three shillings per pound already paid, and afterwards to reduce the sum deposited from time to time, in proportion to the dividends to be made from the company estate, until the whole be finished, so as thereby to ascertain the exact amount of the ultimate claim of the company creditors on the individual estate.”

³ See Act of Sederunt, 14th December 1805, sec. 14.

[The rule is, that the trustee ‘shall put a value on the estate of the company, and deduct from the claims of such creditors such estimated value, and rank and pay them a dividend only on the balance.’ 19 and 20 Vict. c. 79, sec. 66.]

⁴ See above, vol. ii. p. 45.

assets are inadequate to the payment of the partnership debts, the Crown is not entitled to any satisfaction from the partnership effects.¹

[663] 2. In Scotland, the question arose not on occasion of a debt due to the Crown by one of the partners, but of a debt due by all the partners of the company, and the same judgment was pronounced.²

¹ 1 Montagu on Partnership 85.

The *King v Sanderson*, 1810. This case came on to be argued upon a demurrer to a plea in extent; and the point for the decision of the Court was, Whether the Crown could, for the debt of one partner, take out of the hands of the assignees of all the partners the share of that one; the whole being insufficient to discharge the partnership debts?

The following facts were admitted,—namely, that an act of bankruptcy had been committed by the bankrupts previously to the *teste* of the writ of extent, 18th June 1806; that the commission of bankruptcy, and the assignment of the partnership effects to the defendants, were subsequent to the *teste* of the extent, but prior to the inquisition, the commission being dated 19th June, the assignment 5th July, and the inquisition 12th August. The *teste* of the *scire facias* was the 4th of February 1807. It was also admitted that the debts of the partnership exceeded the effects and credits.

The demurrer was argued three times by Dampier for the Crown, and by Abbot for the defendant.

Macdonald, Chief Baron: 'It appears from the pleadings in this case, that the writ of extent against two of the partners issued the day before the commission of bankruptcy against the partnership; that the effects were assigned to the defendants in trust for the creditors previously to the taking of the inquisition, and that the defendants having possessed themselves of the goods and chattels of the bankrupts, as such assignees, sold the same; that the debts proved under the commission amount to £15,308, 6s., and the estate, debts, and effects of the bankrupts, including the said goods and chattels, amount only to the sum of £12,817, 16s. 10d. Under these circumstances it is said, on the part of the Crown, that the goods being sold, the king is to be satisfied of his debt; on the other hand, it is said that the king can only take what his debtor could have taken, and that the debts due by the partnership are first to be taken out. The conversion of the goods into money makes no difference in the present case. The question here is, *Whether the Crown is to be paid a debt due from two of the partners at the expense of the whole partnership?* In cases of execution by a subject, it is generally settled that the whole must be taken in execution and sold, and the purchaser becomes a partner in common with the other partners. The sheriff can only sell the interest of the party, not the effects themselves: can the Crown, by extent, do more? We are of opinion that it cannot. It is not just to argue this as a case of prerogative preference, for the preference is admitted; and the only question is, *Upon what that preference operates?* We think upon what the partner himself had. We are not confounding cases of equity with law. It is not necessary to have recourse to equity, it may be pleaded; it may, indeed, be tedious to go through it with a jury, but that cannot be helped. Here the account would be short; but however long it might be, that would not at all alter the case: therefore, unless the Attorney-

General chooses to take issue on that, the judgment must be for the defendant.'

The Attorney-General had liberty to withdraw his demurrer, and plead otherwise. 1 Wightwick's Rep. in Exch. 50.

² *Lords of the Treasury v M'Nair*, 14 Feb. 1809, 15 F. C. 183. Houston Rae having purchased the coal of Polmadie from M'Nair (a part of the price of which was made a real burden on the coal), he entered into partnership with Andrew Houston (who was proprietor of other coal), under the firm of the Govan Coal Co. A West India concern, under the firm of Alexander Houston & Co., subsisted entirely separate from the above, but of which both Houston Rae and Andrew Houston were partners. In 1797 there was advanced the sum of £240,000 of public money to Alexander Houston & Co., under the Act 35 Geo. III. c. 127, for relief of those connected with Grenada and St. Vincent. For a balance of £2000 of the price of Polmadie coal, the partners of the Govan Coal Co. in 1798 granted a bond binding themselves, jointly and severally, and the company and its stock. A few years afterwards, viz. in 1800, Andrew Houston having died, his son made up titles, and conveyed his share to the partners of Alexander Houston & Co. The company, under this change, and without any notice, continued under the same firm, manager, and books; and M'Nair's interest was regularly paid as by the Govan Coal Co. The Lords of the Treasury, in the meanwhile, came to have an interest in the estates of A. Houston. Acts of indulgence were passed in favour of A. Houston & Co., proceeding on a statement of their funds, among which was stated the stock of the Govan Coal Co., which by that time had been assigned by A. Houston's son as above. The estates were afterwards, by Parliament, vested in trustees, with a provision that all questions should be settled as if there had been a sequestration of the estates. For the debt of £2000 in the bond by the Govan Coal Co., M'Nair claimed a preference, on the ground that this debt attached to the stock of the Govan Coal Co., and passed as a burden along with it; while the debt to the Crown was the proper debt of A. Houston & Co., and might give the Crown a preference over the funds of that company, but could extend no further. The Lords of the Treasury contended for an universal preference, on the ground that the whole estates of Houston & Co. were liable to the Crown's preference: that the partners of the Govan Coal Co. were partners of A. Houston & Co., and had, with the company, given bond to the Crown before the date of the bond to M'Nair, and so rendered their whole estates and, *inter alia*, the stock of the Govan Coal Co. liable to the Crown's preference, and M'Nair must be held to take the bond under this previous liability to the Crown's preference. They contended also, that by dissolution of the Govan Coal Co. its stock was distributed among the partners of Houston & Co., and its debt now lay only against each individual partner *privato nomine*; to all which debts the Crown was preferable.

It is the obvious result of this contest, that the question at

IV. OF COMPENSATION BETWEEN COMPANY DEBTS AND PRIVATE DEBTS.—In the [664] doctrine of compensation between the debts of the company and of the partners, it is only where there is a *concursus debiti et crediti* that compensation may be pleaded. And,

The GENERAL RULE is, that in the common case there is no concurrence of debit and credit between the debts of the company and those of the partners, the company forming an entirely different person in law.¹

1. One exception to this is, where the company still subsists, and there is room for an arrangement, or a presumed or tacit assignation, by means of which a concurrence may be brought about which did not originally exist. In applying the doctrine under this exception, 1. The general rule holds, where a company being the creditor, the debtor attempts to plead compensation on a debt due to him by one of the partners. The individual debtor cannot here set off against the company's demand the debt due to him by the partners: for the parties are not originally the same, so as to give concurrence; nor is there any consent, express or implied, to an assignation by which such concurrence can be effected. 2. Where a demand is made against a company, and all the parties are solvent, there seems to be no impediment to the company so arranging with a partner, to whom the creditor of the company is indebted, as to set forward the partner to pay, and so extinguish the demand against the company by the partner's debt, making the partner creditor to the company: for an express assignation by the partner to the company would have this effect; and to such assignation, while parties are solvent, there could be no objection.² But, 3. The bankruptcy of the creditor of the company, or even diligence, or insolvency intervening, will bar such an arrangement, and re-establish the general rule, so as to prevent a company, when called upon to pay their debt, from setting forward one of their partners who happens to be creditor to the bankrupt, to pay the debt by compensation.³ The grounds on which this position rests are these: That although, before the failure of the creditor, there is no [665] *jus quæsitum* acquired by third parties to prevent such an arrangement from being entered

issue for the Court was, Whether the Crown's right, as creditor of both the partners of the Govan Coal Co. as individuals, was preferable on the stock of that company, after the company was dissolved, to a creditor of the company whose debt was not yet paid? There could be no doubt at all (nor was it questioned), that the Crown had preference over the creditors of A. Houston & Co., the king's debtor, and also over the creditors of each of the partners of that company on their respective moveable estates, for they also were the king's debtors. But the point was, Whether the Crown had a preference on the funds of the Govan Coal Co., to the effect of excluding the proper creditors of that company? or, in other words, Whether company creditors are to be excluded by the Crown, where all the partners are the Crown's debtors in their individual capacity?

The Court of Session had no doubt that M'Nair, the company creditor, was preferable to the Crown on the funds of the Govan Coal Co.

¹ *M'Ghie v M'Dowall*, 1774, M. 2575. John M'Dowall was due money to M'Culloch & Co., and the company was also creditor of two companies of which M'Dowall was a partner. On the bankruptcy of M'Culloch & Co., the trustee for the creditors brought an action against M'Dowall, and also against the two companies of which he was a partner, for the several debts due to M'Culloch & Co. On the other hand, M'Dowall was guarantee for M'Culloch & Co. to one of the company's creditors for £5000. M'Dowall claimed a right to retain the debt due by himself to M'Culloch & Co., and also what was due by the companies of which he was a partner, till relieved

of the sum for which he was guarantee. The difficulty, of course, was upon the last point. The Court found that the two companies of which M'Dowall was partner 'cannot plead compensation or retention of the sums due to them by M'Culloch & Co., on account of any debt which M'Culloch & Co. may be due to him.'

See, for the continental law, Salgado Lab. Cred. pp. 71 and 697. Casaregis lays down the doctrine thus: 'Compensare proprium debitum cum credito sociali ea in jure vetitum expressè reperitur per doctores plena manu a me allegatos' (Disc. 76, sec 20); and he refers to his 75th Discourse, where he cites, according to the continental method, a host of authorities. Disc. 75, sec. 30.

The same point is taken for granted in the English cases, though perhaps there is not an example to be cited of a direct determination.

[Compensation cannot be pleaded on a private debt of a joint adventurer against a debt due to the joint adventure. *Thom v North British Bank*, 1850, 13 D. 134.]

² See the case of *Galdie and Gray*, however, p. 548, note 4.

³ See this principle operating in *Cauvin v Robertson*, 1783, M. 2581; and in the English case of *Doe v Davulon*, 1802, 3 East 149, where a case having been cited as importing that a judgment recovered by C against A and B, was set off against one recovered by A against C, not as falling within the statutes of set-off, but by the general jurisdiction of the Court in such matters, 'the Court observed, that in the case cited no insolvency had intervened so as to introduce the claims of third persons.'

into for bringing about a concourse, bankruptcy is a virtual conveyance of the estate, as it stands, to the creditors of the bankrupt; or, at least, the creditors come to have the equitable and substantial right of the bankrupt: That without concourse there can be no compensation; and that when analyzed, the operation by which a concourse not originally existing is effected, implies either that the company—the primary debtor—is unable to pay, so that recourse comes to be taken against the partner as guarantee of the company's credit, or that the partner has expressly or tacitly assigned his debt to the company: That an express assignation for the purpose of acquiring a preference against the equity of the bankrupt laws would be objectionable, and such an arrangement will never be raised on the ground of a tacit arrangement; but the right to the debt being in the creditors of the bankrupt, the debt must be paid to them by the proper debtor, which is the company. It would therefore appear, that where a bankruptcy has taken place, the trustee for the creditors of the bankrupt claiming, against a company, payment of a debt due to the bankrupt, cannot be met by a partner of that company setting off a private debt due to him by the bankrupt in extinction of the company debt. It has, indeed, been imagined that this doctrine is opposed by two cases decided in the Court of Session; but those cases, when duly considered, do not appear to be in the least adverse to the doctrine now laid down. The case of Bogle and Ballantyne has been considered as a precedent not to be disturbed; but it is carefully to be distinguished, that the point in question is not touched by that case. There the company was dissolved; the demand was made against partners *privato nomine*; and the only question was, whether Ballantyne, one of the partners so called on, was entitled to compensate the demand to any greater extent than his own half of the debt, the other partner being solvent? In Hall and Bisset's case the company also was dissolved, and the Court proceeded on the ground that Bisset was now the surviving and managing partner, against whom the claim was properly to be made, and by whom it might competently be answered by a set-off.¹ That there were opinions delivered from the bench adverse to the above view of the law, is true; but, with the deference which is due to those opinions, and setting against them other opinions of equal weight, and which appear more consonant to the principles of the law, I have thought myself justified in stating the law as I have done, subjoining the materials out of which that statement, if wrong, may be corrected. Since the former edition of these Commentaries was published, two cases have been decided adverse to the view here given of the law, and giving less effect to bankruptcy [666] as a bar to all such arrangements, than it had appeared to me to demand. And whatever doubts may still be entertained at the bar on the question, the rule must be held as fixed by these decisions.²

¹ Having been consulted on occasion of the bankruptcy of a company carried on under the firm of Thomson & Co., whether a partner of a company which stood indebted to them, and which was perfectly solvent, could insist on pleading compensation against the demand by Thomson & Co.'s trustee, on a debt due by the solvent company to him as an individual, I felt myself bound, on principles of law, to give an opinion against the claim of compensation; but having been given to understand that the cases of Bogle and Ballantyne, and Scott v Hall & Co., had been stated to the parties by a very eminent counsel, who had been engaged in them, as opposing that opinion, I had a conference with that counsel, and so far qualified my opinion as to say, that 'I could not presume to set up my opinion in opposition to what I now understood to be the import of those cases, however difficult it might be for me to discover a just principle on which the judges could arrive at the conclusion they appear to have formed.' The late Lord Meadowbank happening accidentally

to see these opinions, sent to let me know that my view of the case was entirely according to his conception of the law, and that I had been misinformed as to the case of Hall & Co. He gave me his notes, both of Bogle's case and of the case of Hall & Co., with permission to make use of them in this work. See below, note at the end of this chapter.

² *Russell v M'Nab*, 1824, 3 S. 63, N. E. 41. Here the Falkirk Banking Co. was bankrupt, and also Gillespie a partner. Gillespie's trustees brought an action against M'Nab, as debtor to Gillespie in £95. M'Nab being creditor to the Falkirk Bank, pleaded compensation on that debt against Gillespie's debt, and the Court sustained it.

Salmon v Padon & Vannan, 1824, 3 S. 406, N. E. 285. Here there were two companies, in each of which James Tod was a partner. He became a bankrupt, and Salmon was trustee in his sequestration. There was due to him £919, as his share of stock of one of the companies, and an action was brought against his copartners for it. They pleaded compen-

2. Another exception from the general rule takes place where the company is dissolved.¹ A claim brought in such a case against a partner by a creditor of the company may be compensated by what is due to that partner as an individual,² and more

sation on a debt due to one of them, as having paid debts of the other company, of which James Tod was a partner. The Court sustained the plea, holding the law to be settled by the three cases of Bogle, Hall, and Russell. [See *Thomson v Stephenson*, 1855, 17 D. 739.]

¹ [Two copartners having separated, held that one of them was entitled to set off, to the extent of one-half, a debt due to the company against a debt due by him individually to the company's debtor, although the other partner had, after the dissolution, in settling his own accounts with the party, taken credit for the whole. *Oswald's Trs. v Dickson*, 1833, 12 S. 156. See *Hill v Lindsay*, 1846, 10 D. 78.]

² *Tr. of Bogle's Crs. v Ballantyne*, 1793, M. 2581. The case was: Bogle, a partner of Ballantyne, Wilson, & Co., advanced £300 to the company. Ballantyne, another partner, was a private creditor of Bogle's for £333, 18s. The company was dissolved by the bankruptcy of some partners and death of others, and Bogle's trustees brought an action against the two surviving partners, Ballantyne and Blane, jointly and severally, for the £300. Blane was solvent, but did not appear in the action. Ballantyne appeared, and pleaded compensation on the debt due to him by Bogle: one effect of which would have been to make him paymaster of the whole debt, and give him right to demand his relief from Blane of his half; another was, to pay Ballantyne in full the debt due to him by Bogle's estate, instead of his having only a dividend with the other creditors. Lord Justice-Clerk M'Queen repelled the defence, and gave judgment against Blane and Ballantyne, jointly and severally. The Court affirmed this judgment. Afterwards the judgment was altered, and compensation sustained. Then it was altered again, and compensation repelled. Again the judgment was altered, and compensation sustained; and, on a petition, a hearing in presence was ordered, when the Court, by a small majority, adhered to the judgment sustaining the defence of compensation. I have a very full note of the opinions of Lord President Campbell and of Lord Justice-Clerk M'Queen; and on comparing it with Lord Meadowbank's note, I find it quite correct, but more full. I therefore subjoin it here.

Lord Justice-Clerk M'Queen: We have had much ingenious argument on the effect of the company's being dissolved or not dissolved; for my part, I do not enter into the distinction. When a company is solvent, the creditors have the funds of the company, which they may debar other creditors from touching. But supposing a company to be ever so solvent, a partner is entitled to say to a creditor of the company, You shall not touch the funds of the company; there's your debt against the company, and you have no more to say. The company creditor, though he may carry off the funds of the company from the creditors of the individual partner, is still entitled to his decree against the partners, and the funds of every partner liable for the company debt; so that, without going against the company, the company creditor may lay hold of any one partner, and force him to pay the debt. Suppose you have a decree against a company, how are you to get a caption against that company? The practice of the Bill Chamber in such a case is proper. The creditor finds

out the individuals composing that company; he obtains the warrant for a caption, not against the company, but against the individuals, and he is entitled to proceed against any one of them, and to imprison him for the whole debt. So that, whether a company be solvent or not, it comes to this, that every partner of that company and his private funds are liable for the company debt; and when an action is brought, it is competent to any one partner of that company to pay off the debt; and then, no doubt, he may say to the others bound with him, There's your bill, pay me your proportion.

It has been said that there are two obligants both equally liable: why, then, should Ballantyne be entitled to plead compensation for the whole debt? But that is a question that Bogle's creditors have no concern with; it is a question betwixt the two obligants alone. Had the parties been bound each for a half of the debt, it might have been said, You shall not give a preference to one of these obligants; and the Court *ex equitate* might interfere and give equal relief. But here the parties are liable *in solidum*, and must pay the whole. Every obligant bound for the whole sum; and the creditor holding this obligation must take off my hands a debt which he owes me.

Lord President Campbell: The Justice-Clerk has admitted that in one case Ballantyne might be barred from compensating for more than a half, that is, if Blane had an interest to object. This gives a principle which rules the present case. I have changed my opinion as to this case. Formerly, I held that, agreeably to former opinions, compensation could not be admitted; but I now see, that correctly we may admit compensation to a certain extent in this case, and I shall explain what that extent is. The company here is at an end, and the demand made against the partners is truly and substantially a demand against Ballantyne and Blane, as *correi debendi*, as if co-obligants in a bond, with relief against each other. They are each principal debtor as to one-half of the debt, and cautioner as to the other half. It is no matter whether they were formerly a company or not. I take them as they now stand, two individuals liable for this debt; and the question is, what decision we ought to give on this plea, where there are two persons *correi debendi*, or principal and cautioner, the one having a claim of relief against the other? To what extent can compensation be pleaded by one of them? Now, this plea is not founded on the fact of their being now, or having been, a company, but in the strict principles of law; and these, both in ancient and modern law, rest on equity and expediency. Compensation or set-off, introduced here and in England by an Act of the Legislature, is carried no further than to do justice to the parties. Every man ought to pay his own debt; and taking them as jointly liable, it is clear that the one has his share, and the other his; and if one pays the whole, he has relief against the other for what he has paid above his own share. The rule explained by the Lord Justice-Clerk does very well where compensation is pleaded betwixt the original debtors and creditors; but it does not regulate the case when a third party comes to have an interest. A is due B, and B is due A; consequently the one claim so far compensates the other. But A assigns his claim, or it is carried off from him by the diligence of his creditors, or by

especially where there is only one surviving partner of a company, and where he alone [667] comes to combine in his own person the characters of creditor and debtor. This has [668] been held not only in this country,¹ but it has been also ruled in two several cases

sequestration; or I shall suppose that after they have acquired this right, B obtains a new claim of compensation. This claim, although it would have been good before, is now worth nothing, from the mid-impediment arising out of the right in the assignee or creditors. I state this not as applicable to the case before us, but merely to show that the principles laid down by the Lord Justice-Clerk, although they do justice while the rights remain in the original parties, are not sufficient to regulate the matter when third parties have acquired an interest. The assignee says, This will not do against me, —the plea might have been good against Bogle himself, but his rights were conveyed to his creditors, and they have acquired a *jus quæsitum* which puts an end to this plea of compensation.

In like manner, suppose that one debt had been substituted in place of another due by the company, had there been a transaction betwixt Ballantyne and Blane, by which Ballantyne had agreed to take upon him this debt to Bogle's creditors, while Blane took upon him others of equal value, this would have done very well so long as Bogle continued solvent, and no person could have objected to such a transaction; but when Bogle becomes bankrupt, his creditors acquire a *jus quæsitum*: I shall not say that there was a mid-impediment, but the creditors of Bogle had a title to say, You have entered into this transaction for the purpose of giving an undue advantage to Ballantyne, and therefore it cannot affect us. In this way you would change the shape of the debtor. One-half of the demand only comes truly out of the pocket of Ballantyne; but in this way he would pay the whole. Bogle's creditors are entitled to prevent this, in consequence of the right which they have acquired by his bankruptcy. This is the light in which this case appears to me: it is a change in the circumstances of the debtor which alone produced the plea of compensation; and this change is, I think, an unfair one to Bogle's creditors. Ballantyne is entitled to plead compensation to the extent of the one-half, which is his own debt; but the other, where he is only a cautioner, he cannot compensate. Do not mistake me; I do not say that they are principal and cautioners, but only *quoad* each other they are so. Let me illustrate this. I shall suppose they were both standing at the bar, both solvent, and with money in their hands ready to pay their debt. Blane lays down his share. No, says Ballantyne, I'll not allow you to pay; I will pay it myself, and draw from you. I ask any man what the meaning of all this is? Is it not plainly this, that Ballantyne may by this operation recover from Bogle's estate £300 of a private debt due to him, which I should think both unjust and unlawful? There has been no defence made by Blane: why not give judgment against him? He brings a multipounding, and says, I am ready to pay to either of you. I say, in such a case, the payment ought to be to Bogle; but if you think that it ought to be made to Ballantyne, then you will adhere to the judgment which has been pronounced.

But it has been said, How is judgment to be executed? Blane may be bankrupt, and Ballantyne in that case will be charged for the whole. Then is his time to say, Formerly Blane was in the field, and liable for one-half of the debt,

and then I had right to plead compensation to the extent of one-half only of the debt; but now I am liable for the whole, and to that extent my plea of compensation must now go.

Lord Justice-Clerk: I go on the supposition that decree will not pass for a single shilling. The discharge of the debt to Ballantyne will extinguish Bogle's claim.

Lord President: I admit that as to one-half of the debt due by the company to Bogle's creditors; but the other half is not set off in this way, and I am not for giving a fraudulent advantage to Ballantyne.

Lord Justice-Clerk: Whoever is liable for a debt, is entitled to pay the debt; and the case that I put is, that when the two *correi debendi* are liable, it is *ex necessitate* that you interpose, and Mr. Blane could have no interest to object to that method of settling the demand. The bankruptcy of Bogle can make no difference to the creditors of Bogle.

Lord President: It is not *ex necessitate*, but *ex equitate*, that we ought to sustain the plea of compensation. Wherever this plea is stated, it operates *retro*, but not *ipso jure*. It must be pleaded. Instance the case of prescription.

¹ *Scott v Hall & Bisset*, 13 June 1809, Fac. Coll. Here the only room for doubt was, whether the company estate was not kept separate by the trust-deed. Sommervail & Bisset were partners under the firm of Sommervail & Co., Bisset having one-third, Sommervail the other two. Sommervail died, and so the company was dissolved, but it was not bankrupt. To wind up the affairs trustees were appointed, and Bisset was one of them. Grindlay was a creditor of the company for £900, afterwards reduced to £300. He was, on the other hand, indebted to Bisset £159, on mercantile dealings with him as an individual. After Bisset became trustee for the dissolved company, Grindlay having failed, his creditors brought their action against the trustees of the dissolved company for the debt of £300; and against this Bisset pleaded a set-off to the extent of £159 on his private debt. The Lord Ordinary sustained the compensation; and the Court having ordered the cause to be heard in presence, affirmed that judgment. This case was so far different from Bogle and Ballantyne's, that here the demand was not against the partner of the dissolved company, as now debtor for the company, but against the trustees having administration of the company estate. The Court, however, appear to have taken it as a case similar to Bogle and Ballantyne's. Lord Newton and Lord Meadowbank distinguished justly; but the decision may, I think, be considered as resting on this assumption, that here there were two partners, one of whom was dead, and the other the surviving and managing partner, the natural person against whom the demand is to be made, and who therefore might answer it by compensation. See note of Lord Meadowbank's opinion, below.

[A party disposed heritable subjects *ex facie* absolutely to a partner of a company, but under a backbond declaring the conveyance to be in security of advances made, and to be made, in relation to the premises. Advances were made by the company, for repayment of which the partner sold the subjects; and thereafter a creditor of the disponent arrested in the hands of the partner and of the company. Held in an

in England.¹ And I subjoin to this chapter a note in which the late Lord Meadowbank's opinion was delivered at some length on the point.²

3. Where a company has two different firms, a debt due by one of the firms may be compensated by a debt due to the other.³

action of forthcoming that the partner was entitled to retain the price in liquidation of the advances made by the company; and observed that this did not affect the decision in the case of *Scott v Hall and Bisset*. *Wood v Downie*, 1836, 15 S. 12.]

¹ *Slipper v Stidstone*, 5 Term. Rep. 493; and *French v Andrade*, 6 Term. Rep. 582, where the Court said: 'It is perfectly clear that the debt due from the plaintiff, as surviving partner, may be set off against the demand he has in his own right.'

² See below.

³ *Williams' Tr. v Inglis, Borthwick, & Co.*, 13 June 1809, 14 Fac. Coll. 309. Here Inglis, Borthwick Gilchrist, & Co. were indebted to Williams; while Williams was indebted to James Inglis & Co. Those companies consisted of the same partners; and as a defence against the demand on Inglis, Borthwick Gilchrist, & Co., compensation was pleaded on a debt due to James Inglis & Co. The Court sustained it.

The only doubt that can be suggested is, that here the companies were not one and the same; for the lines of trade were different, the one being a banking, the other a linen company.

NOTE BY THE LATE LORD MEADOWBANK IN *SCOTT v HALL & BISSET*.

This note is above referred to as having been sent to me by Lord Meadowbank himself, as containing his deliberate opinion on the question. See above, p. 554.

'Fixed and settled law, that a company, while carrying on business, constitutes a distinct *nomen*, which holds the property of the stock, and is subject to the debts. The partners are expromissors, who guarantee the responsibility of the company by a joint and several obligation. The stock of the company affords them no sort of security for debts that one of the partners may contract to another as an individual. Nay, it cannot be pledged to them by an assignment, for the entire legal possession remains in the *nomen* or company. Hence admitted, a partner of a solvent company, when sued for a debt due by himself, cannot plead compensation on a debt owing to the company, even to the extent of his own interest in it, corresponding to his share in the capital of the company upon a division. Neither can the company, when suing for a debt, be met with a plea of compensation or retention to the extent of the interest of a partner in the stock, who may be debtor to the company's debtor. The interest may first be attached and taken out of the *nomen* before a creditor can convert it into a fund of payment.

'But it is said that when a company is sued, a partner may come forward and plead compensation on a debt due to himself by the company creditor; and in this way, if that creditor is insolvent, may procure full payment of his own debts. If this be law, it is plainly not founded on the nature of the partner's interest in the company's stock, which, or the *nomen* by which it is held, constitutes the principal debtor; for the partner is not proprietor, not even a joint proprietor in common, of the stock. Accordingly Mr. Douglas rests the doctrine on the personal liability of the partner for the company debts; and, on the authority of the *dictum* reported in the case of [669] *Ballantyne v Bogle's Trustees*, refers it to a general rule, "that the obligation to pay always implies a right to compensate."

'If this is all right, then it follows that any stranger guarantee for the company debt, who is *ex facie* only a cautioner, but liable in a joint and several obligation, must be entitled to step forward just as much as any partner, and set up his plea of compensation in an action against the company for a company debt. But I believe no lawyer will maintain this doctrine. Let it only be considered that no cautioner is entitled to step forward ultroneously, and pay beyond what the creditor demands from him. Though under a joint and several obligation, and of course not entitled to claim the *beneficium ordinis*, or benefit of discussion, still he certainly has neither title nor interest to restrain the creditor from suing and discussing, in the first place, the principal debtor. The creditor exercises his own right in fixing the extent to which he claims implement of the obligation he has obtained; and surely no co-obligant, who is *ex facie* still only a cautioner, is entitled to insist on implementing the obligation which the creditor does not require him to implement. In this way, in the case of joint co-obligants, the creditor may certainly sue each for his own proportion, without asking decree against any one severally for the whole debt. And in that case each could only plead compensation to the effect of extinguishing his own proportion of the debt.

'But if there is no law to entitle a co-obligant, cautioner, or guarantee (and we have seen that a partner of an existing company is nothing more), to step forward and interpose, in order by the circuit of a plea of compensation to get full payment of his own debt at the expense of a bankrupt estate, there is still less equity to plead in his behalf. It is settled on the soundest principles of equity, that after bankruptcy no debtor to the bankrupt estate can acquit his debt by acquiring debts owing by the bankrupt, in order to found a plea of compensation. A trading

company, therefore, could not acquire from its partners, or any other guarantee, or any other person, a debt, in order to compensate a claim of a bankrupt creditor. And neither can a co-obligant, cautioner, or guarantee have any just right to volunteer on implementing an obligation, for which if implemented he would have a total relief, in order thereby to get full payment of a debt due to himself by the bankrupt estate, in prejudice of the other creditors on that estate. If the bankrupt estate must come upon him as a cautioner or guarantee for payment, then it is just and equitable that he should be entitled to plead compensation on the debts due to himself to extinguish it. But he has surely no equitable right to avail himself of an obligation undertaken for quite a different interest, and of which implement is not required of him, in order to get payment of a debt due to himself, with which it has no manner of connection. Such stepping forward is plainly grasping at an advantage neither stipulated by parties, nor founded in their respective rights and interests; but if obtained, would be conferred at the expense of the rights of others.

'I therefore must qualify the rule quoted from Ballantyne and Bogle, by limiting it, in expromissory or cautionary obligations, to the case where the obligation is enforced, and to that extent only to which it is claimed to be enforced. Then, undoubtedly, the obligee is entitled to plead compensation on any debt due to himself by the creditor. But there is neither law nor equity for allowing a cautioner to convert the debt of a principal solvent co-obligant into a security for all debts that may become due to himself by the creditor in the obligation.

'But if these principles of law are clear, it follows that the cases of Galdie and Gray, 27th November 1776, M'Ghie and M'Dowall, and Robertson and Cauvin, which have regulated numberless cases since, and indeed are fundamental in the ranking of company estates, remain unshaken; and that of Bogle and Ballantyne, in the way in which it is represented in the Faculty Collection, as sanctioning an irregularity in defence of system, and adverse to principle, ought to be reprobated (Bell's Commentaries, 8vo, vol. ii. p. 392; Term. Rep. vol. v. p. 493, vol. vi. p. 582). In fact, the argument of Mr. Rolland in the case of Ballantyne is wholly founded on the terms of the judicial demand, as conferring on him a right to compensate, and in that I concur as general law; whether correctly applied to the circumstances of that case, signifies little. It is only the doctrine assumed by Mr. Douglas that I quarrel with. And in this case, the company character of the funds is preserved by the trust-deed.'

CHAPTER VII.

OF THE DOCTRINE OF ELECTION WHERE SEVERAL FIRMS HAVE BEEN USED AMBIGUOUSLY.

[670] WHERE trade is carried on under an equivocal firm, that is to say, where a firm is used by the same parties for managing the trade of several distinct concerns, there being some difference in trade or in the interests of the partners, it has been held that those who have given credit to the firm, without its being clearly distinguishable with which of the concerns indicated by that ambiguous title they were trading, are in justice entitled to the privilege of electing which of the concerns they shall hold as their debtor.

1. In transactions of trade directly with the company, it is difficult to imagine that the dealer should be deceived as to his proper party. A case of this kind, however, did occur, and the Court of Session held the two companies to be one and the same, except in those instances in which it could be shown that the creditor knew to which company the furnishing was made.¹

2. Where negotiable securities have been signed by an equivocal firm, and have gone into the circle, the rule is, that the bill-holder has his option, if ignorant of the company from which the bill issued, to choose which he will; but no right to have recourse on more

¹ Sir William Forbes v Forrester's Crs., 27 Feb. 1798, n. r. P. & F. Forrester carried on trade in Edinburgh under that firm; and under the same firm they, with John Watt, carried on trade in Leith. Peter Forrester bought goods which he applied to the use of the Edinburgh company, and entered them in the books of that concern. On the bankruptcy of

Forrester the vendors of the above goods claimed upon the Leith house, which was on its own transactions solvent. The Court held that the house must be liable to these debts, unless where the creditors were aware that the furnishing was made to the Edinburgh house, relief being reserved to the Leith house against the estate of the Edinburgh house.

than one.¹ This doctrine of election seems first to have been stated by Lord Kenyon,² [671] and afterwards adopted by Lord Chancellor Eldon in the House of Lords. What shall be sufficient to constitute an election is not clearly laid down. But it would seem, 1. That any act distinctly indicating credit to be given to one of the partnerships will fix the election to that company; and, 2. That the entering of a claim on either of the estates will have the same effect.³

3. From the moment that the person concerned comes to entertain doubts whether a particular person is included, the presumption will be against him in making his demand from the firm including that person.⁴

¹ *M'Nair v Fleming*, 5 July 1805, and in H. L., 5 Pat. 632. In this case, a partnership under the firm of Hugh Mathie & Co. carried on trade in Greenock. Another branch of trade was undertaken by H. Mathie and A. Fleming to Nassau in New Providence; Fleming having no share in the partnership of H. Mathie & Co. This Nassau trade was carried on in Greenock by Hugh Mathie & Co., without any distinction; in Nassau, by James Home in his own name; and at London, by A. Fleming & Co. Hugh Mathie kept separate accounts for the concern, distinguished by the letters N. C. for Nassau Concern; and those accounts were clear. Certain bills had been discounted at the branch of the Bank of Scotland in Greenock, having the firm of H. Mathie & Co. subscribed to them; and no explanation was required or given at the time they were so discounted. H. Mathie & Co. failed; and M'Nair, as agent for the bank, on the ground of his having relied on Fleming's credit as included in the firm, made his demand against him. A proof was taken, and the Court of Session was satisfied that Fleming was not a general partner with H. Mathie & Co.; but that bills having formerly been discounted under that firm for the use of the Nassau concern, and sanctioned by Fleming, a credit was raised entitling bill-holders to rely on his credit; and on that ground the Court held Fleming liable.

In the House of Lords the doctrine of election was applied to the case; and although I have not seen any note of what fell from the Lord Chancellor on that occasion, we have accidentally a report of the spirit of the decision from the hand of Sir Samuel Romilly. In an opinion by that eminent person on the result and application of the judgment to the circumstances of the case as they stood after the decision, and which was laid before me as counsel in a subsequent case, he says: 'The question is, Who became the debtors of Mr. M'Nair by the signature of Hugh Mathie & Co. to the bills? The House of Lords was, as I understood that decision, of opinion that where several partnerships consisting of different individuals carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of these partnerships he chooses for his debtors. But it never, as I conceive, entered into the minds of any of the Lords that he could take all the partnerships as his debtors. The signature of H. Mathie & Co. being equivocal, and being sometimes used for Mathie, Parker, & Jameson, and sometimes used for Mathie, Fleming, & Home, the Court was finally of opinion that the holder of the bills had an option to say which of those partnerships he would understand to be meant. The Lord Chancellor (Eldon), during the argument, expressed great

doubts even upon this point, and a very strong inclination of opinion against it; and said he believed that there was no authority for such a decision but a *Nisi Prius* case before Lord Kenyon, which was cited to him in the course of the argument. And his Lordship in the strongest terms stated that it was impossible that both partnerships should be the debtors. There never was a partnership of Mathie, Parker, Jameson, Fleming, & Home: those five persons, therefore, never could all become bound by one signature of Hugh Mathie & Co.'

² *Baker v Charlton*, 1791, Peake 79, where three persons carried on trade under the firm of King & Co., and two of those persons, with another, under the same firm carried on another partnership, a bill under the firm, and which was drawn on account of the one partnership, was made the ground of an action of *assumpsit* against the other. Lord Kenyon was of opinion that this company was liable; that the partner not connected with the company that drew the bill, having traded along with the other partner under that firm, persons taking bills under it, though without his knowledge, have a right to look to him for payment.

See also *Swan v Steel*, 1806, 7 East 210, holding the endorsement by the firm to be effectual to transfer (without notice) the bill of one company for the use of the other.

³ This was the point on which Sir S. Romilly was consulted in *M'Nair's* case for the purpose of knowing how the doctrine of election should in this case be applied. He said that 'the fact of Mr. M'Nair having gone in and proved his debt under the sequestration was not proved, and did not appear in the cause. The House of Lords, therefore, could not decide upon the effect of his having done so. But the fact was stated to the House, which was the reason of that point being reserved in the judgment. Sir S. of opinion that Fleming was entitled to avail himself of the option so taken by Mr. M'Nair; and that Mr. M'Nair, by proving his debt and receiving a dividend under the sequestration against Mathie, Parker, & Jameson, had completely abandoned all recourse which he was otherwise (according to the decision of the House of Lords) entitled to have against Mr. Fleming; and the benefit of this defence is (as I understand the order of the House of Lords) expressly reserved to Mr. Fleming.'

⁴ In the above case of *M'Nair v Fleming*, a question arose relative to bills discounted by M'Nair after he had begun to entertain doubts of Fleming's responsibility, and after he had proposed those doubts to Mathie, he having gone on without any distinct resolution of his doubts. The Court held him *in mala fide* to trust to Fleming without his own authority. This affirmed in House of Lords.

CHAPTER VIII.

OF PROCEEDINGS FOR DISTRIBUTION OF THE FUNDS OF THE COMPANY, AND OF THE PARTNERS,
AMONG THE CREDITORS.

THERE are some distinctions to be marked in the operation of bankruptcy, and in the proceedings to be taken on occasion of it, between the case of an individual and that of a company and its partners.

SECTION I.

OF PROCEEDINGS TO RENDER THE COMPANY BANKRUPT.

The insolvency of a company is attended with two consequences which especially demand [672] attention: 1. The creditors may proceed against the stock of the company by all the diligence of the common law; and, 2. They may proceed against the persons and separate estates of the partners, as guarantees bound *singuli in solidum* for the debts of the society. It is not to be imagined that the law of Scotland is so defective, that the inadequacy of those diligences to the occasions of insolvency are left unremedied in this case, while the evil has been so diligently remedied in the case of individual debts. By the recent series of statutes establishing sequestration the case of companies has been fully provided for. But this important class of cases had not been quite neglected even in the more ancient laws for preventing partial preferences.

This point has already been touched slightly,¹ and a doubt stated to have been entertained, whether a partnership can be made bankrupt under the Act 1696, c. 5. But those doubts may now be considered as at an end. That such bankruptcy is competent, seems not only to be fairly within the construction of the Act, but to have been at all times taken for granted by the Court; and, indeed, on any other supposition, a difference would have existed between a company and an individual in the carrying on of trade, absurd and groundless, and of dangerous consequence. All that seems to be requisite in order to establish such bankruptcy, is to have ultimate diligence executed against one or more of the partners for a debt of the company. It certainly cannot be said to have been *decided*, that such diligence directed against one of the partners is enough to make the company bankrupt. But this seems to be law: *first*, Because it has been held that such diligence against the partners generally is sufficient;² and it would be unjust, and against expediency, to give this remedy where all the partners were known, and to deny it where they were concealed. And, *secondly*, Because the Legislature has declared, that execution against *one or more* of the partners will be sufficient to authorize a sequestration of company estates at the instance of creditors without the consent of the partners.³

Proceedings may be taken against the estate of the company by inhibition and adjudication, if the company be possessed of heritable property; by arrestment or by poinding, where the fund is moveable. In the former case, the inhibition and the adjudication must be directed against the individual partners, as joint holders of the company stock, if the

¹ Vol. ii. p. 158. [See 19 and 20 Vict. c. 79, sec. 8.]

² In the case of *Fairholm* (above, vol. ii. p. 158, note 4), there was an execution of search against the partners.

³ By 54 Geo. III. c. 137, sec. 20, it is enacted, that where the application for sequestration of a company estate is not

authorized by those acting for the company, 'it must appear that diligence has been done against *one or more* of the partners for payment of a company debt, in the same way and manner as is before required to found an application against individuals.' [See 19 and 20 Vict. c. 79, secs. 8, 13, and 27.]

titles are taken in their name; or against the company's trustee, whether a partner or not; or against the company and him; or against the company alone, as having the radical right, to be followed by an action of declarator of trust and adjudication. The arrestment or pouding will, of course, be directed against the company itself by its firm; or against the partners, both in partnership and in joint adventure.

The company creditors may proceed against the individual partners, but subject to the obligation of assigning to the individual partners their claim against the company on receiving full payment; or of deducting from their debt, in ranking on the partner's separate estate, the actual proceeds of the company estate, or the value at which it may fairly be reckoned.

In proceeding against a company as bankrupt, there are two methods for extricating the affairs,—by TRUST-DEED, and by SEQUESTRATION.

I. There seems to be nothing peculiar in the settlement of a company bankruptcy by TRUST-DEED, which does not obviously arise out of the difference in the situation of a [673] company and of an individual. Thus, 1. The trust-deed must be signed not by the firm alone, but by the several partners, because it is an act not of ordinary, but of extraordinary administration. 2. The conveyance, where there is heritage, must be completed by the co-operation and assignment of the trustee, by whom it is held for the company, or by all the partners, if the title be by infestment in them all. 3. In the *supersedere*, discharge, or whatever other indulgence is to be given, provision must be made not only for one, but for all the partners. And, 4. The question of liability of partners, and of relief among them individually, ought to be disposed of by stipulation in the contract, in order to make a perfect and satisfactory agreement. Reference may therefore be made to what has already been delivered as to the settlement of bankruptcy by trust-deed.¹

II. SEQUESTRATION may proceed of the estates of companies engaged in trade and manufactures as effectually as against those of individuals. It is provided by 54 Geo. III. c. 137, sec. 20, 'That the estates of all copartnerships carrying on business under any of the denominations or descriptions above set forth, and not within the exceptions, may be sequestrated upon the application either of those entitled to act for them, with consent of any creditor of such partnership whose debt amounts to the sum of £100 sterling, or any two creditors whose debts amount to the sum of £150 sterling, or any three or more creditors whose debts amount to the sum of £200 sterling or upwards, or at the application of such creditor or creditors themselves, whose debts are to the amount already mentioned; in which last case it must appear, that diligence has been done against one or more of the partners for payment of a partnership debt, in the same way and manner as is before required to found an application against individuals; and in either case, the procedure hereby directed with regard to individual debtors shall be followed out; and it shall be sufficient to cite the partnership, by leaving a copy at the house or shop where their business is or was carried on, or where any of their acting partners reside; and if the said house and shop be shut up or deserted by them, a copy shall also be affixed at the market-cross of Edinburgh, and pier and shore of Leith.'²

1. Sequestration may proceed in a combined process against the company, and also against the individuals, where the individuals are insolvent; or it may proceed against the firm alone, and the estate belonging to the company.

2. Even where one of the partners is able to pay the whole debts, the sequestration of the company estate may proceed alone; and in that way only can it with certainty be discovered what is the true amount of the debts, so as to give the solvent partners assurance against future responsibility.

3. Where the sequestration includes the estates of the company alone, being directed

¹ See above, vol. ii. p. 382.

² [See 19 and 20 Vict. c. 79, secs. 13, 27.]

only against the firm, the company stock may be distributed, and the trustee exonerated, leaving the creditors to seek the unpaid balance of their debts from the separate estates of the partners.

4. Where it is necessary to go against the partners, the creditors may proceed either by diligence at the instance of individual creditors, or at the instance of a trustee for some or all of the creditors, or by sequestration against the individual partners.

5. Where some of the partners are unknown, the creditors must, by means of a strict examination, both of the avowed partners and of all concerned in the company, and by a scrutiny into the correspondence, books, and papers of the company, endeavour to discover evidence of participation in the profit and loss of the concern. The creditors may proceed in different ways, according to the result of their investigation.¹ 1. If the evidence be so clear as to justify so sudden and hazardous a course, they may charge the suspected partner [674] as an individual, on diligence against the company. If he suspend, the question will at once come to issue. If he do not thus resist the attempt, the creditors may go on to make him bankrupt, and so apply for a sequestration of his individual estate; or if he have already been made a bankrupt on his separate debt, they may apply by petition for sequestration. 2. If the person suspected of being a partner be already a bankrupt, and under sequestration as an individual, the company creditors may enter their claims to be ranked on his funds for the balance left unpaid by the funds of the company, and the question will be tried in the individual sequestration. 3. If the evidence be such that the creditors cannot venture to proceed by summary diligence, and might encounter the hazard of an action of wrongous imprisonment, they may raise a declarator, to have it found and declared that the person suspected is a partner, and responsible for the company debts. In that action they will have all the sources of evidence open to them on which to try the question;² and on obtaining decree of declarator, they may proceed with diligence, or apply for sequestration.³

SECTION II.

OF PROCEEDING BY SEQUESTRATION ON THE BANKRUPTCY OF COMPANIES.

It is intended here merely to point out (according to the course of the Commentaries on the case of individuals) what it may be useful to observe as peculiarities respecting the sequestration of companies. The statute is in this respect far from being expressed in that clear and precise way in which the directions respecting the sequestration of companies ought to have been given; the whole being contained in one sentence, 'that the procedure hereby directed with regard to individual debtors shall be followed out' (sec. 20).

I. OF THE PETITION FOR SEQUESTRATION.—It is of importance to observe correctly the rules of law in presenting a petition for the sequestration of a company.

1. By the statute, the company may be sequestrated on the application of a creditor, without the debtor's consent, after such diligence done on a company debt as is required in the case of an individual.⁴ But,

2. If no diligence has been done, it ought to be strictly observed whether there be due authority for presenting a petition for sequestration in name of the company. The expression of the Act is very general,—'upon the application of those entitled to act for them' (the company). But who is entitled to act for a company in a matter so extraordinary?

¹ By the Act of Sederunt, 14 Dec. 1805, sec. 6, it was attempted to facilitate this inquiry, but it is believed with no great success.

² This was the practice in the *Calder Iron Co.'s* case (below, p. 565, note 3), and in *Belch & Co.'s* case, 19 June 1805, 5th ed. vol. ii. p. 392.

³ In the case of *Belch*, after the character of partner was fixed on him, he was sequestrated 'as an individual, and a partner of the Merchant Banking Co. of Stirling, or Stirling Merchant Banking Co.' 2 July 1805.

⁴ 54 Geo. III. c. 137, sec. 20. [See *Cullen v M'Farlane*, 1842, 4 D. 1522. 19 and 20 Vict. c. 79, sec. 27.]

1. A mandate signed by all the partners will be good to authorize the application under the above provision. 2. A mandate signed by the firm is questionable, as necessarily it must be written by the hand of a single partner; and being an act of the most extraordinary administration, extinguishing the very life of the company, it can have no support from the presumed *præpositura*. But where it is an act of the whole company legitimately assembled, or the result of a signed minute expressive of their resolution to terminate their career, the desire of the petition will on proper evidence be granted. 3. If one of the partners be abroad, the rest have no power, without express delegation, to apply for sequestration.¹ In such a case, the sequestration should proceed on the petition of a creditor, and regular diligence. Should a sudden emergency render it eligible to have sequestration instantly awarded, in order to prevent preferences, which the delay of proceeding by diligence [675] might place beyond recall, both methods may be followed, and the sequestrations conjoined. 4. Where a power is given, by the express mandate of an absent partner, to the rest to take the entire management, it will be effectual to authorize a petition.²

3. Sequestration is competent only if the company carry on its business in Scotland; and it will be sufficient that it has a domicile and establishment here, although it may also have a domicile and establishment in England or elsewhere.³ Nor does it seem that attention will be paid to superiority in one branch over another, or that sequestration would be refused on pretence that the chief establishment of the company is abroad.

4. The creditor who petitions or concurs must be a proper creditor of the partnership. It will not, in general, occasion much difficulty to settle this character; the doubtful cases, indeed, being only those in which the transaction has been with a partner, and where it is left doubtful whether he acted for himself or for the company. Thus, money lent to one individual who is a partner of a company, and which afterwards is by him applied to the uses of the company, will not make a debt by the company to the lender: the company will be debtor to the partner, and the partner will be debtor to the lender.⁴ But, 1. If the company while solvent has recognised the loan as a company debt, the lender will be a direct creditor of the company.⁵ 2. It was at one time held in England, but that doctrine is now abandoned, that a person lending to a partner money which was applied to the use of the company, though he could not directly claim as creditor of the company, might do so by a circuitry.⁶

¹ [But see *Buchanan*, 1849, 11 D. 510.]

² *M'Lean & Sons*, 1824, 3 S. 122, N. E. 82. [See above, p. 287.]

³ See the case of the *Royal Bank v Stein & Co.*, and other cases, below, p. 572. [*Luak v Elder*, 1843, 5 D. 1279. 19 and 20 Vict. c. 79, sec. 13.]

⁴ So held in *ex parte Wheatly*, 1 July 1797, Cooke's B. L. 550.

Erskine (iii. 3. 20) seems to lay down a different doctrine on the authority of the Pandects, *Pro Socio*, lib. 17, tit. 2, l. 82. But I would take, in preference to his authority, as a commentator on the civil law, that of Pothier: 'Lorsque l'un des associés ne paroît pas avoir contracté au nom de la société, puta, si ayant emprunté en son nom seul une somme d'argent pour ses affaires, il l'a employé aux affaires de la société; celui qui a contracté avec cette associé n'aura pas pour cela d'action contre les autres associés; car, selon les principes de droit, un créancier n'a d'action que contre celui avec qui il a contracté, et non contre ceux qui ont profité du contrat (L. 15, Cod. Si certum petatur tantum, et passim): le créancier n'a, à l'égard des autres associés, que la voie de saisir en leur mains ce qu'ils doivent à son débiteur pour raison de cette affaire.' *Tr. du Cont. de Société*, p. 570, No. 101.

⁵ *Ex parte Clowes*. Clowes had lent to Livesey and to

Hargrave large sums. The money, though but on individual securities, went to the partnership; and the company, while solvent, agreed to consolidate the debts, and consider them as company debts. The Lord Chancellor, on the footing of this agreement of the company alone, considered these as joint debts. 29 Geo. III., 1789, 2 Brown 595.

⁶ *Ex parte Hunter*; 1742, 1 Atk. 223. Here Hunter and Spect were partners. Hunter borrowed £1500 on his own note from his brother, and afterwards gave his bond for it. Spect was not then privy to the transaction, but afterwards agreed that the partnership should take this sum in loan from Hunter, the borrower, who was accordingly credited in the books. On the bankruptcy of the company, the lender claimed as a creditor of the company. Lord Hardwicke, after much doubt, held him entitled so to claim, as coming in place of Hunter, who was creditor of the company to this amount.

But this, by subsequent cases, has been discountenanced. *Ex parte Parker*, 1780; *ex parte Burrell*, 1783; *ex parte Pirie*, 1783, which are to be found in Cooke's B. L. 559; *ex parte Wheatly*, 1797, Cooke 564, where money was borrowed by one who was a partner of a company to pay for an estate, and afterwards applied to pay company debts. The lender was not allowed to prove against the company estate.

5. A partner who has advanced money to the company beyond his stock is a creditor of the company. But his debt will not support a petition for sequestration; for no partner can be considered as a creditor on funds which are appropriated to creditors, whom he is bound to see paid.

6. As already observed, the petition for sequestration directed against the company [676] generally includes also the partners as individuals. Where this is done, the sequestration may be considered as joint, or as consisting of distinct sequestrations, comprehending interests inconsistent and adverse. The common case is of a joint sequestration, where the partners have had no other trade, and properly no other creditors but those of the company. And in such cases there is the same course of administration, the same trustee, and the same commissioners, in both sequestrations. Where the partners, however, have separate estates and separate creditors, the distinct interests to be administered, and which frequently lead to contest and dissension, may require different trustees and an entire separation in the management.¹

7. A partnership creditor may proceed in diligence, or apply for sequestration, against the individual partners; but it is necessary, in regard to his title as petitioning creditor, in such a case to attend to the operation of two rules; one of which excludes contingent creditors from petitioning, and the other gives to a partnership creditor a right to claim against the separate estate, in competition with the separate creditors, only for the balance unpaid by the company. It would seem that such creditor would be bound to value and deduct (as directed in sec. 24 of the 54 Geo. III.), and would be admitted as a petitioning or concurring creditor against the individual's separate estate only for the balance.²

8. The statute itself expressly regulates a point which might otherwise have created difficulty. It is provided, 1. That the partnership is to be cited by leaving a copy of the petition at the house or shop where their business was or is carried on, or by leaving it at the residence of any of the acting partners.³ And, 2. That if the shop be shut or deserted, a copy shall be affixed at the market cross of Edinburgh and pier and shore of Leith; but to this the more efficacious remedy of a citation at the Record Office is now substituted.⁴

II. PROOF OF DEBTS.—All that has been already said relative to this subject in the case of individuals may be applied to the case of companies; only it may further, in particular, be observed that the creditors of the company cannot, in voting in the company sequestration, be called on, under the 24th section of the Act, to value and to deduct their claim against the partners, the company being the primary debtor, although they must value and deduct the company ranking, when they claim or vote in the sequestration of the partner's estate.⁵

The right which a bank or other creditor of the company has, by special stipulation or by common law, to retain bank shares, or to hold property belonging to partners in security for the debt of the company,⁶ not only has no effect in diminishing the claim for which the creditor is entitled to be ranked on the company estate, but it has not even any effect in lessening the qualification to vote under the 24th section of the Act.

III. OF THE INTERIM FACTOR AND TRUSTEE.—The election of the interim factor and of [677] the trustee is regulated by the same rules as in the case of the sequestration of an individual. But an objection to the person intended for the office may arise, from the incongruous duties which he may have to perform, where the partners are under sequestra-

¹ See case of *Paterson and others*, vol. ii. p. 302, note 7; and below, p. 565.

² *Nicol v Christie*, 1827, 5 S. 882, N. E. 819. [See *M'Clelland v M'Cowan*, 1849, 11 D. 1168.]

³ 54 Geo. III. c. 137, sec. 20. The latter, as an alternative, ought to have been admitted, only if there was no house or shop occupied by the company. But it ought to have been required in all cases along with the other notice.

⁴ 54 Geo. III. c. 137, sec. 20. I formerly suggested, that for this ceremony should be substituted a notice in the Gazette, if the company had deserted their shop or place of trade, and the partners could not be found.

But the matter has been regulated by the Judicature Act, 6 Geo. IV. c. 120, sec. 51. [See 19 and 20 Vict. c. 79, sec. 27.]

⁵ *Nicol v Christie*, 1827, 5 S. 882, N. E. 819.

⁶ *Hotchkiss v the Royal Bank*, 1797, M. 2673.

tion, and the estates require a distinct administration.¹ Where there are thus separate interests, there ought to be a distinct separation of the proceedings in the two sequestrations. And even if the same day and hour should be appointed for the election, the trustee for the company and for the separate estates should be put separately in nomination. In the election for the separate estate the company creditors will be entitled to vote along with the separate creditors, but only as creditors of the individual, for the balance of their claims, after valuing and deducting their claim against the company funds.²

IV. OF VESTING THE ESTATE IN THE TRUSTEE.—The same means of coercion which are provided for the case of an individual bankrupt, may be resorted to against each of the partners, to force him to subscribe the necessary conveyances of the joint stock of the company.

1. The particular form of the deed to be granted must depend in all cases on the state of the property and of the titles.

2. The adjudication included in the decree of confirmation of the trustee will carry the whole estate of the company, wherever situate, and of whatever it may consist; enabling the trustee to complete the transfer according to the law of Scotland, or to take the proper measures in other countries for enforcing the conveyance in his favour.

3. The feudal estate will generally be found vested in a trustee, or in the partners jointly. And the proper method must be taken by declarator of trust if necessary; or by means of an order of Court on the trustee who holds for the company to dispoise; or according to the particular shape of the titles, to have the property vested in the trustee under the sequestration, by a title so unexceptionable as to bring the fair price at market.

4. In leasehold property sometimes the right is so expressly limited to the partnership, that the bankruptcy which dissolves the company annihilates the lease.³ In such cases it ought carefully to be considered as part of the general arrangement on the company's [678] insolvency, whether there be any way of continuing the existence of the company, so as to give to the creditors the benefit of the lease.

V. DISPOSAL OF THE PERSONS OF THE PARTNERS.—The allowance and personal protection which is authorized to be granted to individuals, is competent to each of the partners on the bankruptcy of the company. The question as to each partner must proceed in a distinct and separate course of discussion. And although there has been no application for

¹ See above, vol. ii. p. 302, note 7, for the cases of *Pater-son*, and of *Garden & Co.* [See 19 and 20 Vict. c. 79, sec. 16.]

² See *Nicol's case*, above, p. 564, note 5.

³ *Campbell v Calder Iron Co.*, 11 Dec. 1805, n. r. *Campbell of Shawfield*, and 'David Muschet of the Calder Iron-work, for himself and partners,' entered into a lease, by which Shawfield 'let to David Muschet and his heirs, *secluding assignees, legal or voluntary, and all subtenants, except with the proprietor's consent,*' certain veins of iron ore, etc. The Calder Iron Co., for whose behoof this lease was professedly granted, became bankrupt; and a new company having bought their works, Muschet became bound to supply them with ironstone from the veins which were the subject of the lease. Security was offered for the rent; but Shawfield brought an action for declaring that Muschet, and the said Calder Iron Co., 'of which he was a partner, and for whom he took the lease,' had failed 'to implement the conditions;' and that therefore he, 'for himself and the said partners,' had forfeited the lease, and that the tack was extinct. The Court held the lease to be at an end by the bankruptcy of the company, and the necessity of their assigning to another before they could derive benefit from it, which the lease expressly

prohibits. Lord Armadale delivered a very clear opinion, that this was a lease of the Calder Iron Co., existing and carrying on business: that this company being now dissolved by bankruptcy and the sale of the works, there was no longer a tenant; the lease was assigned: that this would have held in an agricultural farm, but that in a mining concern it was of still more importance who should manage the mines. Lord Meadowbank had some difficulty, as Shawfield could have held Muschet bound to the end of the lease; and it is not easy to find one bound and the other free. But he thought the opinion delivered extremely strong; and felt relieved from further anxiety by Muschet *having gone to England, and abandoned the lease.* Lord President Campbell said the lease was inaccurate; in the preamble, an agreement with Muschet, *for the use of the company*, though in the dispositive clause, *to him and his heirs.* But the whole object of the lease made it a company concern; and the company possessed, and were really the tenants. The company, however, was now gone by bankruptcy and sequestration, and by the benefit being made over to another company. A general question has been stirred as to the effect of a tenant's bankruptcy; but, without entering into that in the case of an individual, here the company (the tenant) is gone.

a separate sequestration against the partners as individuals, they may severally petition for protection against the diligence competent to the company creditors against their persons.

VI. DISCHARGE.—It seems to be only where there is a sequestration of the separate estate of the individual, combined with the sequestration of the company, that an effectual discharge can be granted to any of the partners by less than an unanimous resolution of all the creditors, or a deed signed by all.¹ Where the creditors unanimously agree to discharge the partners of a company, on the company estate being fairly surrendered, it will of course be effectual. But in a sequestration of the company estate, not including the individual estates, it does not seem to be competent, by a majority of voices, to compel the rest of the creditors to forego their recourse against the separate estates of the partner. The indispensable condition of a discharge is, that the person discharged shall have given up all his estate and effects, to be administered and divided among the creditors according to the directions of the Sequestration Act. But this, in so far as regards the guarantee obligation of the partners, can take place only in a sequestration of the individual estate. Thus, the proper place for a discharge is in the sequestration of the individual partner's estate; and discharge by the vote of a majority of four-fifths appears to be competent in a company sequestration, only where it is combined with a sequestration of the separate estate.²

When, in a sequestration of both company and separate estates, a discharge is applied for by one of the partners, while there are others undischarged, who, either from their absence, or from not being sequestrated as individuals, do not apply, or from circumstances in their conduct are afraid to make the attempt, some difficulty may arise concerning the effect of what is done by the creditors. By concurring in the discharge of one of the partners, the creditors seem to renounce their claim of guarantee against the rest to that extent. Suppose, for example, that the debts of a company consisting of two partners amount to £5000, that the company funds pay off £3000, leaving a balance of £2000, each partner is liable for this to the whole extent of his fortune; and they are entitled to mutual relief when one has paid more than his share, or above £1000. If the creditors discharge one of those partners, they will be barred, it would appear, from claiming against the other more than his half, or £1000: for to that extent he is liable on his own account; and he cannot be forced to pay more, if the person truly the debtor, and for whom he is as cautioner bound, has been freed from his liability. But these are matters to be settled between the parties. The Court does not allow such difficulties to stand in the way of a discharge to one of the partners.³

[679] VII. OF COMPOSITIONS BY COMPANIES.—1. A composition contract is competent in the sequestration of a company as well as of an individual. It does not seem necessary in this case, as in the case of a discharge, that the sequestration of the company estate should be accompanied by a sequestration of the separate estates of the individual partners; for this is a bargain between the creditors and the bankrupts, whereby the latter are to pay and give surety for a certain proportion of the debts, in consideration of receiving a discharge, with a reconveyance of the estate, as the fund out of which the payment is to be made. It therefore may either be entered into with all the partners of the company, or with any one or more of them, with the concurrence of the others. The consideration may either be the discharge of all the partners, or the discharge of those who offer the composition, reserving the claims of the creditors for the unpaid balance against the other partners; or such discharge, with an assignment of the claims of the creditors against the other partners, to the effect of making good the relief of those who pay, so far as the fund may

¹ [Where a company, and the sole partner as an individual, have been sequestrated, it is contrary to practice to discharge the firm. *Steel & Co.*, 1855, 18 D. 34.]

² This seemed to be the opinion of the First Division of the Court in the case of *Dollar v Ross, Richardson, & Co.*, in

May 1816, though the question was compromised, and never came to judgment.

³ *Fraser*, 27 May 1815, Fac. Coll., where 'the Court granted a discharge to one partner, though the company itself, and the other partners, did not apply for it.'

prove inadequate. But there does not seem to be authority under the statute to conclude a composition contract, without the concurrence of all the bankrupts, if it shall not be accompanied by a discharge to them all. Each one of the bankrupts is entitled to insist that the estate shall be managed and brought to sale and division under the sequestration, as being the best mode of deriving the true value from the estate; and he has an interest so to insist, unless his person and his separate estate shall be discharged. The statute authorizes a composition only where it is proposed by the bankrupt (which in the case of a company must comprehend the whole), or by 'his friends,' which must imply that it is with his concurrence, and so in the case of a company with concurrence of each partner, that the composition is proposed.

The sequestration may be reserved in force, so far as the company estate is concerned, and the individual partners discharged.¹

2. The legal presumption in a composition agreement is, that the estate is equal to the composition, and that the benefit derived to all parties arises from the greater advantages with which the bankrupts can turn the estate into money. It seems to follow: 1. That where the composition is proposed by one of the partners, and acquiesced in by the rest, if he stipulate only for his own discharge, the creditors should be held as reserving their remedies against the private estates of the other partners. 2. That where the offerer of the composition stipulates for an assignation to the claims of the creditors, he will not be entitled to demand from the other partners more than the share of what he can show he has paid towards the debts of the company, without reimbursement from the funds. And, 3. That where a partner proposes a composition on the whole company debts, and pays it, he cannot be called on by any of the company's creditors to make payment in his individual character of the balance unpaid from the company funds. But it may be different if he be bound both as a partner and as an individual, or if he draw a bill on a company of which he is a partner, and the company accepts it. The Court has in such a case held the contract of composition, signed by the creditors of the company, to be insufficient to discharge the individual obligation separately and specifically undertaken.²

¹ *Smith v Jones*, 1827, 5 S. 357, N. E. 331.

² *Mellis v the Royal Bank of Scotland*, 22 June 1815, Fac. Coll., where, in a cash-account to be operated on by a company, the bond was subscribed by the firm, and by the individual names, and the individuals bound themselves in the bond as such. One of the partners proposed and paid a composition; and afterwards a demand was made on him by the Royal Bank, who had not taken the composition for the whole

debt. The defence was on the composition contract. The answer twofold: That it had not been agreed to by the bank; and that it could only have discharged the obligation as a partner, not the separate special obligation of a co-obligant. The discharge was held not regular. But a majority held that if it had, it would not have availed Mellis, 'as he had bound himself to the bank as an individual by having subscribed his name separately from the signature of the company firm.'

CONCLUSION.

OF THE MUTUAL RELATION OF THE SCOTTISH AND FOREIGN LAWS IN BANKRUPTCY.

[680] THERE are several occasions on which there arises a conflict of laws, and it becomes very doubtful which rule shall be adopted. These are occasions where the *universitas* of a man's property is to be disposed of according to some general arrangement of territorial or domiciliary law, or in which the efficacy of a particular act or deed comes to be questioned, as conformable or disconformable to the law of the country where the person resides, or the property is situated. These occasions are chiefly, Marriage, Death, or Bankruptcy.

In relation to bankruptcy, it is a matter of great importance to regulate the several relations of the laws of countries connected with each other in commercial intercourse, so as to facilitate an equitable arrangement of the affairs of bankrupts, and a fair distribution of their estates. Formerly, the principles of those arrangements were ill understood, and great confusion, with a distressing variety and shifting of opinions, were the result. But more recently, the leading points of the doctrine have been well settled in all the British dominions.¹

SECTION I.

OF PROCEEDINGS AGAINST DEBTORS ABROAD.

Persons resident abroad, whether natives of Scotland or foreigners, may be indebted to persons resident in Scotland, and may also have estates in land, or in moveables, situate there. When this property is attached for debt by several creditors, it is of some importance to ascertain whether the equalizing spirit of the more modern law can operate, or whether in such a case creditors are to be left to all the injustice of the former laws.

1. By certain proceedings, a foreigner may be called upon to answer in our courts for debt, and his property may be affected by the diligence of the Scottish law. And it has lately been decided, that a native domiciled abroad (and the analogy will hold to a foreigner) is also liable to the operation of the Act of 1696, c. 5, as lately extended.² In

¹ [The substance of this concluding chapter is incorporated with Mr. Shaw's chapter on Sequestration in Bankruptcy, which, for reasons elsewhere stated, has been introduced in place of the author's chapter on the same subject. Reference is made to that chapter (*supra*, pp. 375 sqq.) for the recent law relating to this subject.]

² *Waldie, Tr. for Chatto, v Blackburn*, 22 Feb. 1810, Fac. Coll. Chatto was proprietor of lands in Roxburghshire, but had for many years resided as a merchant in Newcastle. A horning was executed against him at the market-cross of

Edinburgh, pier and shore of Leith; and arrestments of his moveables were used in October 1805. Within sixty days (*viz.* in December 1805), Chatto granted an heritable bond over his land in Roxburghshire to Blackburn. He afterwards made a trust for payment of his debts; and the trustees having sold the lands, called the creditors by action of multiplepoinding. An objection was then stated by the personal creditors against Blackburn's heritable bond, on the footing of the Act 1696, c. 5; and the question was, Whether this Act extended to the case of a person domiciled in London? Lord

this way, all the provisions of the bankrupt law of Scotland, for attaining equality [681] among creditors, are open to the creditors of persons resident abroad; though the peculiar process of sequestration cannot be admitted, even with the debtor's own concurrence, where his trade has not been carried on in Scotland.¹

2. The bankruptcy which may be established in the way above explained, will have no effect beyond Scotland, so as to equalize attachments in other countries, or to render voluntary conveyances made abroad objectionable.

3. A foreigner who is arrested for debt in Scotland is entitled, as already laid down, to the benefit of all the humane provisions of the Scottish law for his relief, the Act of Grace, bill of health, and *Cessio Bonorum*.²

SECTION II.

EFFECT OF BANKRUPTCY IN THE COUNTRY OF THE DEBTOR'S DOMICILE.

If there were a perfect accordance among the laws of all the countries of the civilised world, the fullest effect would in each country be given to conveyances made for the purpose of collecting and distributing among creditors, according to the law of the debtor's residence and seat of trade, all his funds and estates of whatever kind. For the attainment of this perfect accordance, even among the three united kingdoms of Great Britain and Ireland, no provision has been made by legislative enactment; but the matter has been left entirely to the regulation of those principles of international law which guide the connections between states, and prescribe the sanction and authority which is to be allowed by each to the institutions and laws of another. Perhaps it is better, on the whole, that a subject so full of difficulty should thus be left to the guidance of the principles of general jurisprudence; and in the settlement of those points which have occasioned contests in the courts, there is much reason to approve of and applaud the way in which the law has been fixed.

Three great questions have been raised on this subject. Two of them relate to the effect of the conveyance in bankruptcy; the other to the force of the discharge given to the bankrupt.

1. PROCEEDINGS AGAINST THE PERSONAL ESTATE.

I. The great rule on which the whole doctrine of the international effect of bankruptcy depends, has been completely fixed in all the three kingdoms upon a general principle of the law of nations; namely, that the PERSONAL ESTATE is held as situate in that country where the bankrupt has his domicile, and that it is to be administered in bankruptcy according to the rules of the law of that country, just as if locally placed within it; while TERRITORIAL, or REAL PROPERTY, is to be regulated by the law of the place where it is situated.

The consequence of fixing this rule is, that a Commission of Bankruptcy in England or in Ireland, and the assignment following on it, or a Sequestration in Scotland, and the conveyance to the trustee, have the effect of transferring to the trustee or assignees [682] the whole personal estate of the bankrupt, defeating all preferences attempted to be obtained by the diligence of the law of the country where such estate happens to be placed, or by any voluntary conveyance of the bankrupt after the period when the effect of the proceedings under the bankruptcy attaches to the funds; but that it is insufficient to carry the real estate.

Balmuto sustained the objection. The Court adhered to this judgment; and, on a reclaiming petition, again adhered unanimously, holding the point to be quite clear, and that

this was one of the very cases intended to be provided for by the late statutes.

¹ See above, vol. ii. p. 284.

² See above, vol. ii. pp. 476-7.

EFFECT GIVEN IN ENGLAND TO FOREIGN PROCEEDINGS.—‘The Courts in England,’ says Mr. Cullen, ‘recognise the laws of other countries in giving effect to an assignment made under a law in those countries, analogous to our bankrupt law, against a creditor in England, who, after such assignment, recovers, upon a foreign attachment here, a debt due to the bankrupt in England.’¹ The cases referred to for the support of this doctrine are cited below.² But it may be proper to quote here the argument of Lord Loughborough in the case of *Sill and Worswick*, so far as relates to the present question, as presenting a very concise and clear view of the English law on the subject: ‘It is a clear proposition,’ says his Lordship, ‘not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here dies, that property is claimed according to the right of representation given by the law of his own country. In the case of *Pipon v Pipon*, a party had possessed himself of a debt which was due to the intestate, a subject of Jersey, and whose personal property was therefore governed by the law of Jersey. Lord Hardwicke was applied to by his other relations resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be entitled to a share according to the distribution of England; and they therefore prayed, by their bill, that the administratrix might be restrained from taking the property to Jersey. Lord Hardwicke very wisely and justly determined that he would not restrain the administratrix: he would not direct in what manner she was to dispose of the property, or to distribute it. Having acquired the right to it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate. Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but it will give effect to the title of the assignees. The [683] determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons v Ross* and *Jollet v Deponthieu*, where the laws of Holland having, in like manner as a commission of bankrupt here, taken the administration of the property and vested it in persons who are called curators of desolate estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the Court of Chancery

¹ Cullen, p. 246.

² 1. *Solomons v Ross*, in Chancery, 26 Jan. 1764, before Mr. Justice Bathurst, sitting for Lord Chancellor Nottingham. There the right of the curators of desolate estates in Holland was sustained to render void a foreign attachment in London.

2. *Jollet v Reitveldt*, and *Deponthieu v Baril*, in Chancery, 23 Nov. 1769, before Lord Chancellor Camden, where the same thing was decided in almost the same circumstances.

3. *Hunter v Potts*, 4 Term. Rep. 182. And,

4. *Sill v Worswick*, 1 Henry Blackstone 665. These two cases, however, touch more properly another point, to be afterwards considered, viz. What remedy is to be given in England when an English creditor recovers abroad, notwithstanding an English commission? It is only the doctrine delivered on the bench that goes to our present question.

felt very strongly the principle which I have stated, and it has had a very universal observance among all nations.¹

EFFECT GIVEN IN IRELAND TO FOREIGN PROCEEDINGS.—The same doctrine is established in IRELAND; the judges there giving effect to the English bankrupt laws, so as to prevent a creditor, attaching property after the commission, from gaining a preference over the assignees of the bankrupt.²

EFFECT GIVEN IN SCOTLAND TO FOREIGN PROCEEDINGS.—In SCOTLAND the same doctrine has at last been fully established, though for a long time the principles were unsettled, and the determinations of our Court exhibited a very distressing versatility of opinion.³ It seems unnecessary to enter into any account of those earlier cases; for the matter has of late undergone a very thorough investigation, and has been settled conformably to just principles.

1. The principle that moveables follow the law of the owner's domicile, had been finally and conclusively settled by the Court of Session in several cases of intestate succession, and the decisions of that Court were affirmed by the House of Lords.⁴

2. The first case in which this principle came to be applied in bankruptcy, was one in which an English creditor of certain English bankrupts had arrested in Scotland goods belonging to the bankrupts, after a commission of bankruptcy had been issued, and an assignment had been executed, under which title the assignees claimed the arrested goods. The Court preferred the English assignees; thus rendering void, as in favour of an English creditor, an arrestment used posterior to the commission and assignment.⁵

3. Still it was thought that there might be some peculiarity in the case of a [684] Scottish creditor, unconnected and unacquainted with the English law, taking a fair advantage of those means of securing his payment which the law of Scotland affords. But a case having occurred for trying this question also, the great ruling principle was applied to it as to the former case, and the Scottish creditor as well as the English was found liable to the distribution of the English bankrupt law from the moment it attaches to a subject not already affected by a legal security.⁶

¹ 1 H. Blackst. 690, 691.

² Neill (Assignees of Gratton) v Cottingham. Gratton, a merchant in London, failed, and a commission of bankruptcy in England was issued against him, 28th October 1763. On 10th November his effects were assigned. A debt being due in Dublin to Gratton, a creditor of his made affidavit, and commenced action in Dublin, and on 31st October (three days after the commission in England) attached the debt. The creditor having obtained judgment, received £600 of the debt; and afterwards a bill was presented in Chancery by the English assignees against this creditor, to have an account taken of what he had received, and a decree for payment of it, with interest, to the assignees. Lord Lifford, who had sat on the bench for some years in England, was Chancellor; and the question being important, and the first of the kind in Ireland, 'he called in the assistance of several of the judges; and after great consideration, with the approbation of the judges whom he consulted, he pronounced a decree in favour of the plaintiffs, the assignees, and ordered the creditor to pay them the money which he had received.' 1 H. Blackst. 132.

³ Ogilvie, 1746, 5 Br. Sup. 280, note; Wilson's Assignees v Fairholm, 1755, M. 4556, 5 Br. Sup. 280, *ib.* 938; Thomson v Tabor, and Gewtress v Roberts, 1762-1764, M. 4561; Vase v Glover, 1776, and Parish v Khones, 1775, 5 Br. Sup. 451.

⁴ Bruce v Bruce, 25 June 1788. For the judgment on which case in the House of Lords, as delivered by Lord

Thurlow, see 2 Bos. and Pull. 230, note; Bell's Oct. Ca. 519, note.

Hog v Hog, 1791, *aff.* in H. L. 7 May 1792, M. 4619, 3 Pat. 247; Durie v Coutts, 1791, M. 4624.

⁵ Strothers v Reid, 1803, M. App. Forum Compet. No. 4. A very elaborate argument was in this case maintained in a hearing in presence appointed for the purpose of having the question solemnly decided; and on the bench an enlarged view was taken of the whole argument, as depending on the principles of international law.

This is a leading case, which is not now to be questioned; and no one who understands the argument or the subject has ever dreamt, in any subsequent discussion, of questioning the judgment. See below, p. 572, note 3, case of Stein; and p. 574, note 3, case of Selkrig.

The doctrine is directly confirmed in Falconer v Weston, 18 Nov. 1814, Fac. Coll., where the English assignees were preferred to the trustee in a Scottish sequestration in the recovery and management of the moveable or personal estate. See below, as to the real estate, p. 574, note 3.

⁶ Selkrig (trustee for Fairholme's creditors) v Bolton (assignee for Garbet's creditors), 20 Nov. 1805. In this case there were some specialties; but the whole of the case, which depended on the general question, was this:—Garbet was an Englishman, carried on trade there, became a bankrupt, and a commission of bankruptcy was in March 1782 issued against him. A Scottish creditor had used arrest-

4. Next, it was questioned whether diligence by arrestment, used before the assignment, but after the commission, was available against the assignees; and the Court decreed that it should not be available, the commission operating from its date.¹

5. The only point which remained undecided was, Whether diligence may effectually be used before the *teste* of the commission, but after the first act of bankruptcy? This case admitted of more doubt, as depending upon the doctrine of relation back to the act of bankruptcy, rather than on the actual and immediate effect of the commission or assignment; and the Court has held the act of bankruptcy to have no relation back, so as to affect diligence by arrestment in Scotland.²

6. Great difficulty still remained in the case of a company having a domicile in several countries. Admitting the whole doctrine of the case of *Strothers and Reid*, as ruling the case of individuals, viz. that the law of the domicile regulates, in bankruptcy as in succession, the effects of the conveyance to the creditors; still it was doubtful what should be the effect of a double domicile with a double set of creditors, each trusting to the laws of bankruptcy as established in the domicile of their debtor, the company with which they transacted. This was the difficulty that occurred in the case of the *Royal Bank of Scotland against Stein*; but the Court disregarded the distinction, and held the proceedings in bankruptcy [685] in either of the domiciles of the company to comprehend the whole personal estate of the entire concern.³

This, then, settles the whole doctrine in the law of Scotland, and on a footing so satisfactory, that all future cases may easily be determined on the broad principle which has thus been established.

7. Doubts have sometimes been entertained in cases of this description whether the assignees under an English commission of bankruptcy are not bound to produce evidence of

ments in 1772, but these made a part of the special case. The general question depended on other arrestments, used by the same creditor in 1798, long after the commission and assignment. The Court held the English commission and assignment to reach the effects of the bankrupt in Scotland; approved of the decision in *Strothers' case*; held that the residence of the creditor in Scotland made no difference on the case; and preferred the English assignees to the Scottish arrestor.

This was affirmed in the House of Lords, March 1814, and a very full report of the case will be found in *Dow's Cases*, vol. ii. p. 280; and still more fully, 2 *Rose* 291.

¹ *Morrison's Assignees v Watt*, 4 March 1807.

The same decision pronounced relative to an American commission of bankruptcy in *Maitland v Hoffman*, 4 March 1807, *Fac. Coll.*

² *Oswald's Trs. v Gibsons*, Winter Session of 1810. In a case determined in the Outer House, in which the judgment was acquiesced in by the party, but the discussion was by no means such as to entitle this to be held as in any sense a precedent, Lord Hermand decided that the title of the assignees, even in these circumstances, controlled the diligence of the creditors in Scotland. But this was altered in the next case.

Hunter & Co. v Palmers & Wilson, 1825, 3 S. 586, N. E. 402. Here the commission was issued 8th July 1819. In February preceding he committed several acts of bankruptcy; in April was notoriously insolvent; and on 3d May arrestments were used in Scotland of debts due to the bankrupt. The Court held the arrestments not to be affected by the commission of bankruptcy.

³ *Royal Bank of Scotland v Scott, Smith, & Co.*, 20 Jan. 1813, *Fac. Coll.* John and Robert Stein, T. Smith, R. Smith, and J. Stein, carried on business as bankers and insurance brokers in Edinburgh, under the firm of Scott, Smith, Stein, & Co. They were also partners in a trade in London under the firm of Smith, Stein, & Co. The Scottish firm became insolvent in July 1812. The English firm was also insolvent of course. In August 1812 a commission of bankruptcy issued in England against the partners, described as carrying on trade in Fenchurch Street, London, under the firm of Smith, Stein, & Co., and a provisional assignment was executed the same day. The Royal Bank of Scotland holding two bills of the Scottish firm, made the company bankrupt, and applied for sequestration, but not till after the English commission was issued. The question was, Whether the English commission excluded the Scottish sequestration by priority? On the part of the bank, we had no conception of questioning the doctrine of *Strothers and Reid's case*, which would have been very desperate; but the distinction we took rested on the difference between the case of an individual and that of a company, the former having necessarily only one domicile, the company having in this case manifestly two, one in England and one in Scotland, having distinct sets of creditors in those two countries, who gave them credit as separate and distinct companies, and who were entitled to rely on the bankrupt laws, and the course of administration and payment therein prescribed, as one of the grounds of their credit. This distinction, however, was not held sufficient to ground a different determination from that given in the case of *Strothers*; and the Court therefore stopped the Scottish sequestration.

the bankruptcy, as well as of the commission and assignment. It was indeed formerly required in all actions by assignees in England, that they should prove the act of bankruptcy as part of their title to pursue; and it was not easy to get over the necessity of doing this in actions pursued in Scotland. But by Sir Samuel Romilly's Act¹ it was provided that this shall no longer be necessary; but 'that the commission of bankruptcy, and the proceedings under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, on or before the term of his pleading to such action, and, if plaintiff, before issue joined in such action, give notice in writing to such assignees that he intends to dispute such matters, or any of them;' and if the assignee prove the matter, or it be admitted at trial, the assignee shall have the costs occasioned by such notice, to be added to his costs if he prevails, or deducted from the other party's costs if they should prevail.

8. Where a voluntary deed of trust has been executed abroad for the benefit of creditors, it may perhaps be liable to question, so far as concerns property in this country, on the footing of the bankrupt statutes of 1696, c. 5, etc. But, at least, it is clear that no creditor who has acceded to the trust abroad, can in Scotland contend for a preference against the trustees.²

9. Another great point in this doctrine is, What effect shall be allowed in Scotland to a different decision in any foreign country from that which has been adopted in these islands? Let it be supposed, for example, that effects of the bankrupt are in a country in which the sequestration and the conveyance to the trustee are held to be of no force, and where preference is given to the diligence of the country in which the effects are situate: is the creditor who recovers payment under such local rule obliged to pay over to the trustee in this country, for general distribution, the money he has received? And this, again, resolves into two questions: 1. Whether the creditor can claim for any balance [686] without having communicated what he has received? and, 2. Whether he is liable to an action for restitution?

In England, where there is no provision by statute for regulating this matter, it is held, 1. That an English creditor who, having notice of the bankruptcy, makes affidavit in England in order to proceed abroad, cannot retain against the assignees what he recovers.³ 2. That a creditor in the foreign country would not, if preferred by the laws of that country, be obliged to refund in England.⁴ And, 3. That, at all events, such a creditor cannot take advantage of the bankrupt laws in England without communicating the benefit of his foreign proceedings.

In Scotland there is an express provision in the statute relative to payments and preferences abroad, the policy of which it is proper to explain. As the jurisdiction of the Court of Session does not reach foreign countries, wherever the principle of the law of nations does not operate, or has been evaded, it is provided, 1. That the creditor who, after the first deliverance on the petition for sequestration, shall obtain payment or preference abroad, shall be obliged to communicate and assign the same to the trustee for behoof of

¹ 49 Geo. III. c. 121, sec. 10.

² *Khones v Parish & Schreiber*, 1776, 5 Br. Sup. 451, Hailes 714.

³ *Hunter v Potts*, 4 T. R. 182; *Sill v Worswick*, 1 H. Blackst. 665; *Phillips v Hunter*, 2 H. Blackst. 402, where the judgment of the Court of King's Bench was affirmed. There was, however, a difference of opinion, and the whole argument is well worthy of perusal, though too full for insertion here.

⁴ See *Sill v Worswick*, 1 H. Blackst. 693. 'I do not wish to have it understood,' said Lord Loughborough, 'that it follows as a consequence from the opinion I am now giving

(I rather think the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided.

the creditors before he can draw any dividend out of the funds in the hands of the trustee; and, 2. That in all events, whether he claims under the sequestration or not, he shall be liable to an action before the Court of Session at the instance of the trustee, to communicate the said security or payment in so far as the jurisdiction of the Court can reach him.¹ It may, however, as already observed, be doubted whether this enactment, in so far as it exposes a creditor to a challenge, even where he does not claim under the sequestration, might be held to include foreign creditors not apprised of the bankruptcy and proceedings in this country, but who, having recovered in the usual way the property of their debtor abroad, should have come afterwards to Scotland. Recently the question occurred under these enactments, whether a local statute in one of our colonies abroad, which was said to proceed on views of local utility, did not so far qualify the sequestration statute of this country, that the foreign creditors should be entitled to retain the preference they had obtained? But the Court held that the preference could not be supported.²

2. PROCEEDINGS AGAINST THE REAL ESTATE.

[687] II. As to REAL ESTATE, the estate in land, or connected with land, there is a difference of principle very remarkable. The real estate is not, like the personal, regulated by the law of the domicile, but by the territorial law. A real estate, in England, is not held to be under the disposition of the bankrupt laws of Scotland, if the proprietor be a trader there. Nor is an heritable estate in Scotland affected by the commission of the English law; and yet the spirit and policy of the laws, considered internationally, should open to the creditors of a bankrupt, in either country, the power of attaching his real estates.

1. The Scottish sequestration (besides imposing a legal obligation on the bankrupt to execute a conveyance) carries, by force of the adjudication in favour of the trustee, all the heritable or real estate as well as the personal. But this, in England, has been held to produce no further effect than to entitle the trustee to take proper measures indirectly for obtaining the bankrupt's property, which could not be obtained by legal process.³ The

¹ 54 Geo. III. c. 137, sec. 51. This is not as the punishment of *mala fides*, and undue advantage taken, but on the principle of *negotiorum gestio*. Compare and combine secs. 38, 41, and 51.

² *Bennet, Tr. for Crawford & Co.'s Crs., v Johnston and others*. In this case, a sequestration had been awarded in Scotland against a company carrying on trade in Scotland and in Newfoundland. The trustee sent to Newfoundland to take the necessary proceedings there for vesting the funds in him, in order to be recovered and converted into money. He was opposed by certain Newfoundland creditors, who claimed a preference on the Act 49 Geo. III. c. 27, conferring certain privileges on certain classes of creditors in Newfoundland. On this the judge of the Supreme Court at St. John's gave judgment against the trustee in the sequestration. Two proceedings were thereupon instituted: 1. An appeal was taken to His Majesty in Council, and the judgment of the Court in Newfoundland was reversed in the Privy Council; and, 2. An action was brought in Scotland for redress, and that the creditors preferred in Newfoundland should be ordered to communicate to the trustee, for general distribution, the funds which they had received abroad. This case the Court decided in favour of the trustee, before the decree of the Privy Council was pronounced. Winter Session, 1819.

³ The following observations were made in the highest quarter on occasion of the appeal in *Selkirk v Davies*. Speaking of Stein's case, the Lord Chancellor said: 'The assignees in that case stated, that inasmuch as they were assignees,

they were entitled to hold the property of the bankrupt, and therefore that sequestration, which was a proceeding to affect the property of the bankrupt, would be a sequestration that would affect them, and which the Court ought not to sanction. It appears that, in that particular case, the bankrupt himself had executed such instruments, and made such dispositions as would pass, for the benefit of the creditors under the English commission, not only his personal estate, but also his real estate. But the judges seem to have entertained an opinion that, by the bankrupt law of England, the bankrupt could be compelled to execute a conveyance to his creditors of his real and personal estate. No man can doubt that there is a moral obligation imposed on the bankrupt to make that conveyance; but it was argued as if there was a legal obligation imposed on him by the English commission. I believe this is effected in Scotland by force of the sequestration, or that by certain Acts the bankrupt is ordered to make a conveyance. However that may be, if the question happens again to come under the consideration of the Scottish Court, it will not be considered that, according to the effect of an English commission of bankruptcy, the bankrupt can be compelled to make a conveyance of his estate to his creditors. The principles of the English bankrupt law are more connected with criminal than with civil considerations. Those who have had a great deal to do with bankrupt estates in this country, know that where persons propose to buy a real estate belonging to a bankrupt, they are extremely apprehensive there may be some secret act of bankruptcy affecting the commission and

English commission of bankruptcy formerly comprehended no conveyance of the real estate; nor did it impose any legal obligation on the bankrupt to grant a conveyance. When assignees under an English commission, therefore, came to take measures in Scotland against the heritable estate, they could do so only by means of a private deed of conveyance, or by the diligence of adjudication. Of these, a deed of conveyance is the most likely to give the assignees a chance of carrying off the heritable estate for distribution in England. But, 1. Such deeds were liable to challenge on the same footing with a Scottish trust-deed. 2. They were excluded by the diligence of adjudication, or superseded by the action of judicial sale at the instance of the Scottish or non-concurring creditor, or by a sequestration.¹ By the late Act of 6 Geo. iv. c. 10, secs. 12, 64, and 65, provision is made for the commissioners assigning real estates abroad.

SECTION III.

RECIPROCAL EFFECT OF THE BANKRUPT'S CERTIFICATE OR DISCHARGE.

A general principle was long ago laid down by Lord Mansfield, which is universally acknowledged to be just; namely, That where a debt is discharged by the law of one country, it will be discharged in another.² The application of this general doctrine admits of no difficulty where a *particular* discharge can be pleaded by the debtor; but in applying it to the case of a *general* discharge to a bankrupt, questions of great nicety arise.

I. The chief class of difficulties flow from the maxim, that a debt contracted in one country, or an engagement meant to be performed there, is not to be regulated by the law of another country, the creditor not being supposed to rely on any rule of decision but that of the country where execution is demandable. Thus,—

1. Where both creditor and debtor reside in the country in which the discharge is granted, and the debt also has arisen there, the question is, Whether the creditor can, after

the title of the assignees; and yet, that you cannot call on the bankrupt to execute a conveyance, has been ruled over and over again. If, therefore, such a judgment is to stand merely on the existence of a supposed obligation, capable of being enforced by legal process in England, it cannot, I am afraid, be supported.

‘In the difficulties which these questions present, there is a necessity for the interference of the Legislature equally applicable as to real estates, whether the administration is to be made under a Scottish sequestration on the one hand, or under an English commission of bankruptcy on the other. I have heard it repeatedly stated in the Court in which I have the honour to administer the bankrupt laws, that it was usual for the creditors not to proceed against a real estate in Scotland, according to the forms of the law of that country, but for the bankrupt to convey his real estate there to the English assignees, in order that it may be converted into money for the benefit of all the creditors. It has very frequently happened, when a man becomes bankrupt, and is known to possess a real estate in Scotland, that his creditors say to him, “We will not talk to you on the subject of legal obligation; the moral obligation on you is clear, and we have the disposal of your certificate: if you will not convey your real estate, you shall remain uncertificated.” Under the effect of that control, the real estate is very frequently brought into the common fund. But I know no process in the law of England that can compulsorily effect it.’ Selkirk v Davies, 2 Rose 311.

¹ Falconer v Weston, in the bankruptcy of Hunter, Rainy, & Co., 18 Nov. 1814, Fac. Coll. There was here a previous commission in England, and a subsequent sequestration in Scotland. The English commission not carrying the Scottish heritage belonging to Hunter, one of the partners, he conveyed it to the assignees, who were infest 31st October 1812. The trustee in the sequestration had, on his adjudication, been infest previously; and the question between those competitors was brought in the shape of a reduction of the conveyance to the assignees, on the Act 1696. The Court seemed all to be agreed that, on principles of law, the English assignees could not interfere with the right of the trustee, and so the case was decided. But much difficulty was occasioned by taking into consideration the consequences of introducing a distracted, perhaps an inextricable, management. Those considerations are very powerfully represented by Lord Meadowbank in his argument. But the Court justly and correctly proceeded on proper judicial ground, leaving these consequences for legislative remedy.

In the same sequestration, the question was raised, Whether the English assignees should not have the proceeds of the heritable estate paid over to them by the trustee in the sequestration, for distribution under the commission of bankruptcy? The Court, after elaborate argument, held that they were not entitled to this. Weston v Falconer, 17 Dec. 1817, Fac. Coll.

² Ballantine v Golding, Cooke's B. L. 515.

a general discharge, as by an English certificate, follow the debtor into another country, and there prosecute him? In England the leading case on this point is in 1784, where the defendant having been a bankrupt in Ireland, had there obtained his certificate, and was sued in England by an Irish creditor, for a bill of exchange drawn in Ireland, and payable by the defendants. The certificate was found a good defence.¹ Lord Mansfield, in that case, referred to another which 'he remembered in Chancery, of a *cessio bonorum* in Holland, which is held a discharge in that country; and it had the same effect in England.'²

In Scotland the same doctrine is established by the cases quoted below.³

[689] 2. The residence of the creditor being in another country, does not seem to vary the case; for upon no principle can it be held that his right arising on a personal contract against the debtor, can alter with his change of place.⁴

3. The locality of the contract has in England been admitted to raise a distinction. Thus, an English merchant having sold goods in England to a merchant in Maryland, the contract was held by its locality to be exempt from the discharge under the bankrupt laws of Maryland.⁵

In Scotland a similar decision was pronounced in a case where goods were delivered by a Scottish merchant for and on the order of an English merchant, to the carrier from

¹ *Ballantine v Golding*, Cooke's B. L. 515.

² See also, for this doctrine, the case of *Potter v Brown*, 5 East 124, where one of the points turned on the effect of an American discharge, supposing the debt to be American.

³ *Sir James Rothead v Scott*, 1724, M. 4566; *Marshall v Yeaman & Spence*, 1746; *Christie v Straiton*, 1746, M. 4569; *Coalston v Stewart*, 1770, M. 4579; *Watson v Renton*, 1792, Bell's Oct. Ca. 92, M. 4582.

⁴ In the case of *Watson v Renton*, the English certificate was held effectual to discharge one of the debts, although the creditor resided in Scotland. 1792, Bell's Oct. Ca. 92, M. 4582.

See *Richardson v Lady Haddington*, 1824, 1 Sh. App. Ca. 406.

⁵ *Smith v Buchanan*, 1 East 6. Lord Kenyon said: 'It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended, that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? how can it be pretended that he is bound by a condition to which he has given no assent, either express or implied? It is true that we so far gave effect to foreign laws of bankruptcy, as that assignees of bankrupts deriving titles under foreign ordinances are permitted to sue here for debts due to the bankrupt's estates; but that is because the right to personal property must be governed by the laws of that country where the owner is domiciled. This was recognised in the case of *Hunter v Potts*, 4 Term. Rep. 182, 192. The Court there considered the assignment of the bankrupt's effects in another country, although in fact made *in invitum*, as equivalent here to a voluntary conveyance by him. Cooke (Bankrupt Law), 374, cites Beawes, Lex Merc. 499. The case of *Bal-*

lantine v Golding is very distinguishable from the present; for there the debt was contracted in Ireland, where the commission issued. But in the same page of the book (see the case of *Waring v Knight*, sittings at Guildhall after Hil. T., 5 Geo. III. cor. Lord Mansfield, where the same opinion was entertained; *ib.* addenda to first edit.) from whence that was quoted, is to be found an opinion of Lord Talbot's, directly contrary to the conclusion we are desired to draw in this case; for there he held, that though the commission of bankruptcy issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein. The same rule, then, must prevail here.

'Lawrence, J.: If the defendants had made a voluntary assignment of all their property to the use of their creditors, it is not pretended that that would have been a bar to the suit of the plaintiffs; and yet the title of the assignee would have been as valid here as under the foreign commission, which shows that the validity of the title under such an assignment cannot make any difference in the present argument. Then it rests solely on the question, Whether the law of Maryland can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws? This cannot be pretended; and therefore the plaintiffs are entitled to judgment.

'Grose and Le Blanc, Justices, concurring, judgment for the plaintiff.'

Note to the above case.—In *Pedder v M'Master*, 8 Term. Rep. 609, 'the Court refused to discharge a defendant out of custody, who was arrested at the suit of a creditor resident here, on an allegation that the debt was contracted in Hamburg, and that the defendant had become a bankrupt, and obtained his certificate there, and that the plaintiff might have proved his debt under the commission; for the Court said that, as the plaintiff was not resident in Hamburg at the time of the bankruptcy, they would not decide the question in a summary way, but put the defendant to plead his bankruptcy and discharge. The defendant accordingly filed such a plea, which the Court held to be informally pleaded; and the matter never came on again.'

Dunbar to Berwick. The debt was held to be Scottish, and the English certificate not to be effectual against it.¹

4. But where the debt is made payable in any particular country, that seems to be the place according to the law of which the discharge must, by the force of stipulation, be regulated. In the above case of Watson, a part of the debt was liquidated by a bill [690] payable at Berwick; and the Court held this to be an English debt, while the open balance of the same debt, resting on the contract of sale alone, they considered as Scottish.² A bill drawn on a person in a particular country, without any other place of payment, is held to be a debt of that country.³

But wherever the proceedings in bankruptcy are such as to include the whole of the debtor's estate, his discharge in that bankruptcy has been held effectual as a discharge in Scotland.⁴

II. Another class of difficulties springs from the peculiar effect which is sometimes given to a general discharge, or to particular proceedings in the country of the bankrupt's residence.

1. In England a commission of bankruptcy is of itself a discharge of all proceedings at law, by creditors who have come in under the commission, but not against those creditors who make their election to neglect the commission, and take proceedings at law. It would be manifestly against the spirit of the bankrupt law, which offers to the debtor a full discharge as the price and condition of his surrender, if creditors proceeding at law were not subject to have their debts discharged by the certificate; and therefore the certificate is declared to be effectual against all creditors who might have come in under the commission, although they have made their election to proceed at law.⁵ On the one hand, then, a creditor who has made his election to proceed at law, may bring his action against the debtor, in order to attach his person either in England or in another country, notwithstanding the subsistence of the commission, provided the certificate has not been allowed. On the other, no creditor who has proved his debt under the commission can take such proceedings, even before certificate allowed; but his action will be discharged, as if the bankrupt held his certificate.⁶ Under the former law, if such a creditor chose to refund the dividend under the commission, he might have proceeded at law before certificate allowed; but this privilege is now cut off by Sir Samuel Romilly's and the recent Act.⁷

This doctrine should, according to the principles of international law, receive [691]

¹ *Watson v Renton*, 1792, Bell's Oct. Ca. 92.

² See as above.

³ In *Armour v Campbell*, 1792, a bill was drawn from New York on Greenock, in favour of Armour in Scotland; but it was not accepted. The Court held it to be a Scottish debt, not discharged by the bankrupt certificate in New York in favour of the drawer. Bell's Oct. Ca. 109, M. 4476.

In *Stein's* case the bills were accepted by the drawees in England, and held to be English. *Royal Bank of Scotland v Scott, Smith, Stein, & Co.*, 20 Jan. 1813, F. C.

See above, p. 572, note 3.

⁴ In *Stein's* case this was held in the Court of Session, although the commission of bankruptcy clearly did not carry the whole estate, and the bankrupt was not even bound to convey his heritable estate to the assignees. So far the case was decided on a ground which, in point of fact, failed. The estate had, indeed, been conveyed to the assignees under the commission, but that was by a private deed; but that could scarcely support the decision were it again brought into question. As a decision between the parties, it stands securely enough upon another ground, viz. that the debts in question were English debts. See above, note 3.

VOL. II.

⁵ Formerly such creditors were admitted to prove under the commission, to the special effect of voting on the question of certificate. But this is now altered by 49 Geo. III. c. 121, sec. 14; 6 Geo. IV. c. 16, sec. 59.

⁶ This doctrine is very clearly delivered by the English authorities. See Cullen, p. 148 et seq. He lays it down: 1. That creditors cannot proceed against the effects; and the reason is, that the assignment carries all. 2. That they may, on renouncing the benefit of the commission, proceed against the person; but that both they cannot take.

By the statute 49 Geo. III. c. 121, the claiming or proving under a commission is declared to be an election to take under the commission. See 6 Geo. IV. c. 16, sec. 59.

⁷ 49 Geo. III. c. 121. By the 14th section it is enacted: 'The proving or claiming a debt under a commission of bankruptcy by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so claimed or proved by him.' In an opinion given by Mr Cooke on the case of Robinson (see next note), he lays it down as settled, that under this statute there is no refunding of dividends, so as to regain the privilege of proceeding at law.

effect in other countries as well as within the territory of England, where the person against whom it is pleaded, and the debt to which it is contended to apply, are clearly within the reach of the law. Thus, where an English creditor claims under a commission in England, and so by the law of England the debtor is discharged from all proceedings at law, it would seem that, on the debtor's going to Scotland, he cannot there be arrested or proceeded against, but will be protected by the operation of the commission, on the same principle as he would be held discharged by a certificate allowed.¹

2. The certificate in England is an effectual discharge only of such debts as may be claimed under the commission, and till very lately the class of creditors who could not claim was very considerable; for no contingent debt gave the creditor a right to prove under the commission. We have seen this made a subject of deep regret by Lord Mansfield. But Sir Samuel Romilly, to whom the English law of bankruptcy owes so much, found a remedy at least for part of this evil, though he could not venture to go quite so far as he wished. In one of the late Acts proposed by him, it is provided that annuity creditors shall be entitled to claim under a commission for the value of the annuity, and that the certificate shall be a discharge against all demands, in respect of such annuity and the arrears and future payments thereof, as in ordinary debt.² Still, against no other class of contingent creditors will the English certificate prove a discharge, either in England or in Scotland.

3. The discharge of a bankrupt in Scotland, under an act of sequestration, is effectual against all debts of whatever description, present, future, and contingent, in every imaginable shape; and therefore in England, on the principles of international law, such discharge must be admitted as a good acquittance of any debt which does not fall under the exception of being a foreign debt, not under the disposition of the law of Scotland.

4. The discharge in a *cessio bonorum* is of a limited nature, as already explained; and when pleaded in another country, it cannot produce a stronger effect than if pleaded in a Scottish court. We have already seen that a foreigner may have the relief of *cessio* in Scotland. But it seems to be quite clear, 1. That the decree of *cessio* will have no effect as a discharge even of a limited nature against the foreign creditors, in any proceedings against the debtor abroad, but will only stop their diligence against his person in Scotland; and, 2. That the disposition *omnium bonorum* will have no other effect against the debtor's funds in the country of his residence, than a voluntary conveyance in security or satisfaction of debt.

¹ *Robinson v Coupar*, Feb. 1810, n. r. Robinson was a trader in England, and a commission was issued against him in 1793. He surrendered, and complied with all the requisites. He did not obtain a certificate, nor did he feel it necessary; for none of his creditors showed any wish to disturb him, and they had all taken under the commission. Robinson became a farm-servant in Scotland. Coupar, an English creditor, who had claimed and taken under the commission, swore his debt against him, and had him imprisoned on a border-warrant. Being bailed, Coupar executed a summons for the balance of his debt, and he obtained a decree, on which he imprisoned Robinson. A bill of suspension and liberation was refused by Lord Armadale, in 'respect that, though a commission of bankruptcy was taken out in England,

no certificate had followed in favour of the complainer; and that Coupar is not barred from proceeding against the person of the complainer, according to the law of Scotland, by any proceedings under the commission of bankruptcy, which *for some time are said to have been derelinquished*.' On a petition against this judgment, an objection was moved that it was incompetent, as too late. But the Lord President Blair said that, had it been competent, the judgment would in all probability have confirmed that of the Lord Ordinary. But that judgment would probably have been grounded, not on the inefficacy of a subsisting commission of bankruptcy, but on the point of dereliction.

² 49 Geo. III. c. 121, sec. 17.

INDEX.

ABANDONMENT—

- Whether goods may be abandoned for freight under a charter-party, where accidental damage, i. 617-8.
- Abandonment for freight, where goods stopped short of destination, *ib.*
- Abandonment to insurer, i. 618-9.
- Goods abandoned or jettisoned are still property of owner if recovered, i. 638-9.
- Abandonment of ship or cargo in insurance company's claim for total loss, i. 653-4.
- Abandonment on imperfect information, i. 654-5.
- Where ship or goods restored between time of offer to abandon and the action brought, *ib.*
- Where ship insured with one set of underwriters, and freight with another, i. 656.
- Loss entitling to abandon, i. 654.
- Notice of, i. 657-8.
- See INSURANCE.
- Abandonment of lease by creditors, landlord may let to another tenant and claim damage, i. 75-6.

ABBEY, ii. 461-2.

See SANCTUARY.

JAIL OF—

- Imprisonment in, ii. 463-4, note.
- Whether sufficient to entitle to *cessio*, ii. 464-5.

ABBREVIATE of adjudication, i. 742-3.

- Recording of first effectual, i. 759.
- Omission to record, i. 781-2.

ABRIDGMENT of a literary work, whether an invasion of copyright, i. 116-7.

ABROAD—

- Debtor domiciled abroad may be made bankrupt, ii. 158-9.
- In case of foreigner, arrestment *ad fundandum jurisdictionem* necessary, *ib.*
- Where debtor more than forty days out of Scotland, execution of horning at his dwelling-house inept, ii. 163-4, note.
- Going abroad without necessary call held absconding, *ib.*
- Persons abroad, how to be made bankrupt, ii. 164-5.
- See FOREIGN.

ABSCONDING—

- An equivalent of imprisonment, to infer bankruptcy, ii. 161-2.
- Messenger's execution of search *prima facie* evidence of absconding, *ib.*
- But may be explained away, ii. 162-3.
- Circumstances inferring absconding, *ib.*
- Unnecessarily leaving the country, ii. 163-4.
- Mode of proving date of absconding, ii. 165-6.
- See MEDITATIO FUGÆ.

ABSENCE of acceptor of bill—

- Mode of negotiation in case of, i. 437-8.
- Decree of expiry of legal in absence, i. 743-4.
- Decree of sale in absence of holders of real securities, ii. 259-60.
- See ABROAD.

ABSOLUTE DISPOSITION—

- With backbond, nature of the deed, i. 619.

ABSOLUTE DISPOSITION—continued.

- Effect of, on further advances, i. 724-5.
- Retention of absolute right under backbond, *ib.*
- Effect of recording backbond, or producing in judgment, *ib.*
- Cancelling backbond challengeable on 1696, ii. 213-4.
- Effect of recording it, ii. 223.
- Sale under, ii. 272-3.
- See CONVEYANCE.

ACCELERATING adjudications, i. 762-3.

- Forms to secure preference to ancestor's creditors, i. 767-8.
- Dividends under sequestration, ii. 366-7.

ACCEPTANCE—

- Of bills, i. 421-2.
- Proper acceptance, *ib.*
- Separate acceptance in England, *ib.*
- Acceptance completes transfer of debt, i. 422-3.
- Acceptance by anticipation, *ib.*
- Verbal acceptance, written refusal to accept, i. 423-4.
- Implied acceptance from detention of bill, *ib.*
- Conditional acceptance, *ib.*
- Whether acceptance may be retracted, i. 424-5.
- Acceptance per procuracion, *ib.*
- Who may accept per procuracion, *ib.*
- Recall of procuracion, i. 425-6.
- Collateral undertaking by signature as acceptor, *ib.*
- Power of partner of company in accepting, *ib.*
- Acceptance *supra* protest, *ib.*
- Claim by agent, etc., on protest for honour, *ib.*
- Presentment for acceptance, i. 432-3.
- Protest for non-acceptance, i. 438-9.
- Mutual acceptances or accommodation bills, i. 449-50.

OF OFFER IN MERCANTILE BARGAINS, i. 343-4.

- What delay allowed, *ib.*
- Binds the bargain, *ib.*
- Nature of acceptance, *ib.*
- Order for goods does not require acceptance, i. 344-5.
- See OFFER.

OF TRUST-DEED, ii. 386-7.

- Does not require acceptance of creditors or trustee, *ib.*
- Effect of trustee not accepting, *ib.*
- See TRUST.

ACCEPTOR of bill—

- Claim by payee against, i. 429-30.
- Whether liable for re-exchange, *ib.*
- Presentment of bill where acceptor absent or not to be found, i. 437-8.

ACCESSION—

- Effect of securities by, i. 786-7.
- Of accessories to land in their nature moveable, *ib.*
- Whether included in heritable securities, *ib.*
- Distinctions where the question is between heir and executors, tenant and landlord, heritable and personal creditors, *ib.*
- Machinery of mills, steam engine, *ib.*
- Where thing not removeable without injury or destruction to principal or accessory, *ib.*
- Houses, walls, and fixtures thereto, i. 787-8.

ACCESSION—*continued*.

- Moveable and stationary parts of machinery, i. 787-8.
- Accessories to trade of owner, *ib*.
- In question with landlord, *ib*.
- Writ of extent against manufacturer, i. 788-9.
- Effect in question with heritable creditor, *ib*.
- Steam engine, i. 789-90.

OF CREDITORS TO TRUST-DEED, ii. 392-3.

- Accession in general, *ib*.
- To plan of distribution, ii. 394-5.
- Proof from circumstances, *ib*.
- Implied conditions, fairness, concurrence of all, *ib*.
- Effect of accession, ii. 395-6.
- On assignee, *ib*.
- On creditor acceding, acquiring another debt, *ib*.
- See CONCURRENCE, TRUST-DEED.

DEED OF, and chief points to which it is commonly directed, ii. 395-6.

ACCIDENTAL damage, or act of God, damage from, i. 606, 626-7.

See ACT OF GOD.

ACCOMMODATION BILLS—

- Nature of, i. 449-50.
- Rules as to negotiation, i. 450-1.
- Holder's claim against drawer, *ib*.
- Drawer cannot plead want of notice of dishonour where no funds in drawee's hands, *ib*.
- Where drawer had good grounds for drawing, i. 451-2.
- Where for drawer's accommodation, no notice necessary, i. 452-3.
- All except the person accommodated entitled to notice, i. 453-4.
- Effect of indulgence to drawer in discharging acceptor, *ib*.

COUNTER ACCOMMODATIONS OR CROSS PAPER, i. 454-5.

- Doctrine of cross bills, ii. 420-1.
- Rules of ranking, *ib*.
- Commentary on cases establishing doctrine, ii. 421-2.
- No double ranking, *ib*.
- Effects of the several ways of disposing of cross paper, ii. 422-3.
- Accidental crossing, ii. 423.
- Dividend is payment, ii. 424.
- See CROSS BILLS.

ACCOUNT, production of, as claim on bankrupt estate, ii. 309-10.

See SEQUESTRATION.

BALANCING ACCOUNTS ON BANKRUPTCY, ii. 118-9, 126-7.

See COMPENSATION.

CREDITOR BY, i. 347-8.

- Proof of debt by account, *ib*.
- Prescription, *ib*.
- Close of an account, i. 348-9.
- How established after prescription, i. 349-50.
- May be conveyed by assignation, ii. 19-20.
- See PRESCRIPTION, BOOK-DEBT.

CASH ACCOUNT—

- Cautioner for, i. 384-5.
- History of securities for, ii. 714-5.
- Method of securing against challenge on 1696, ii. 219-20.

ACCRETION—

- Doctrine of, in relation to heritable rights, i. 737-8.
- Sasine on a warrant from one having a personal right afterwards completing his title, *ib*.
- In what circumstances the real right of disponer will accresce *ipso jure* to complete provisional right of disponent, *ib*.
- Effect of accretion, *ib*.
- Principle of accretion, i. 738-9.

ACCUMULATION—

- Of principal and interest, i. 695-6.
- No accumulation *ipso jure*, *ib*.

ACCUMULATION—*continued*.

- Accumulation in judicial sale on payment of price, i. 695-6.
- Cautioner paying a debt with interest, i. 696-7.
- By bond of corroboration, *ib*.
- Cannot be done after operation of bankrupt statutes, nor by anticipation, *ib*.
- By judicial proceedings, *ib*.
- Denunciation, *ib*.
- Adjudication, i. 697, 753.
- Decree of sale, effect of, i. 697-8.
- Diligence against moveables will not produce accumulation, *ib*.
- Of debt in an articulate adjudication, must be separate, i. 774-5.
- See INTEREST.

ACQUISITIONS after *cessio*, ii. 482-3.

- ACT OF GOD, damage by, frees from responsibility under the edict *Nautæ*, etc., i. 499-500.
- An exception from liability for loss in bill of lading, i. 606-7.
- What held as act of God, i. 606, 626.

ACT OF GRACE, ii. 445-6.

- Who entitled to benefit of Act, *ib*.
- New statute, ii. 446-7.
- Debtor must be unable to maintain himself, *ib*.
- Intimation to creditor, *ib*.
- Conveyance *omnium bonorum*, where it may be required, *ib*.
- Effect of liberation on the Act, ii. 448-9.
- Debtor imprisoned in Abbey jail for debt contracted within sanctuary entitled to the benefit, ii. 464-5.

See IMPRISONMENT.

ACT OF PARLIAMENT 1621, c. 18 (alienations to conjunct and confident persons after the contraction of debt), ii. 170-1.

See ALIENATION.

- 1696, c. 5 (alienations to particular creditors in prejudice of others after bankruptcy), ii. 191-2.

Commentary on this Act, as amended by the Bankruptcy Acts, *ib*.

See PREFERENCES.

ACT OF WARDING, ii. 430-5.

ACTUAL AND CONSTRUCTIVE DELIVERY, i. 181-2.

See DELIVERY.

ADJUDICATION, i. 5-6.

- History and nature of the simple adjudication, i. 739-40.
- History of appraising, *ib*.
- Introduction of adjudications in place of, i. 741-2.
- General and special adjudications, *ib*.
- Summons of adjudication alternative, i. 742-3.
- Decree and abbreviate, *ib*.
- Completion of the creditor's right, i. 743-4.
- Adjudication gives a redeemable right, *ib*.
- Declarator of expiry of the legal makes it absolute, *ib*.
- Decree of expiry in absence, *ib*.
- Whether it can be opened up, *ib*.
- Mere expiry of legal not sufficient to foreclose, *ib*.
- Whether adjudication becomes irredeemable otherwise than by declarator, i. 744-5.
- Charter of adjudication and sasine with forty years' possession after expiry and irredeemable title, i. 745-6.
- Charter of adjudication without sasine, *ib*. note.
- Effect of personal exception against debtor, i. 746.

VARIETIES OF ADJUDICATION, i. 746-7.

- Common adjudications, *ib*.
- Of property vested in debtor, *ib*.
- Of property to which debtor succeeds, i. 747-8.
- Debtor succeeding to heritage and entering, *ib*.
- Debtor refusing to enter, *ib*.
- Charges to enter, *ib*.
- Where debtor renounces the succession, i. 748-9.
- Adjudication of debtor's property after his death, i. 749-50.
- Where heir enters, *ib*.
- Where he behaves as heir, *ib*.

ADJUDICATION—*continued*.VARIETIES OF ADJUDICATION—*continued*.

- Where he does not assume the representation, i. 750-1.
 General charge, *ib*.
 Action of constitution, *ib*.
 Special charge, *ib*.
 Where heir renounces, i. 751.
 Where Crown *ultimus hæres*, *ib*.
 Adjudication *contra hæreditatem jacentem* may proceed before sheriff, i. 751-2.
 Need not be recorded, *ib*.
 Horning against superiors refused on such adjudications unless recorded, *ib*.
 Adjudication in security, i. 752-3.
 Libel, *ib*.
 Legal does not expire, *ib*.
 Sort of debt to warrant it, *ib*.
 Whether intimation necessary, *ib*.
 Where competent, *ib*.
 Adjudication on *debita fundi*, *ib*.
 Purpose of, to accumulate principal and interest, i. 753-4.
 Poining of the ground, *ib*.
 When interest due on the accumulated sum, *ib*.
 COMMENTARY ON THE STATUTES for regulating preferences among adjudgers, i. 754-5.
 By creditors of same debtor, *ib*.
 Nature of the *pari passu* preference where debtor alive, *ib*.
 First effectual adjudication, i. 755-6.
 Completing adjudication, *ib*.
 Heritable subjects not feudal, *ib*.
 Where the estate is feudal, *ib*.
 History of the perplexity in charging superiors, *ib*.
 Superior's titles not complete, i. 756-7.
 Where superior adjudges, *ib*.
 Where base rights and titles not clear, i. 757-8.
 New rule as to first effectual, *ib*.
 Superior adjudging, i. 758-9.
 First effectual belongs to all the creditors, *ib*.
 It is the criterion of *pari passu* preference, *ib*.
 Period of communion, *ib*.
 Publication of first effectual, and provisions for lessening the number and expense of adjudications, i. 759-60.
 Recording of abbreviate, *ib*.
 Bad effects of present law, i. 760-1.
 How far intimation may be stopped, *ib*.
 Conjunction of adjudications, *ib*.
 Adjudications conjoined with posterior decrees, i. 761-2.
 What is the first adjudication, *ib*.
 Consequence of defects in first adjudication, *ib*.
 Equitable interposition of Court of Session for promoting equality, i. 762-3.
 In the action of constitution, *ib*.
 Dispensation with second diet, *ib*.
 Reservation *contra executionem*, *ib*.
 Dispensation with minute-book, *ib*.
 In the adjudication itself, *ib*.
 Preference of adjudications after year and day of first effectual, i. 763-4.
 Where the debtor is dead, *ib*.
 Where the creditors of deceased debtor alone adjudge, *ib*.
 Where heir deliberates, *ib*.
 Commentary on the statute conferring preference on ancestor's creditors, i. 764-5.
 Competition between creditors of heir and ancestor, i. 765-6.
 Effect of judicial sale and sequestration, as general adjudications for all, in stopping adjudications, i. 769-70.
 See ANCESTOR.
 GENERAL REVIEW OF OBJECTIONS that may be taken against adjudications for debt, i. 773-4.
 Objections distinguished as in a ranking, or against the debtor, *ib*.

ADJUDICATION—*continued*.

1. ARTICULATE ADJUDICATION, nature of, i. 773-4.
 Where several creditors joined, *ib*.
 Where one adjudges as trustee for others, i. 774-5.
 Where one adjudges for several debts, *ib*.
 Must be a separate accumulation in articulate adjudications, *ib*.
 Conclusions of the libel, *ib*.
2. OBJECTIONS TO GROUNDS AND WARRANTS of adjudication, i. 775-6.
 To the constitution of the debt, *ib*.
 Adjudication an action of execution merely, debt must be previously constituted, *ib*.
 Liquid debt, *ib*.
 Or debt by written instrument, *ib*.
 Effect of want of stamp, *ib*.
 Where decree of constitution necessary, *ib*.
 Debt must be subsisting, *ib*.
 Future and contingent debts must be unextinguished, *ib*.
 Compensation no objection, *ib*.
 Prescription a fatal objection, i. 776-7.
 On an English penal bond, may proceed without previous decree of constitution, *ib*.
 Wife's bond, *ib*.
 Decree of constitution, *ib*.
 Action of constitution must be correct, i. 776-7.
 Decree for random sum ineffectual, *ib*.
 Where debt future or contingent, the proper proceeding is an adjudication in security, *ib*.
 Where debt not vested in adjudger, i. 777-8.
 Defect in adjudger's right, *ib*.
 Decree reserving objections, *ib*.
 Title to pursue, *ib*.
 Preliminary steps, i. 778-9.
 Special charge, defects in, *ib*.
 In bill for letters, *ib*.
 Not necessary to produce warrants after twenty years, *ib*.
 Grounds of adjudication, *ib*.
3. OBJECTIONS TO THE ADJUDICATION; to the libel, i. 779-80.
Pluris petitio, *ib*.
 Compensation or retention a good objection where instantly verified, *ib*.
 Where the creditor should have adjudged only in security, *ib*.
 Where decree reserving objections *contra executionem*, *ib*.
 Where the property in trust, *ib*.
 Decree, i. 780-1.
Pluris petitio, effect of it, *ib*.
 Extract, omissions in, *ib*.
 Recording of abbreviates, *ib*.
 Effect of diligence by the Crown, *ib*.
 ADJUDICATION IN IMPLEMENT, i. 782-3.
 A form of legal diligence for completing voluntary title to land, *ib*.
 Where led against the granter of imperfect title, i. 783-4.
 Against his heir, *ib*.
 How completed, *ib*.
 Competition of, *ib*.
 Of two adjudications in implement, *ib*.
 With adjudications for debt, i. 784-5.
 DECLARATOR AND ADJUDICATION, i. 785-6.
 ADJUDICATION OF PROPERTY SIMPLY HERITABLE, i. 794-5.
 Decree of adjudication recorded does not require sasine or a charge, *ib*.
 Adjudgers within year and day share *pari passu* preference with first effectual, *ib*.
 Rules for abridging proceedings applicable to this adjudication, *ib*.
 Creditors of ancestor entitled to their preference, *ib*.
 Where adjudications on imperfect conveyance, i. 794-5.
 Where debtor dead, *ib*.
 Adjudication in implement, *ib*.

ADJUDICATION—*continued.*ADJUDICATION OF PROPERTY SIMPLY HERITABLE—*continued.*

General special charge, i. 794-5.

Lease adjudged without a charge, *ib.*In rights which, though moveable, are adjudgeable, a charge necessary, *ib.*In rights having tract of future time, a general special charge and general service carries the right, *ib.*Adjudications of liferents, *ib.*Rents and interests, *ib.*Rules for these cases, *ib.*

RANKING OF ADJUDICATIONS with other creditors, ii. 403.

With each other, ii. 404-5.

Adjudication in implement, first effectual, and others within year and day, *ib.*Adjudication beyond year and day, *ib.*Voluntary security with sasine coming between first effectual and posterior adjudgers, *ib.*State of the effect of different modes of ranking two *pari passu* adjudgers, and an heritable bond intervening between the adjudications, *ib.*Adjudication in implement among simple adjudgers, *ib.*

With inhibition,—ranking of preferences by exclusion, ii. 406-7.

Canons of ranking, ii. 413-4.

By which of the adjudgers inhibitor is to be paid, ii. 412.

Double securities on one estate, ii. 413-4.

Adjudication by creditors holding heritable bond, uses of such diligence, ii. 143-4.

For what to be ranked, *ib.*Creditor with voluntary security adjudging, *ib.*Second adjudication, *ib.*

Double securities over separate estates, ii. 415-6.

See RANKING—COMPETITION—ANCESTOR.

EFFECT OF PAYMENTS, intromissions, etc., on claims of creditors holding securities, ii. 424-5.

Effect on adjudication, ii. 425-6.

Adjudication formerly held a sale under reversion, *ib.*Fluctuation of opinions on this point, *ib.*Formerly payments held not to diminish security, *ib.*Adjudication came to be held as *pignus prætorium*, ii. 425-6.No change on rule as to partial payment, *ib.*

Effect of adjudication as to heritable or moveable, ii. 8-9.

Litigiosity in adjudication, its commencement and expiration, ii. 150-1.

Effect of adjudication as to securing penalties, i. 701-2.

Adjudication in favour of trustee on bankrupt estate, ii. 337-8.

Effect as to property abroad, ii. 340-1.

Effect of litigiosity in ranking and sale, in stopping adjudications, ii. 146-7.

Accumulation of principal and interest by adjudication, i. 697-8.

Adjudication a method of making absentees and privileged persons bankrupt, ii. 164-5.

Effect of challenge on Bankrupt Statute 1621 against adjudger, ii. 183-4.

Benefit of that Act accrues to all adjudgers within year and day, ii. 190-1.

ADMINISTRATION, letters of, the executor's title in England, ii. 78, 79-80, note.

ADMIRAL, JUDGE—

His concurrence necessary in arrestments of goods on board ship, ii. 63-4.

His jurisdiction, i. 546-7.

ADMIRALTY—

Difference betwixt English and Scottish Courts of Admiralty, i. 546-7, notes.

Jurisdiction of Admiral, *ib.* note.

In questions of salvage, i. 641-2, 642-3.

ADMIRALTY—*continued.*

Admiralty Court in England, authority of its decisions in Scotland, i. 549-50.

Privilege of Admiralty as to arresting in *meditatione fugæ*, ii. 432-3.

ADMISSION of claims on bankrupt estate, ii. 362-3.

Objections, *ib.*

ADVANCE, completion of security after, ii. 206, 209-10.

Whether affected by Act 1696, *ib.*

ADVANCES of money to trustee—

Whether creditors bound to advance, ii. 320-1.

To insolvents on security, not challengeable at common law, ii. 231-2.

On bills, i. 288.

On consignment of goods, i. 294-5.

See BANKERS.

ADVENTURE, JOINT, ii. 539-40.

See JOINT ADVENTURE.

ADVERSE interest—

Creditor with, cannot vote, ii. 285.

Cannot be trustee, ii. 302-3.

ADVERTISEMENT—

Of sequestration and meetings, ii. 286.

Of election of trustee, ii. 312.

Of stated and occasional meetings, ii. 330-1.

Of application for bankrupt's discharge, ii. 366.

Of offer of composition, ii. 349.

Lien raised by, ii. 105-6.

Advertisement of ship on general freight, i. 588-9.

Of dissolution of company, ii. 529-33.

Effect of advertisement and notices in limiting responsibility of public carriers, i. 501-2.

ADVOCATION, bond of caution in, i. 401-2.

AFFIDAVIT of creditors in sequestration, requisites of, ii. 361.

For writ of extent, ii. 46-7.

AFFIRMATION. See OATH.

AFFREIGHTMENT, i. 585-6.

See CHARTER PARTY.

AGENCY or commission—

Mercantile, i. 505-6.

Factors, agents, brokers, i. 506.

Constitution of contract, i. 508.

Commission or hire, i. 515-6.

Diligence prestable, *ib.*

Authority and power of factors, i. 516-7.

Power to impledge his own lien, *ib.*General power to pledge, *ib.* et seq.

Determination of factory, i. 522-3.

Claims under contracts of commission, or mercantile agency, i. 526-7.

See COMMISSION—FACTORY.

AGENT—

Delivery to vendee's agents same as delivery to vendee, i. 214-5.

How goods in warehouse of commission agent transferred, i. 194-5.

Agent making advances on goods consigned, i. 294-5.

See FACTOR.

COMMON—

In ranking and sale, ii. 247-8.

Right of electing, disqualification, disputes concerning election, *ib.*Duties, *ib.*

Committee of creditors, ii. 250-1.

Common agent in multiplepointing, ii. 279-80.

LAW—

His liability for neglecting to record petition of sequestration, ii. 297-8.

Responsibility of, for skill, i. 489-90.

Hypothec of, ii. 34.

Lien of, ii. 106-7.

See WRITER—LAW AGENT.

AGENT—*continued.*

OR RIDER, i. 506-7.

Not entitled to swear to verity of debt, ii. 361-2.

Oath of credulity by agent where creditor abroad or incapable, *ib.*

Mandates to vote at meeting of creditors, ii. 361-2.

IN SEQUESTRATION, ii. 322-3.

Cannot buy the estate, ii. 344.

Responsibility of trustee for agent, ii. 322.

Cannot be commissioner on bankrupt estate, ii. 320-1.

Responsibility, ii. 322-3.

BANK, whether bank can claim all money in hands of, at his bankruptcy, i. 283-4.

Cautioner for, i. 380-1.

See CAUTIONARY.

MERCANTILE, description of, i. 448-9.

See FACTOR—BROKER—COMMISSION.

AGREEMENT betwixt friends of bankrupt and creditors to obtain his discharge, ii. 371-2.

See DISCHARGE.

AGREEMENTS AND OBLIGATIONS illegal, i. 317-8.

Of debt by verbal agreement, i. 347-8.

AGRICULTURAL LEASE cannot be transferred without express destination to assignees, i. 72-3.

Landlord's hypothec under, ii. 26.

Where a sublease, ii. 30-1.

AID, extents in, ii. 44-5.

For benefit of Crown's debtor, *ib.*History and abuse of extents in aid, *ib.* note.

Who entitled to it, ii. 48-9.

Nature of the debt due to Crown's debtor, ii. 48-9.

Affidavit, fiat, and form of extent in aid, *ib.*

Extent in aid in different degrees, ii. 49-50.

ALIENATIONS to relations and confidential friends, ii. 170.

Commentary on the Act 1621, ii. 171-2.

FIRST BRANCH—

General view of the Act, ii. 170-1.

Import of the Act, *ib.*Two auxiliary presumptions adopted in interpreting this law, *ib.*

TITLE TO CHALLENGE, ii. 170-1.

Creditors entitled to benefit of Act, *ib.*

Must be creditor before deed challenged, ii. 172-3.

Exceptions, *ib.*Where posterior creditor's money has been applied in paying off prior creditor's debt, *ib.*Distinction between prior and posterior creditor; former entitled to presumption of insolvency, *ib.*Benefit of challenge under this Act extended to whole body of creditors, *ib.*Challenge brought by a single creditor, *ib.*Debt of challenging creditor held as of date of contract out of which it arises, *ib.*

Date of deed challenged, how to be taken, ii. 173-4.

Where creditor's debt is a bill, what is held the date of his becoming a creditor, *ib.*Creditors in future, or even conditional debts, entitled to challenge, *ib.*Gratuitous creditors also entitled to challenge, *ib.*Challenge by a trustee, *ib.*Presumption of insolvency through him extended to all the creditors, if debt of any of the creditors previous to deed challenged, *ib.*

DEEDS LIABLE TO CHALLENGE, ii. 174-5.

Conjunct and confident persons, *ib.*

Who is conjunct, ii. 175-6.

Confident person, partners in trade, servants, factors, confidential men of business, *ib.*Whether an ordinary agent, *ib.**Onus probandi* of conjunct and confident lies on challenging creditor, *ib.*ALIENATIONS—*continued.*DEEDS LIABLE TO CHALLENGE—*continued.*

Of the consideration for which the deed is granted, ii. 175-6.

What deeds are held necessary or onerous, *ib.*

Original deeds, ii. 176-7.

Cautionary engagements by granter, *ib.*Provisions by the relations of a party in marriage, *ib.*Provisions in antenuptial contracts of marriage, *ib.*Must not be exorbitant, *ib.*

Where cause of granting is value given, or debt existing, valuable consideration or debt must be proved, ii. 178-9.

Debt must be lawful, *ib.*Where ground of debt a *pactum illicitum*, *ib.*Price of subject alienated, paid collusively to favourite creditors, *ib.*Price must be adequate, *ib.*If challenge directed against bond or bill, what proof of debt necessary, *ib.*Deeds granted in fulfilment of prior obligations onerous, *ib.*Where deed of the nature of an acknowledgment or voucher of debt, *ib.*

Postnuptial provisions to wife, ii. 177-8.

Postnuptial provisions to children, *ib.*Where father, believing himself solvent, expends sums on children's promotion, are they liable? *ib.*Where the subject is not available to creditors, *ib.*Can creditors challenge conveyance of a subject which they could not attach by diligence? *ib.*

Conveyance of heir of entail's liferent interest challengeable, ii. 178-9.

Whether his faculty to cut down trees challengeable, *ib.*If he has made contract of sale of timber on estate, conveyance of price challengeable, *ib.*Assignment or sublease granted by tenant challengeable, though assignees and subtenants excluded in lease, *ib.*Policies of insurance on life, *ib.*EVIDENCE OF ONEROUS CONSIDERATION, *onus probandi* on receiver, ii. 178-9.Where deed bears onerous consideration, *ib.*Narrative not evidence of onerosity, where deed to a confident, *ib.*Sufficient where deed to a stranger, *ib.*Effect of oath in support of narrative, *ib.*

Proof of the consideration, ii. 179.

In supporting deed, not necessary to prove that highest price possible got for subject, *ib.*Value of contingent interest alienated, *ib.*Where deed objected to is a bond or bill, what evidence? *ib.*

QUESTION OF SOLVENCY, ii. 179-80.

If debtor insolvent at time of challenge, insolvency presumed at date of deed, if to a confident, ii. 180-1.

Deed unchallengeable on proof of solvency, *ib.*Proof of solvency at date, *ib.*Estate *ex eventu* proving insolvent, *ib.*No rights merely *in spe* to be taken into account, *ib.*Mode of valuing life interests, *ib.*

EFFECT OF LAPSE OF TIME on challenge, ii. 181.

If challenge long delayed, grantee not bound to prove solvency of granter, *ib.*Nor is proof of onerous consideration to be laid on grantee, *ib.*Question to be taken in favourable view for debtor, *ib.*

FORM OF THE CHALLENGE, ii. 181-2.

Whether nullity may be pleaded by way of exception or defence, *ib.*Reduction the proper form, *ib.*

Challenge, under this Act, competent only to Court of Session, ii. 182.

EFFECT OF THE NULLITY, ii. 182-3.

ALIENATIONS—*continued.*EFFECT OF THE NULLITY—*continued.*

Against strangers, ii. 182-3.

Effect on *bona fide* purchaser from conjunct and confident person, *ib.*Remedy against person receiving price, *ib.*

Whether adjudger from conjunct person safe? ii. 183-4.

Effect of reduction, *ib.*Circumstances inferring purchaser's knowledge, effect of reduction as to the creditors, *ib.*

SECOND BRANCH OF ACT 1621—

Of conveyances to the prejudice of diligence begun against the debtor's estate, ii. 184-5.

The principle of litigiosity adopted and extended in second branch of this Act, ii. 185.

History of doctrines connected with this Act, *ib.*

Statute authorizes reduction of all voluntary deeds by insolvents after diligence begun, ii. 185.

Where insolvency is secret and unknown to holder, *ib.*

TITLE TO CHALLENGE—

Challenger must be a creditor who has begun the sort of diligence adapted to attachment of the subject, ii. 185-6.

Moveable as well as heritable subjects included, *ib.*

Diligences proper to heritage, ii. 186-7.

Inhibition, from moment of its execution against debtor, *ib.*In adjudication, citation, *ib.*Where charge of horning a proper step previous to adjudication, litigiosity begins with charge, *ib.*Whether an ordinary charge of horning sufficient where subject heritable, *ib.*Diligence proper to moveables, arrestment and poinding should be used, *ib.*Diligence must be regular, *ib.*Effect of *mora* in the prosecution of diligence, ii. 187-8.Delay of three months has been held to exclude challenging creditor, *ib.*

DEEDS LIABLE TO CHALLENGE, ii. 187-8.

Payments in cash, *ib.**Nova debita*, ii. 188-9.Deeds in completion or in implement, *ib.*

What are deeds of conveyance in sense of Act? ii. 189-90.

Good defence against challenge, that person receiving conveyance was in a situation to complete his diligence before challenger, *ib.*

EFFECT OF THE REDUCTION, ii. 190-1.

Where deed challenged a conveyance of land, benefit accrues to all creditors adjudging, or entitled to adjudge, within year and day, *ib.*In other diligences similar communication, provided debtor might have been made bankrupt within sixty days of completion of diligence, *ib.*Is the challenge effectual against third parties purchasing *bona fide*? *ib.*

ALIENATIONS TO PARTICULAR CREDITORS in prejudice of others after bankruptcy, ii. 191-2.

Commentary on the Act 1696, c. 5, as amended by 54 Geo. III. c. 137, *ib.* et seq.

See BANKRUPTCY—PREFERENCES.

CHALLENGEABLE ON FRAUD at common law, ii. 225-6.

Without onerous consideration, as reducible at common law, ii. 184-5.

Case of fraud to be made out, *ib.*Effect of narrative, *ib.*Matter to be proved, *ib.*

IN SATISFACTION OR SECURITY after first deliverance on petition of sequestration, form part of divisible fund, ii. 232-3.

See BANKRUPTCY—SEQUESTRATION.

ALIENATION—

Prohibition against, in feudal grants, i. 28-9.

In entails, effect of, as to power of granting leases, i. 66-7.

ALIEN ships, i. 145-6.

See SHIPS.

Enemy's debt, action denied on, during war, i. 325-6.

Whether competent to pursue in security, suspending execution till peace, *ib.*

ALIMENT to natural child, whether challengeable on 1621, c. 18, i. 688-9.

Debtor for, entitled to *cessio*, ii. 476.

Distinction between aliment to natural and legitimate children, i. 680-1.

Aliment to a widow beyond the terce, i. 58-9.

See ALIMENTARY FUNDS—PROVISIONS—MARRIAGE.

To PRISONERS, ii. 445-6.

Act of Grace, *ib.*Form of applying under, *ib.*Application of the Act, *ib.*Who entitled to benefit of Act, *ib.*Prisoner for damages to private party, though *ex delicto*, entitled to benefit of Act, ii. 445-6.

Sum to be deposited under new Act, ii. 446-7.

See ACT OF GRACE.

ALIMENTARY FUNDS, i. 123-4.

They are not attachable for debt, i. 124-5.

What funds are held as alimentary, *ib.*Property to a wife excluding the *jus mariti*, *ib.*Aliment granted to a wife falls not within her husband's *jus mariti*, i. 70-1.The fund must be expressly declared alimentary, *ib.*Wife's aliment not an inherent burden on *jus mariti*, *ib.*Whether annuity settled on wife on separation attachable by husband's creditors, *ib.*

Pensions, i. 125-6.

Annuities due from Ministers' Widows' Fund, *ib.*A fund alimentary converted into another shape, *ib.*Salary to holder of an office abolished, or retired salary, *ib.*Where, instead of a yearly sum, a residuary principal sum is destined for aliment, *ib.*Persons furnishing subsistence entitled to diligence against the alimentary fund of the year for which they made furnishings, *ib.*Where aliment exorbitant, superfluity attachable, *ib.*

Friends of bankrupt purchasing bankrupt's stock, furniture, etc., for use of himself and family, how to secure it as alimentary, i. 126-7.

Where bankrupt holds a lease excluding assignees and subtenants, creditors can only take the stock, *ib.*Bankrupt's friends may give him a new stock, *ib.*Wages of servants, *ib.*Salary of a comedian, *ib.*Arrears of alimentary funds attachable, *ib.*

Can creditors challenge, under Act 1621, a conveyance of alimentary fund? ii. 178-9.

See CESSIO—PROVISIONS.

ALLOWANCE—

To trustee, ii. 320-1.

To bankrupt, ii. 323-4.

In England, in Scotland, *ib.*Endurance, *ib.*

ALTERATION of bill of exchange, i. 416-7.

See BILL.

Of policy of insurance, i. 649-50.

Of voyage differs from deviation, i. 669-70.

And abandonment of voyage insured, *ib.*Effect of it in several cases, *ib.*

Of partners of company, effect of, on obligations, ii. 525-6.

See CHANGES.

ALTERNATIVE holding, i. 723-4.

Alternative summons of adjudication, i. 742-3.

ANCESTOR—

Adjudication of debtor's heritable property after his death, i. 749-50.

ANCESTOR—*continued.*

Commentary on the statutes conferring preference on ancestor's creditors, i. 763-4.

COMPETITION OF DILIGENCE between creditors of ancestor and heir on heritable estate, under 1661, c. 24, i. 765-6.

Ancestor's creditors, to obtain preference, must do diligence within three years, *ib.*

Heritable estate only under this law, *ib.*

Meaning of apparent heirs in the Act, i. 766-7.

Heir infert during ancestor's life, *ib.*

Diligence by ancestor's creditors requisite, *ib.*

Acceptance of bills or corroborations from heir does not exclude the privilege, *ib.*

Where no impediment, diligence must be complete, *ib.*

Can the forms of proceeding be accelerated where three years in danger of elapsing? i. 767-8.

Where impossible to complete diligence within the term, *ib.*

Heir dying during proceedings, *ib.*

Where creditor obstructed, *ib.*

Entry of heir *cum beneficio*, i. 768-9.

Effect of the laws establishing *pari passu* preference, and abridging expense by judicial sale, etc., *ib.*

Where creditors of heir and those of ancestor both charging heir to enter, *ib.*

First effectual adjudication by creditor of ancestor secures *pari passu* preference to all the ancestor's creditors within year and day of it, and within the three years, *ib.*

But not to those within year and day, but beyond the three years, *ib.*

Where first effectual by creditor of heir, *ib.*

Where heir has completed his titles, the first adjudication, whether by creditor of ancestor or heir, considered as first effectual to both, i. 769-70.

Where heir still in apparenay and entering, *ib.*

If he do not enter nor renounce, the adjudication on the charge should serve as first effectual to both classes of creditors, *ib.*

If led by creditor of heir, available to creditor of ancestor, *ib.*

Where a judicial sale raised, or sequestration awarded, sufficient for ancestor's creditors to enter their claims within the three years, *ib.*

Creditors of ancestor cannot adjudge after process of sale commenced, *ib.*

Nor after sequestration, *ib.*

INEFFICACY OF HEIR'S VOLUNTARY CONVEYANCE to defeat ancestor's creditors, i. 770-1.

Second provision of Act 1661, c. 24, as to this, *ib.*

Prohibition in Act extends to all conveyances or securities whatever, i. 771-2.

To sales for onerous cause, *ib.*

Effect of the prohibition, *ib.*

Conveyance not void, but only not valid, in so far as may prejudice predecessor's creditors, *ib.*

If price fair and unpaid, *ib.*

If price inadequate or paid to heir, *ib.*

To give ancestor's creditors, where no competition with heir's creditors, right to object to deed, not necessary that they have done diligence within the three years, *ib.*

Competition between the ancestor's and heir's creditors, the former not having done diligence within the three years, i. 772-3.

Conveyance by heir to ancestor's creditors not objectionable under the Act, *ib.*

Whether, if granted to a single creditor, objectionable, *ib.*

Conveyance by heir to one of his own creditors not objectionable by the others, *ib.*

A disposition to one of heir's creditors executed within the year cannot defeat diligence of ancestor's creditors within three years, *ib.*

VOL. II.

ANCESTOR—*continued.*

DILIGENCE AGAINST ANCESTOR'S MOVEABLE PROPERTY after death, ii. 76.

Where an executor confirmed, ii. 80-1.

Proceedings by creditors of deceased against creditors confirmed, *ib.*

How personal estate liable after death in England, ii. 79, note.

In Scotland, ii. 79.

Pari passu preference of creditors doing diligence within six months after debtor's death, ii. 82-3.

Commentary on the Act of Sederunt 28th February 1662, ii. 83-4.

Competition with arrestments during debtor's life, *ib.*

Where debtor has been made bankrupt, *ib.*

Where he has not, ii. 84-5.

Steps necessary where no diligence during debtor's life, *ib.*

Competition between creditors of deceased and those of executor, ii. 85-6.

Preference to creditors of deceased for a year, *ib.*

Preference of ancestor's creditors over property simply heritable, i. 794-5.

Right of creditors to adjudge ancestor's estate for debts of the heir, i. 79-80.

ANNEXATION—

Whether machinery, steam-engines, etc., by annexation covered by heritable securities, i. 786-7.

See HERITABLE and MOVEABLE.

ANNUALRENT, infertment of, i. 712-3.

ANNUITIES—

Clergymen's widows', whether attachable, i. 123-4.

To principals and masters of Scottish universities, and provisions to their children, *ib.*

ANNUITY—

Bonds of, and other contingent debts, claims on, i. 352-3.

Nature of annuities, *ib.*

Distinctions, where for a certain or uncertain duration, i. 353-4.

Annuity on lives, *ib.*

Rule for ranking, *ib.*

Sir Samuel Romilly's Act in England, *ib.*

Strict and legal rule for claim and ranking annuitant, i. 354-5.

Rules for other contingent debts, *ib.*

Valuation of the annuity, i. 355-6.

Observations on the ranking of annuities, *ib.* et seq.

REDEEMABLE—

Bond of, nature of, i. 359-60.

Mode of valuing in England, *ib.*

Whether redemption money the value, i. 360-1.

Claims against co-obligants for an annuity, i. 373-4.

Effect of creditor agreeing to compromise for valuing annuity as to cautioners, i. 377-8.

ANNUS DELIBERANDI, i. 748-9.

ANONYMOUS PARTNERSHIP, ii. 510-1.

Dormant partners, *ib.*

Responsible like other partners, *ib.*

One paid for labour in proportion to profit not liable as a partner, *ib.*

Must be regularly dissolved by publication, ii. 333.

How to proceed against partners, ii. 561-2.

See PARTNERSHIP.

ANSWERS—

Bankrupt bound to give, at examinations, ii. 325-6.

Of others than bankrupt, ii. 327.

Whether make evidence, ii. 329-30.

ANTENUPTIAL CONTRACTS of marriage, claims under, i. 681-2.

See MARRIAGE CONTRACT.

ANTICIPATION—

Payment by, challengeable at common law, ii. 228-9.

Fraud and collusion necessary, *ib.*

ANTICIPATION—continued.

Acceptance of bill by, i. 422-3.

Of payment of freight, i. 619-20.

APPARENT HEIR—

An apparent heir may challenge *ex capite lecti* without completing titles, i. 92-3.

Right of apparent heir to enter into possession of ancestor's estate, and levy the rents, i. 94-5.

The rents not received are, during his life, part of his estate divisible among his executors or creditors, *ib.*

Where the debts are the ancestor's, and the heir renounces, the arrears falling due after ancestor's death may be taken by the creditors as part of the *hereditas jacens*, i. 95-6.

Right to cut woods, i. 94-5.

Meaning of apparent heir in the Act 1661, c. 24, i. 766-7.

Sale by, to defeat ancestor's creditors, reducible, i. 770-1.

RANKING AND SALE by apparent heir, ii. 237-8.

Nature and object of the process, *ib.*

Insolvency not necessary, *ib.*

Judicial cognition and sale where proprietor a minor, ii. 239.

Title to pursue, ii. 241.

Whether heir barred after having incurred a passive title, *ib.*

Effect of service *cum beneficio inventarii*, *ib.*

Where actually entered and infeft, he is barred, *ib.*

In such case, proceeding is by action of valuation, *ib.*

Where this opposed, *ib.*

Effect of entail, *ib.*

Action does not infer a passive title, *ib.*

Effect of pursuer's death, *ib.*

See **SALE**.

LIMITED RESPONSIBILITY from possession by apparent heir for three years in conferring on creditors a right against the next heir entering, i. 707-8.

Passing by, i. 708-9.

Possession, *ib.*

Debts and deeds, *ib.*

Entry of next heir, *ib.*

Responsibility, i. 709-10.

Where the estate under entail, i. 710-1.

See **PASSIVE TITLE**.

APPEAL against judgment of Court discharging bankrupt, ii. 371-2.

See **REVIEW**.

APPLICATIONS—

Summary and incidental, in sequestration, jurisdiction of Court of Session in, ii. 283.

Of Judge Ordinary, ii. 283-4.

APPREHENSION of debtor—

Duty of magistrates, etc., in assisting, ii. 435-6.

Solemnities requisite by messenger, ii. 436.

On *meditatio fugæ* warrant, ii. 448.

See **IMPRISONMENT**.

APPRIZING of poinded goods, ii. 58-9.**APPRIZINGS—**

History of, i. 739-40.

Pari passu preference of, i. 740-1.

See **ADJUDICATION**.

APPROBATE and REPROBATE—

Doctrine of, i. 141-2.

Its resemblance to the doctrine of election in English law, *ib.*

In what cases the necessity of election arises, i. 142-3.

Where a burden or condition is annexed to the acceptance of a deed, *ib.*

Express condition, *ib.*

Power of imposing the condition, *ib.*

Where a conveyance of land is made an express condition of a will of personal estate, i. 143-4.

APPROBATE and REPROBATE—continued.

Where the condition is impossible to the person on whom it is imposed, i. 143-4.

Illegal condition, *ib.*

Mode of imposing conditions, *ib.*

Where the condition is only implied, *ib.*

Construction of implied conditions, *ib.*

Where a settlement contains the revocation of an old and declaration of a new disposition, i. 144-5.

Where the implied condition is exceptionable, from want of power or defect of solemnity, *ib.*

Application of the rules in such case, i. 145-6.

Repudiation of a deed where an alternative by condition is effectually raised, *ib.*

APPROPRIATION specific—

Effect of possession under a remittance for, i. 281-2 et seq.

Effect of, as to factor's lien, ii. 110-1.

See **FACTOR**.

APPROVAL OF COMPOSITION—

See **COMPOSITION—SEQUESTRATION**.

ARBITRATION—

Power of trustee and commissioner in submitting claims, ii. 321-2.

Effect of general submission in contract of partnership, ii. 538-9.

Power of, in trust-deed, whether binding on creditors, ii. 383-4.

In deed of accession, ii. 395-6.

ARRANGEMENTS—

Of extrajudicial settlements between insolvent debtors and their creditors, ii. 382.

Of unilateral trust-deeds, ii. 382-3.

Where not affected by bankrupt statutes, *ib.*

Requisites of trust-conveyance, ii. 384-5.

Effect of bankrupt statutes on, ii. 387-8.

Effect of the deeds in relation to creditors, ii. 391-2.

Deeds of *supersedere*, ii. 464-5.

Trust-deeds and deed of accession, ii. 392-3.

Accession, *ib.*

Deed of accession, ii. 395-6.

Administration of trust, ii. 397-8.

Of private composition contracts, ii. 398-9.

Evidence of the contract, conditions implied, *ib.*

Effect of the contract, ii. 400-1.

CONSULTATION, BY A PERSON INSOLVENT, how to arrange with his creditors, ii. 488-9.**HOW TO PROVIDE FOR SAFETY of debtor's person, ii. 496-7.**

Danger of taking sanctuary, ii. 489.

Liberation from prison, *ib.*

Where the debtor is arrested, *ib.*

Where he is under the description in Sequestration Act, *ib.*

OF PROCEEDINGS AGAINST THE ESTATE, ii. 489-90.

Trust-deed by debtor where no danger of diligence, *ib.*

Effect of rendering debtor bankrupt, ii. 490-1.

Deed of accession, if a bankruptcy, *ib.*

Where diligence begun, *ib.*

Measures for defeating preference, *ib.*

Power of debtor to facilitate these measures, *ib.*

Assignment of debts to a trustee; sequestration, *ib.*

Whether debtor may concur in sequestration after a trust-deed, *ib.*

Where matters adjusted extrajudicially, *ib.*

Points to be kept in view in arranging private trusts, *ib.*

Where inhibitions used and not expressly discharged, *ib.*

Adjudication by trustee, *ib.*

Providing for trustee's responsibility, *ib.*

Expediency to be considered in choosing trustee, *ib.*

Where a private composition agreed on, *ib.*

CONSULTATION BY CREDITORS how to settle an impending bankruptcy, ii. 491-2.

ARRANGEMENTS—*continued.*

TO PREVENT DANGER FROM VOLUNTARY ACTS OF DEBTOR, ii. 491-2.

- 1. Debtor's escape from personal diligence, *ib.*
- No debts on which he may be imprisoned, *ib.*
- Inhibition against preferences, *ib.*
- Where preferences already granted, what remedy? *ib.*
- Whether by process in Exchequer a caption may be obtained, *ib.*
- Meditatio fugæ* warrant, *ib.*
- This no remedy against escape into sanctuary, *ib.*
- 2. Voluntary deeds and acts, *ib.*
- Extravagance and fraudulent alienations, *ib.*
- Remedies against, *ib.*
- Bona fide* payments, ii. 492-3.
- Fraudulent payments, *ib.*
- Defeating preferences by a bankruptcy, *ib.*
- Precautions, *ib.*

DANGERS FROM ADVERSE PROCEEDINGS OF CREDITORS, ii. 492-3.

- 1. Diligence against moveables, *ib.*
- How to protect against Crown, *ib.*
- Against pointings, *ib.*
- Arrestments, ii. 493.
- 2. Diligence against heritable estate, *ib.*
- Securing against inhibition, *ib.*
- Adjudication, ii. 494-5.
- Adjudication in implement, *ib.*
- Powers of sale, *ib.*

COURSE OF GENERAL MANAGEMENT TO BE FOLLOWED, ii. 495-6.

- Refractory debtor, *ib.*
- Debtor dead, *ib.*
- 1. Heritable estate, *ib.*
- Arranging trust with heirs, *ib.*
- Sale by apparent heir, *ib.*
- Cognition and sale where heir a pupil, *ib.*
- Ranking and sale by the creditors, *ib.*
- 2. Moveable estate, *ib.*
- Confirmation by representatives or creditors, and conveyance to trustee or multiplepointing, *ib.*
- 3. Mutual contract between creditors and debtor, *ib.*
- Discharging preferences, *ib.*
- Where creditors will not renounce preferences, how to proceed, *ib.*

Judicial sale, where trust ill arranged, ii. 496.

AS TO VESTING OF ESTATES in trust, judicial or voluntary, ii. 496-7.

- Where bankrupt feudally infeft, *ib.*
- How purchaser with personal right may be defeated, *ib.*
- Competition of two adjudications in implement, by purchaser and by creditors, *ib.*
- Where bankrupt not infeft, ii. 497-8.
- Where bankrupt has conveyed or burdened his estate, and purchaser or creditor infeft while bankrupt not infeft, *ib.*
- Danger in completing bankrupt's title in this case, *ib.*
- See TRUST-DEEDS—BANKRUPT—SEQUESTRATION—PREFERENCES—BANKRUPTCY.

ARRANGEMENTS WITH RETIRING PARTNERS of company or representatives, ii. 537-8.

ARREARS of rent, interest, etc.—

- Whether heritable or moveable, ii. 7-8.
- Distinction as to arrears between an heritable bond and an adjudication, *ib.*
- Arrears of alimentary funds attachable, i. 126-7.

ARRESTEE—

- His defences in a forthcoming, ii. 63-4.
- Cannot plead compensation after decree, *ib.*
- Must be called in a forthcoming against cautioner in loosing arrestment, *ib.*

ARRESTMENT—

- General nature of arrestment in execution, i. 6.
- In security, i. 7-8.
- Charge of horning with an arrestment unloosed for fifteen days, a mode of rendering bankrupt persons exempt from personal diligence, ii. 164-5.
- Creditor of buyer arresting goods while under detention, not sufficient to complete the delivery, i. 219-20.
- See DELIVERY.

- Creditors of buyer arresting preferred to seller subsequently stopping as *in transitu*, i. 250-1.

ARRESTMENT and FORTHCOMING, ii. 62-3.

- Difference betwixt arrestment in execution and in security, *ib.*

ARRESTMENT IN EXECUTION and warrant, ii. 62-3.

- Form of the letters and execution, *ib.* note.
- Judge-Admiral must concur where goods on board ship, ii. 63-4.
- Letters of supplement for arresting on precept of inferior judge, *ib.*
- Of the forthcoming, *ib.*
- Parties, *ib.*
- Supplement for calling original creditor where beyond jurisdiction of warrant, *ib.* note.
- Object of the action, ii. 64.
- Pleas which may be stated against it, *ib.*
- Effect of decree of forthcoming, *ib.*

ARRESTMENT IN SECURITY AND FORTHCOMING, ii. 64-5.

- Grounds of it, *ib.*
- Form of warrant, *ib.*
- Proceeds on future or contingent debt, or depending action, *ib.*
- Arrestment on dependence, *ib.*
- Libelled summons without an execution sufficient warrant, ii. 65.
- In case of a foreigner, arrestment on the dependence must be preceded by an arrestment to found jurisdiction, *ib.*
- Unless where a multiplepointing, *ib.*
- Competent after an appeal, *ib.*
- Distinction between the two kinds of arrestment, ii. 65-6.
- Prescription, *ib.*
- Effects, *ib.*
- Recall of arrestment in security, ii. 66.
- Recall where for future debts, *ib.*
- For contingent debts, *ib.*

LOOSING OF ARRESTMENT on caution, ii. 66-7.

- Form, *ib.* note.
- Effect of it, *ib.*
- Distinction, by Act of Sederunt, of general and special loosing, *ib.*
- Proceeding in each, *ib.*, and see note.
- Where goods are unremoved, ii. 67.
- Where the loosing takes effect, *ib.*
- Arrestee must be called in forthcoming against cautioner, *ib.*

APPLICATION AND SUBJECTS of arrestment, ii. 67-8.

- Debts and goods, ii. 68-9.
- Bills not proper subjects, *ib.*
- Exhibition and arrestment, *ib.*
- Criterion of preference, ii. 69.
- Commentary on laws for equalizing diligence, ii. 72-3.
- Proceedings in order to obtain *pari passu* preference, ii. 74.

Effect of sequestration in establishing it, ii. 75-6.

- When arrestment loosed, ii. 76-7.
- Bonus of ten per cent. abolished, *ib.*

OBJECTIONS TO ARRESTMENT, ii. 69-70.

- To the debt, *ib.*
- To the arrestment as used in improper hands, *ib.*
- Moveables in hands of servants, etc., *ib.*
- Arrestment in hands of factor of debtor to the common debtor, ii. 70-1.

ARRESTMENT AND FORTHCOMING—*continued.*OBJECTIONS TO ARRESTMENT—*continued.*

- In hands of trustees or commissioner, ii. 70-1.
- Of moveables or bills with a specific destination, *ib.*
- Arrestment premature, ii. 71-2.
- Arrestment ineffectual if arrestee not in actual possession of the funds, *ib.*
- Informalities, *ib.*
- Extent of the claims secured by arrestment, *ib.*
- Pari passu* preference, ii. 72-3.
- See EQUALITY.

ARRIVAL, conditional sale of goods on, i. 469-70.

ARTICLES OF ROUP in a ranking and sale, ii. 254-5.

Clause of devolution in, *ib.*

ARTICULATE ADJUDICATION—

- Nature and description of, i. 773-4.
- A congeries of single adjudications carried on to avoid expense, *ib.*
- Where several creditors conjoined, *ib.*
- Where one adjudges as trustee for others, i. 774-5.
- Where one adjudges for several debts, *ib.*
- There must be a separate accumulation, *ib.*
- Conclusions of the libel, *ib.*

ARTISTS—

- Responsibility of, for skill, i. 488-9.
- Property in their work, how protected, i. 119-20.

ASSIGNATION—

- Transference of debts by, ii. 15-6.
- Originally debts not transferable without debtor's consent, *ib.*
- Indirect method of accomplishing this by blank bonds, *ib.*
- Requisites of regular transference of debts, *ib.*
- Debts assignable, *ib.*
- Intimation, ii. 16.
- Intimation the criterion of preference, *ib.* note.

INTIMATION, FORM OF, ii. 16-7.

- Regular form by notary and two witnesses, *ib.*
- Instrument must be regular and formal, *ib.*
- Notary cannot act both as procurator and notary, *ib.*
- Where instrument general as to sum, *ib.*
- Sufficient to intimate to one of several debtors in a bond, *ib.*
- To treasurer of hospital, to clerks and managers of a company, *ib.*
- Intimation in debtor's absence abroad, *ib.*
- The formality of notarial intimation not precisely requisite, *ib.*
- Equivalents, *ib.*

Heritable bond an intimated assignment, *ib.* note.

Production of assignment in an action to which debtor a party, ii. 17-8.

Debtor a party to assignment, *ib.*

Acknowledgment by letter, *ib.*

Verbal promise, *ib.*

Payment of interest or part of principal, *ib.*

Acceptance of draft for sum in assignment, *ib.*

Private knowledge not enough, *ib.*

Nor that debtor a witness to assignment, *ib.*

Nor that letter written to him to which no reply, *ib.*

Debtors abroad, intimation to, at Record Office, *ib.*

Assignations not requiring intimation, *ib.*

In bankruptcy, judicial, by marriage, *ib.*

English assignations of Scottish funds require intimation, *ib.*

Assignment necessary to convey diligence, ii. 18-9.

How far diligence may be in assignee's name, *ib.*

Practice on the point, *ib.* note.

Messenger no judge of transfer, *ib.*

Necessary to carry dividends, ii. 19-20.

Assignment of open accounts, *ib.*

Drafts and endorsements of bills on assignment of debt, *ib.*

Of book debts, *ib.*

See PLEDGE—BILL OF EXCHANGE—LEASE.

ASSIGNATION—*continued.*

SPECIAL ASSIGNATIONS and legacies vest without confirmation, i. 137-8.

Of a lease, when competent, i. 72.

Assignment of lease by a tenant will be effectual as a real right, if assignee enters into possession, i. 63-4.

Whether assignment to a sublease is completed by intimation to principal tenant, i. 64-5.

Of lease by tenant may, under Act 1621, be challenged by creditors, even though principal lease exclude assignees, ii. 178.

As a security, how completed, i. 789.

Where a sublease, intimation to subtenant the legitimate completion, *ib.*

Whether intimation to landlord is, in ordinary case, sufficient, i. 792-3.

Of a liferent right, how completed, *ib.*

Of a servitude, i. 793-4.

Incorporeal subjects, right of reversion, *ib.*

Of rents, *ib.*

By heritable bond, *ib.*

Patents and literary property, *ib.*

Assignment of moveables in security, ii. 10-1.

Ships, *ib.*

Goods, ii. 11.

Bills of lading, ii. 13.

Debts, ii. 15.

Pledge, ii. 19.

Hypothec, ii. 24-5.

Assignment to secure *pari passu* preference where trust-deed challenged, ii. 490-1.

Of moveables, how date of, to be taken in challenging on 1696, c. 5, ii. 215-6.

To life policy of insurance, i. 675-6.

By bankruptcy, i. 676.

Whether fire policy assignable, i. 675-6.

Sea insurance, *ib.*

To a reserved burden, i. 730-1.

ASSIGNEES—

In trust, whether entitled to swear to verity of debt, ii. 304.

Assignee to a debt after creditor's concurrence to bankrupt's discharge cannot retract, ii. 367.

Compensation against assignees, ii. 131.

When held to be excluded in a lease, i. 72-3.

ASSIGNMENT—

Of goods at sea, ii. 11-12.

Transfer of bill of lading, ii. 13-4.

Of invoices, etc., without bill of lading, ii. 14-5.

Of goods in hands of another, *ib.*

Drawing bill not sufficient, *ib.*

See ASSIGNATION.

ATTACHMENT—

View of the law of England and Scotland as to previous attachment of the person, ii. 449-50.

Previous attachment not permitted in Scotland, but in *meditatione fugæ*, *ib.*

See MEDITATIO FUGÆ.

ATTESTATION of deeds, i. 340-1.

ATTORNEY, power of, constitution of mercantile agency by, i. 508-9.

Mandate to, to vote, ii. 304.

AUTHORSHIP, or copyright, i. 110-1.

See LITERARY PROPERTY.

AVERAGE—

Of indemnification of loss by general average, and of the *Lex Rhodia de Jactu*, i. 629-30.

General and Particular, *ib.*

Definition of general and particular average, *ib.*

Losses which are average, i. 552-3.

Rhodian law *de jactu mercium*, *ib.*

Principles of general average, *ib.*

AVERAGE—continued.

- Requisites to contribution, i. 631-2.
- The sacrifice must be made advisedly, *ib.*
- Regular and irregular *jactus*, *ib.*
- Presumption, *ib.*
- Safety must result, i. 631-2.
- Detail of particular losses, *ib.*
- Jactura* or jettison, *ib.*
- What not entitled to be averaged, *ib.*
- Goods on deck, *ib.*
- Goods without bill of lading, *ib.*
- Damage in the operation of ejecting goods, etc., i. 633-4.
- Expenses in port refitting, etc., *ib.*
- Act must be done with view to general interest, i. 635-6.
- Running on shore, *ib.*
- Taking refuge, *ib.*
- Expense of workmen, *ib.*
- Damage in a combat, *ib.*
- Curing wounded, etc., *ib.*
- Where whole ship freighted and master takes other goods clandestinely, and they are ejected, *ib.*
- Property liable to contribution, mode of valuing and apportioning general average, i. 636-7.
- Goods jettisoned, *ib.*
- Goods saved, *ib.*
- Valuation of ship, i. 637-8.
- Freight, *ib.*
- Freight of goods sacrificed paid by general contribution, i. 638-9.
- Property of goods abandoned, still with owner, if recovered, *ib.*
- Valuation in policy of insurance affects not the value for contribution, *ib.*
- Particular average, i. 657-8.
- See **INSURANCE**.
- Whether bottomry creditors liable for average loss, i. 581-2.

AVERAGE, PETTY, i. 614-5.

- Average loss by accidental collision of ships, i. 627-2.
- Average hypothec on ship or cargo for, ii. 39-40.
- Lien for, ii. 98-9.

AWARDING sequestration, course of proceedings to, ii. 285-6.
Judgment awarding, and its effects, ii. 333-4.**BACKBOND—**

- Constitution of trust by, with absolute right, i. 33-4.
- How far reversion effectual where it enters not the record, *ib.*
- Absolute right and backbond as a security for debt, i. 713-4.
- Absolute disposition with, for prior debt, challengeable on 1696, c. 5, where backbond cancelled within the sixty days, ii. 196-7.
- Effect of recording it, ii. 223-5.

BAIL, in civil, English, and Scottish law, i. 396-7.

- Liberation on bail of prisoner on *meditatio fugæ* warrant, ii. 457-8.

See **JUDICIO SISTI—CAUTION**.

BAILIE of Abbey, his jurisdiction, ii. 463-4.**BALANCE**, arrangements with retiring partner of a company or representatives, according to balance preceding dissolution or retiring, ii. 537.**BALANCING** accounts on bankruptcy, ii. 118-9.

See **COMPENSATION**.

BANK—

- Shares in a public bank alienable, and attachable by creditors, i. 100.

STOCK, nature of, i. 100-1.

- How attachable, *ib.* et seq.
- Whether heritable or moveable, ii. 2-3.
- Whether adjudgeable, ii. 4-5.

BANK—continued.**CREDIT**, ii. 224-5.

Cautioner for, i. 384.

See **CASH—CREDIT**.

BANK AGENT—

When bank agent fails, can bank claim all the money found in his repositories? i. 283-4.

Cautioners for, i. 380.

Nature of agent's powers, *ib.*

Checks on his fidelity, *ib.*

Responsibility of the cautioners, *ib.*

Negligence of the bank, i. 380-1.

Effect of the usual stipulations on the bond of caution for the agent, i. 381-2.

Institorial power of bank agents, i. 510-1.

See **CAUTIONARY OBLIGATIONS**.

BANKERS—

Bill transactions with, effect of doctrine of reputed ownership on, i. 288-9.

Bills discounted in a single transaction are bought by the banker, i. 290-1.

Sent for negotiation as to an agent, *ib.*

Way of entering this transaction is by short entry, *ib.*

Bills sent indefinitely and entered generally in account, *ib.*

Where customer allowed to draw only certain proportion of amount, i. 291-2.

Where long-dated bills given to banker, and customer draws at short dates for discount, *ib.*

Where bank allows credit on bills deposited, property not changed while credit not operated on, i. 292-3.

Where banker discounts bills on credit being drawn out, this passes the property, *ib.*

But not enough to pass property that banker charges interest on sums overdrawn, i. 293-4.

Banker holding bills with blank endorsements has power to discount them, though deposited with him only as agent, or for special purpose; in that case, owner only personal creditor of banker, *ib.*

If bill has only been pledged for less than its amount, owner will be entitled to redeem on paying the advanced sum, i. 294-5.

LIEN of BANKERS for general balance of account, over all bills placed with them, unless they have been discounted, ii. 112-3.

Limitation of lien, *ib.*

Discounted bills not under it, *ib.*

Distinction between discount and deposit of bills as on general lien, *ib.*

Lien on bills pledged by factor, ii. 113-4.

Bills under special appropriation, *ib.*

Banker can claim no lien on bills left for discount, for which he refuses to give money, ii. 115-6.

What is covered by the lien, *ib.*

BANK INTEREST, part of divisible fund, ii. 361-2.

BANKING COMPANIES—

Bank of England, i. 100-1.

Bank of Scotland, i. 101-2.

Royal Bank, *ib.*

British Linen Company, *ib.*

BANKRUPT—

NOTOUR, ii. 154-5.

Who may be made bankrupt, ii. 155-6.

Mode of rendering bankrupt, ii. 159-60.

Diligence, *ib.*

Imprisonment and its equivalents, ii. 160.

Reducible alienations by, to creditors, ii. 191-2.

Whether bankrupt can acquire right to challenge under 1696, ii. 216-7.

Payments and transactions by, after sequestration, ii. 232-3.

See **ACT 1696—SEQUESTRATION—BANKRUPTCY**.

UNDER SEQUESTRATION. See **SEQUESTRATION**.

BANKRUPT—continued.

History of protections to bankrupts, ii. 464.
See *CESSIO*.

FURNITURE AND STOCK of bankrupt may be purchased up by his friends, and declared alimentary to himself and family, i. 125, 126.

Mode of effecting this, *ib.*

Companies, how to be rendered bankrupt, ii. 286-7.

Trust-deed, *ib.*

Sequestration of companies, ii. 561 sqq.

BANKRUPTCY and INSOLVENCY—

General view of the law of debtor and creditor in the two states of, i. 3-4.

Bankruptcy and insolvency distinguished, ii. 152.

General description of bankruptcy, ii. 154-5.

Objects of instituting a description of bankruptcy, *ib.*

History of the subject, *ib.*

OF NOTOUR BANKRUPTCY, ii. 155-6.

Description of bankruptcy according to the Act 1696, c. 5, as extended by subsequent statutes, ii. 156-7.

Definition of a notour bankrupt by 1696, by 54 Geo. III., *ib.*

Object of the definition in former Act, *ib.*

Persons liable, *ib.*

Peers and other privileged persons, pupils, idiots and lunatics, women, under certain exceptions, *ib.*

Corporations, ii. 157-8.

Partnerships, *ib.*

Foreigners having property in Scotland, and natives domiciled abroad, ii. 158-9.

Circumstances included under the description of notour bankruptcy in the statutes, *ib.*

Insolvency, *ib.*

Diligence by horning and caption, ii. 159-60.

Acts of warding, *ib.*

General letters of horning, *ib.*

Requisites of diligence to infer bankruptcy, *ib.*

Must be regular, ii. 160.

IMPRISONMENT AND ITS EQUIVALENTS—

Of absconding, resisting, or taking sanctuary, ii. 160.

Requisites of imprisonment, *ib.*

Evidence of it, ii. 160-1.

Forcibly defending, *ib.*

Evidence of it, *ib.*

ABSCONDING, ii. 161-2.

Messenger's execution of search good *prima facie* evidence of absconding, *ib.*

Circumstances from which absconding may be inferred, *ib.*

Prima facie evidence from messenger's execution may be explained away, ii. 162-3.

Where debtor forced to leave the country, and has no view of escaping from diligence, absconding not inferred, *ib.*

Officer marching with his regiment, *ib.*

Leaving the country without necessity held absconding, ii. 163.

Where debtor has business both in Scotland and abroad, *ib.*

RETIRING TO THE ABBEY, ii. 163.

Debtor has protection of sanctuary for twenty-four hours without booking, *ib.*

See *SANCTUARY*.

PROVISIONS INTRODUCED BY STATUTE for persons absent or privileged or protected, ii. 163-4.

Charge of horning and arrestment unloosed for fifteen days, ii. 164.

Arrestment may be either before or after the charge, *ib.*

Whether arrestment must be for same debt for which charge given, *ib.*

Charge of horning with poinding executed, *ib.*

By charge of horning with decree of adjudication, *ib.*

BANKRUPTCY and INSOLVENCY—continued.**PROVISIONS INTRODUCED BY STATUTE—continued.**

Date of actual bankruptcy by sequestration, ii. 164-5.

Under 1696, *ib.*

Date of imprisonment, ii. 165-6.

Date of taking sanctuary, *ib.*

Date of resistance and absconding, *ib.*

As concurring with insolvency, *ib.*

Modes of proving date of bankruptcy, *ib.*

Date of equivalents of imprisonment, *ib.*

Where a suspension has been presented, *ib.*

CONSTRUCTIVE OR RETROSPECTIVE BANKRUPTCY—

Principle, ii. 166-7.

Constructive bankruptcy as established on the Continent, *ib.*

In England, ii. 167-8.

In Scotland, *ib.*

Rules of computing the sixty days of retrospective bankruptcy, *ib.*

TERMINATION OF BANKRUPTCY—

By payment of the debts—by composition in full—by final distribution of funds, and discharge, ii. 168.

Where bankruptcy once fixed, and no active proceedings follow, how is it discharged? ii. 168-9.

Not annihilated by liberation of debtor from prison, nor by payment of the debt, *ib.*

Continues to the effect of equalizing arrestments and poindings for four months after, *ib.*

No absolute limitation of time within which deeds may be challenged, ii. 169-70.

Diligence on which debtor made bankrupt the property of all the creditors, *ib.*

Bankruptcy operates till debtor restored to solvency, *ib.*

English law, *ib.*

Whether a debtor who has not reconvalesced from first bankruptcy, may be rendered bankrupt a second time, so as to raise a new period of *pari passu* preference, ii. 168, 493-4.

Practical consultations as to arrangements between debtors and creditors on bankruptcy, ii. 488, 491-2.

See *ARRANGEMENTS*.

Gratuitous alienations, ii. 170-1.

See *ACT 1621, c. 18*.

Bankruptcy under the Acts not necessary to challenge at common law, ii. 231-2.

Remedy against preferences to particular creditors after bankruptcy, actual or constructive, ii. 191-2.

Commentary on the Act 1696, c. 5, *ib.*

See *PREFERENCES*.

RANKING IN BANKRUPTCY—

Effect of payments and intromissions on claims of creditors, ii. 424-5.

In claiming against co-obligants, *ib.*

Dividend declared on one estate before claim entered on other, *ib.*

Holder of security ranking on personal funds, ii. 425-6.

BY MERCANTILE SEQUESTRATION, ii. 283-4.

Contrast of English and Scottish laws of mercantile bankruptcy, ii. 281-2.

What necessary to authorize sequestration, ii. 284-5.

See *SEQUESTRATION*.

FRAUDULENT, ii. 486-7.

A bar to obtaining *cessio*, ii. 478-9.

See *FRAUDULENT BANKRUPTCY*.

OF COMPANIES—

Claims on, ii. 546.

How to render company bankrupt, ii. 559-60.

Trust-deed for settlement of bankruptcy, ii. 560-1.

Judicial proceedings or sequestration, ii. 561-2.

Latent partner, *ib.*

Sequestration, ii. 562-3.

See *SEQUESTRATION*.

BANKRUPTCY and INSOLVENCY—*continued.*

BANKRUPTCY OF BUYER—

Whether equivalent to stoppage *in transitu*, i. 247.

In England, buyer after bankruptcy cannot reject goods delivered, i. 253-4.

Rule in Scotland, that he can, i. 254-5.

CONCEALMENT OF IMPENDING—

Effect of, on transference, i. 266.

Contiguity of bankruptcy as presumptive of fraud, *ib.*

Presumed bankruptcy *intra triduum* abandoned in law of Scotland as a ground for annulling a contract, i. 266-7.

Presumption of fraudulent concealment, *ib.*

Concealment of actual bankruptcy, i. 267-8.

Evidence of restoration to solvency, *ib.*

See FRAUD.

Where goods with which bankrupt entrusted remain in his possession unchanged, and capable of identification, they must be delivered up, i. 294-5.

See SPECIFICATION.

Assignations by bankruptcy to the trustee in sequestration require no intimation, ii. 17-8.

Of the division of the funds among the creditors on bankruptcy, ii. 401-2.

See RANKING.

EFFECT OF CROWN'S EXTENT IN, ii. 51-2.

BALANCING ACCOUNTS IN BANKRUPTCY, ii. 122, 126, 128.

See COMPENSATION.

Bankruptcy no excuse for not duly negotiating bill, i. 444-5.

Effect of bankruptcy in dissolving partnership, ii. 529.

Whether bankruptcy of one party to contract of sale frees the other, i. 470.

Effect of it in recalling mandate, i. 522-3.

On trust-deeds, ii. 387-8.

RELATIONS OF SCOTTISH AND FOREIGN LAWS of bankruptcy, ii. 375-6.

See FOREIGN.

OF A TENANT—

Effect of, on the contract of lease, i. 76.

Irritancy of lease on bankruptcy, i. 76-7.

BANKRUPT LAW—

General review of the principles of, i. 7.

English and Scottish law, i. 9.

English law, i. 11.

Scottish law, i. 13-4.

Practical uses and application of the bankrupt law, ii. 488-9.

Effect of Bankrupt Acts on unconditional trust-deed, ii. 387-8.

See SEQUESTRATION—SALE—ARRANGEMENTS.

BANK STOCK, ii. 4-5.

See BANKING COMPANIES.

BARGAINS settled by correspondence, i. 342-3.

Offers must be accepted, i. 343-4.

What delay allowed, *ib.*

The act of acceptance binds the bargain, *ib.*

Order for goods, i. 344-5.

Execution of it acceptance, *ib.*

Quinquennial prescription of bargains, i. 347.

See MERCANTILE OBLIGATIONS.

BARTER distinguished from sale, i. 487-8.

BASE infetment, criterion of preference of, i. 722-3.

See REGISTRATION.

BASTARD, alimont to, whether a proper debt, i. 680-1.

Bond for, i. 688.

Debtor for, whether entitled to *cessio*, ii. 480-1.

BEHAVIOUR as heir, i. 704, 749.

How excluded, i. 704.

See HEIR.

BENEFICE of clergyman in England liable to sequestration, i. 123-4.

BENEFICIO INVENTARII—

Entry of heir *cum beneficio inventarii*, his liability under, i. 706.

Requisites to be observed, i. 706-7.

Effect of heir's entry, *ib.*

Not a trust-estate, *ib.*

Personal limited responsibility, *ib.*

Pay debts to the amount, *ib.*

Heir full proprietor, *ib.*

Powers, *ib.*

Rules of accounting, i. 707-8.

BIDDERS at judicial sale, ii. 255-6.

Obligations under clause of devolution where highest offerer fails, *ib.*

BILL OF EXCHANGE—

History of bills of exchange, i. 412.

Claims on bills and promissory notes, i. 412.

Of the form and requisites of bills, i. 413-4.

Distinction between debt and bill, *ib.*

Of bills as evidence of debt, *ib.*

Objections *ex facie*, *ib.*

Want of stamp, i. 414-5.

Subscription, *ib.*

Forged bill, *ib.*

Liability of person whose name is forged by giving currency to the bill, *ib.*

By initials, i. 415-6.

By a mark, *ib.*

Skeleton bills, *ib.*

Space unoccupied or blanks, effect of, *ib.*

Blank in drawer's or payee's name, *ib.*

Vitiations and alterations, i. 416.

Sexennial prescription, i. 418.

From what date it runs, *ib.*

How to preserve against it, *ib.*

What makes interruption, i. 419-20.

DRAWING OF BILLS, i. 324-5.

Must be signed to ensure summary execution, *ib.*

Representatives may sign after death, i. 421-2.

Act of drawing infers obligation that drawee shall accept, *ib.*

How this may be counteracted, *ib.*

Bills drawn in a representative character, *ib.*

Bills drawn in sets, *ib.*

ACCEPTANCE OF BILLS, i. 421-2.

Acceptance proper, *ib.*

Draft is equivalent to assignation, i. 422-3.

Acceptance by anticipation, *ib.*

Verbal acceptance, i. 423-4.

Written refusal to accept, *ib.*

Implied acceptance, *ib.*

Conditional, *ib.*

Whether acceptance can be retracted, i. 424-5.

Acceptance by procuration, *ib.*

Recall of procuration, i. 425.

Acceptance *supra* protest, i. 425.

Claim by agent, etc., on protest for honour, *ib.*

ENDORSEMENT and transfer of bills and notes, i. 425-6.

Endorsement in blank, *ib.*

In full, *ib.*

For a part, i. 426-7.

Bill payable to a company, *ib.*

Endorsations per procuration, *ib.*

After term of payment, *ib.*

Will not carry protest or diligence; assignation necessary, i. 427-8.

Endorsement as a collateral security, i. 428.

Blank endorsement makes a bill transferable by mere delivery; should be filled up in case of bill being lost, i. 428-9.

CLAIMS IN REAL TRANSACTIONS ON BILLS AND NOTES, i. 429.

By payee or holder, *ib.*

Against acceptor, i. 429-30.

BILL OF EXCHANGE—*continued.*CLAIMS IN REAL TRANSACTIONS, ETC.—*continued.*

- Against drawer, i. 429-30.
- Exchange, re-exchange, etc., *ib.*
- Circuitous re-exchange, *ib.*
- Payee may claim on bill though not signed by drawer, creditor's name being on the bill, i. 431-2.
- Claim by drawer, *ib.*
- Bill found in drawer's repositories not signed, his representatives may subscribe his name as drawer, *ib.*
- Drawer's remedy against drawee, *ib.*
- Endorsee's claim, *ib.*
- Against acceptor, *ib.*
- Against drawer and endorsers, i. 432.
- REQUISITES OF DUE NEGOTIATION, i. 432-3.
- Presenting for acceptance, *ib.*
- For payment, i. 433-4.
- Days of grace, usance, i. 434.
- Time of presenting, *ib.*
- Day, *ib.*
- Hour, i. 435.
- Place, i. 436.
- Absence or death of drawee, i. 437.
- Protest, *ib.*
- Requisites of instrument, *ib.*
- Whether can be dispensed with, i. 438.
- Protest for non-acceptance, *ib.*
- For non-payment, *ib.*
- Notice of dishonour, *ib.*
- Form of it, *ib.*
- Time, i. 441-2.
- In foreign bills, *ib.*
- In notes and inland bills, i. 442.
- By whom to be given, i. 443.
- To whom to be given, i. 444.
- Equivalents of protest and notice, *ib.*
- Bankruptcy of acceptor not equivalent, *ib.*
- Bankruptcy or insolvency of drawer no excuse for not giving notice, *ib.*
- Waiving or discharge of rules of negotiation, i. 445-6.
- Partial payment, etc., *ib.*
- Ignorance of neglect to give notice, *ib.*
- Where bill-holder in possession of funds of acceptor when bill is dishonoured, i. 446-7.
- Where bill-holder indebted to any of the parties to the bill, i. 447-8.
- Claim by agent, etc., on protest for honour, *ib.*
- Bill should first be protested, and notice given, to ensure recourse, *ib.*
- Proofs of this claim, *ib.*
- Exception to rules of protest and notice where person drawn on has no funds of drawer, *ib.*
- Bill in security no exception, i. 448-9.
- Bill-holder's claim against all for entire sum, deducting what he has received, and what entitled to by declared dividend, *ib.*
- Claim on bill acquired for smaller sum, *ib.*
- Remedy to bill-holder beyond the bill, *ib.*

CLAIMS ON ACCOMMODATION BILLS, i. 449-50.

- Obligations and rights of parties, *ib.*
- Claim against drawer, i. 450-1.
- Rules as to negotiation, *ib.*
- Drawer cannot plead want of notice where no funds in drawee's hands, *ib.*
- Onus probandi* as to this, *ib.*
- Wherever drawer has good ground for drawing, he is entitled to notice, i. 451-2.
- Cases of this sort, *ib.*
- In Scotland, recourse not lost by omission of protest and notice, if no effects in drawee's hands, i. 452-3.
- Where effects in drawee's hands at date of drawing, but withdrawn before bill presented, *ib.*

BILL OF EXCHANGE—*continued.*CLAIMS ON ACCOMMODATION BILLS—*continued.*

- Where the bill for accommodation of drawer, *ib.*
- Where not so, *ib.*
- Holder's claim against endorsers, i. 453-4.
- Each person engaged, except him accommodated, entitled to notice, *ib.*
- Effect of indulgence to drawer in discharging acceptor, *ib.*
- OF COUNTER-ACCOMMODATIONS OR CROSS PAPER, i. 454-5.
- Doctrine of cross bills, ii. 420-1.
- Rules of ranking, *ib.*
- Commentary on cases establishing the doctrine, ii. 421-2.
- No double ranking, *ib.*
- Effects of the several ways of disposing of cross paper, ii. 422-3.

See CROSS BILLS.

BILL TRANSACTIONS WITH BANKERS—

- Effect of the doctrine of reputed ownership in, i. 288-9.
- Bills discounted in a single transaction are bought by the banker, i. 290-1.
- Where bills sent for negotiation, banker a mere agent, and they are usually entered short, *ib.*
- Bills not entered short, but to account, held not as discounted unless where customer has been allowed to draw for the amount, i. 291-2.
- This more clearly the rule where customer allowed to draw only a certain proportion of amount, *ib.*
- Long-dated bills lodged with banker, while short bills are given for discount, are with banker only in pledge, *ib.*
- Where bank allows credit on bills deposited, property not changed while credit not operated on, i. 292-3.
- Property of bills discounted (on credit being drawn out) passed, but not by merely charging interest on sums overdrawn, *ib.*
- Banker holding bills with blank endorsements may discount them, though deposited with him only as agent or for special purpose: in that event, owner only personal creditor of banker, *ib.*
- Bill pledged for less than its amount may be redeemed on paying advanced sum, i. 294-5.
- Banker has lien for general balance over all bills placed with him, unless they have been discounted, ii. 112-3.

PLEDGE OF BILLS, ii. 22-3.

- How far affected by arrestment, ii. 70-1.
- Exhibition and arrestment the proper course, *ib.*
- Lien of factor on, ii. 111-2.
- Of bankers, ii. 112-3.
- Whether bill-holder entitled to benefit of factor's lien, *ib.*
- See BANKERS.
- Payment by bills and notes, how far challengeable on 1696, ii. 202-3.

- Bills not an effectual way of transferring goods, ii. 14-5.
- Transference of debts by, ii. 18-9.

ENDORSEMENT TO BILLS AND DRAFTS—

- How far challengeable on 1696, c. 5, ii. 196-7.
- What is the date of, in a challenge under the Act, ii. 215-6.

BILL OF HEALTH—

- Liberation of prisoners on, ii. 440-1.
- Act of Sederunt as to, *ib.* note.
- Illness must endanger life, ii. 441-2.
- Certificate of surgeon must be on oath, *ib.*
- Restraints on debtor so freed: duty and responsibility of magistrates in liberating, ii. 443-4.
- Debtor confined in Abbey jail for debt contracted within sanctuary entitled to bill of health, ii. 464-5.
- Prisoner out on bill of health entitled to *cessio*, ii. 473-4.
- To SHIPS sailing from suspected port, i. 601-2.

BILL OF LADING—

- Sale of goods by endorsement, and delivery of, i. 212-3.
- Whether goods transferred by bill of lading may be stopped *in transitu*, i. 213-4.

BILL OF LADING—continued.

- Not against third party, i. 214-5.
- Effect of bills of lading in a question of stoppage *in transitu*, i. 230-1.
- Use of negotiable bills of lading, i. 234-5.
- Endorsed bill of lading without notice, i. 235-6.
- Opinions of Valin and Emerigon as to the negotiability of bills of lading, i. 235-7.
- In England, bills of lading held negotiable, *ib.*
- Right of stopping ineffectual against endorsee of bill of lading, *ib.*
- Exceptions to the rule, i. 236-7.
- Effect of foreign laws, *ib.*
- Endorsation with notice, i. 237.
- Confidential endorsation, i. 238.
- Knowledge of consignee's insolvency, *ib.*
- See STOPPING IN TRANSITU.

TRANSFERENCE BY—

- In security or payment, ii. 12-3.
- Assignment of, ii. 13-4.

EFFECT OF BILL OF LADING IN CONTRACT OF AFFREIGHTMENT IN GENERAL SHIP, i. 590-1.

- Fixes goods on ship, *ib.*
- Nature and form of, *ib.* note.
- Must be stamped, i. 590-5.
- Several parts of it, *ib.*
- Questions that may arise under it, *ib.*
- Obligations of owners and master, i. 591-2.
- Condition of the goods, *ib.*
- Master in general only liable for external packages, *ib.*
- Unless bill bears description of goods, *ib.*
- Where bill bears quality or contents unknown, *ib.*
- Effect of bill as evidence of loss in question on insurance, where master examines and certifies condition of goods, *ib.*
- Competition of holders of bills, *ib.*
- Obligation on masters where several parts of bill endorsed to different persons, *ib.*
- Rule is, that property passes by bill first endorsed, i. 593-4.
- Where bills signed to different persons, *ib.*
- Can bill be altered? *ib.*
- Master's obligation to deliver, subject to vendor's right of stoppage *in transitu*, unless bill endorsed to a third party for value, i. 594-5.
- Effect of endorsement, *ib.*
- Blank endorsements, *ib.*
- Conditional endorsements, i. 595-6.
- Burden of paying freight, *ib.*
- Effect of previous receipt, *ib.*
- Responsibility of shipmaster for goods not in bill, i. 611-2.
- Bills bearing contents unknown, *onus probandi* on shipper, *ib.*

See FREIGHT—RESPONSIBILITY—LIEN.**BILL OF SALE OF A SHIP, i. 154-5.****BLANK STAMP—**

- Effect of signing, i. 415-6.
- In bills, i. 415.
- Endorsation, i. 425.
- In bill of lading, i. 594-5.
- In bonds, ii. 15-6.

BLAZON of messenger must be displayed at apprehending debtor, ii. 436-7.**BLEACHER, lien of, ii. 104-5.****BLOCKADE, restriction on the trade of neutrals trading with belligerents in consequence of, i. 324-5.****BOND—**

- Backbond and absolute disposition, i. 713-4.
- For prior debt, ii. 196-7.
- See ABSOLUTE.

OF CAUTION for bank agent, i. 380.**VOL. II.****BOND—continued.****OF CAUTION—continued.**

- For a messenger, i. 381.
- For a notary, i. 383.
- For a cash account, i. 384.
- See CAUTIONARY.
- Of caution in losing arrestment, ii. 66-7.
- For a trustee, ii. 315.
- For a composition, ii. 352, note.
- De judicio sisti*, i. 396-7.
- Judicatum solvi*, i. 400.
- In suspension or advocacy, i. 401-2.
- Of presentation, *ib.*

OF CORROBORATION—

- How far challengeable on 1696, ii. 197-8.
- Accumulation of principal and interest by, i. 696-7.
- Effect of heritable bond of, in rendering debt heritable, ii. 4.
- Heritable, history of, i. 712-3.
- As a real security, *ib.*
- Effect of partial payments on, i. 578.
- Sale by creditor under it, i. 309-10.
- Effect of collateral obligation for payment of interest, i. 364-5.

AND DISPOSITION IN SECURITY, i. 713-4.**TO KING for duties, ii. 19-20.****OF ANNUITY, i. 352-3.**

- Redeemable bond of annuity, 359.
- Bond secluding executors, ii. 6-7.
- English penal bond, adjudication upon, i. 776-7.

SIMPLE MONEY BOND or agreement—

- Claims on, i. 352-3.
- Amount of claim, evidence to support it, *ib.*
- Prescription of bonds, *ib.*
- Where holograph, *ib.*
- Interruption of prescription, *ib.*
- English double bonds, *ib.*

AD FACTA PRÆSTANDA—

- Claims on, i. 352.
- Amount of the claim, *ib.*
- When competent in bankruptcy, i. 352-3.

OF PROVISION to wife and children, i. 680-1.**Challenge of, on deathbed, i. 88-9.****See MARRIAGE CONTRACTS.****BY MASTER AND OWNERS OF SHIP at obtaining register, i. 152-3.****BOND DEBTS, ii. 15.****See DEBTS.****BONDING ACTS—**

- Commentary on, i. 198-9.
- Manner of transferring goods *in publica custodia* under Bonding Act, i. 203-4.
- Bonding or impledging goods for duties, ii. 19-20.
- See WAREHOUSING—DELIVERY.

BONORUM, CESSIO, ii. 469-70.**See CESSIO.****BONORUM, COMMUNIO, i. 678-9.****BONORUM, OMNIUM—**

- Conveyance by debtor applying for Act of Grace, ii. 447.

Obtaining *cessio*, ii. 482-3.**See CONVEYANCE.****BOOK DEBT, or open account, i. 347-8.**

- Proof of the debt *prima facie*, *ib.*
- Further evidence, *ib.*
- Prescription of merchants' accounts, etc., i. 348-9.
- How claim established after prescription, i. 349-50.
- Assignment of, ii. 19.
- See PRESCRIPTION.

BOOKING of prisoners for debt, ii. 436-7.

- Of debtors within sanctuary in record of Abbey Court, ii. 462-3.

BOOKS and papers connected with bankrupt estate. See SEQUESTRATION.
 Bankrupt who had no books denied *cessio*, ii. 480.
 Effect of books in proof of debt, ii. 310-1.
 In a question of prescription, *ib.*

BOOKS OR LITERARY WORKS, property in, i. 110-1.
 See LITERARY PROPERTY.

BORDER warrants, ii. 449-50.

BOTTOMRY and RESPONDENTIA—
 Loans of money on, i. 577-8.
 Definition of, *ib.*
 Parties to the contract, *ib.*
 Who entitled to enter into it, *ib.*
 Owners of ship, i. 578-9.
 Owners of goods, *ib.*
 Power of the master, *ib.*
 Form of the contract, *ib.*
 The sum lent to be expressed, *ib.*
 Must bear for the use of ship, *ib.*
 Must be for repairs or furnishings, i. 579-80.
 Maritime interest, *ib.*
 Subjects of bottomry and *respondentia*, *ib.*
 Bottomry on ship or freight, *ib.*
 May be entered into though ship at sea, i. 580-1.
 Effect of the contract, *ib.*
 Right of lender, *ib.*
 Preference of bottomry creditors, *ib.*
 Risks to which liable, *ib.*
 Where ship has sailed, i. 581-2.
 Where not seaworthy, *ib.*
 Fair loss, general and particular average, *ib.*
 Completion of the voyage, i. 582-3.
 How to make debt effectual, *ib.*
 Ranking of bottomry creditors, *ib.*
Respondentia, *ib.*
 Claims under, i. 583-4.
 Creditor may take collateral security, *ib.*

BOUGHT and SOLD notes, i. 458-9. See SALE.

BREACH of WARRANTY in insurance, i. 662-3.
 See INSURANCE—CHARTER-PARTY.

BRIEVES for trial of causes, i. 4-5.

BRITISH LINEN COMPANY BANK, how erected—how stock transferred, i. 101-2.

BROUAGE contracts, to procure a marriage, illegal, i. 321-2.

BROKER—
 Insurance broker's lien, ii. 115-6.
 Business of insurance broker, *ib.*
 No power in ordinary case to recover amount of loss, *ib.*
 Lien on sums recovered where he has such power, ii. 115-6.
 Power of recovering loss where he has a *del credere* commission, ii. 116-7.
 Recovery of policy delivered to principal reinvests with lien, *ib.*
 No lien to retain premiums on bankruptcy of underwriter, ii. 117-8.
 Whether lien of broker available to underwriter against insured, *ib.*
 Balancing accounts on broker's failure, ii. 126-7.
 Settlement of accounts between broker and insured, *ib.* ii. 131-2.
 Effect as to compensation against underwriter, *ib.*
 Whether compensation on other debts, *ib.*
 Where premiums paid by broker to underwriter, *ib.*
 Question between estate of broker and insured, *ib.*
 Balancing accounts on underwriter's failure, ii. 127-8.
 On failure of assured, ii. 131-2.

CLAIMS BY, on bankruptcy of insured for premiums, i. 645-6.
 Effect of delivery of receipt in policy to broker, i. 646-7.

BROKER—continued.

CLAIMS BY—continued.

Underwriters may claim on broker's bankruptcy where premiums unpaid, i. 646-7.
 Claim by broker not barred by receipt in the policy, i. 448-9.
 Grounds of broker's claim, *ib.*
 Policy, i. 648-9.
 Proofs to support claim, *ib.*
 Policy not sufficient to settle losses or return premiums, but other evidence also to prove order to insure, *ib.*
 Amount of claim, *ib.*
 Suffers diminution by return premium, *ib.*
 Not affected by claim for loss, *ib.*
 See INSURANCE—COMPENSATION—LIEN.

MERCANTILE, sale by, i. 458-9.
 Bought and sold notes, *ib.*
 Implied condition of negative by seller, if purchaser's name not communicated to him, i. 459-60.
 Misnomer of buyer, *ib.*
 Description of mercantile agent or broker, i. 506-7.
 Constitution of mercantile agency, i. 508-9.
 See FACTOR—COMMISSION—SALE.

BROKERAGE, rate of, i. 481.

BUILDING MATERIALS, how transferred, i. 193-4.

BUILT of a ship, proof of, at obtaining registry, i. 151-2.
 See SHIP.

BURDENS RESERVED, i. 38-9.
 As securities for debt, i. 725-6.
 Competition before donee's right completed by infetment, *ib.*
 Constitution of, i. 726-7.
 Debt must be declared a burden on the lands, not a personal debt, *ib.*
 Must be expressed as a burden in dispositive clause, i. 728-9.
 Must be expressed and inserted in *sasine*, *ib.*
 Must be specific in amount and name, i. 730-1.
 Nature and effect of the right, i. 730-1.
 Right acquired by the creditors, *ib.*
 Criterion of preference, *ib.*
 Form of transmission, *ib.*
 Conveyance of creditor's right in reserved burden, *ib.*
 How to make effectual, i. 731-2.
 Order of ranking in competition, *ib.*
 Ranking of burdens by reservation, ii. 402.
 Reserved liferent, i. 52-3.
 See LIFERENT.

FACULTIES AND POWERS to burden, i. 39-40.
 Faculty reserved to the granter, *ib.*
 It may be adjudged, *ib.*
 How diligence against it excluded, *ib.*
 Deed expressing faculty must be definite in extent, and on record, *ib.*
 Nature of the deed exercising it, *ib.*
 Or of diligence for attaching it, *ib.*
 Faculty to be exercised by a third party, i. 41-2.
 Effect of faculty in competition, *ib.*
 After death of holder of the power, *ib.*
 Where no real right created and on record, *ib.*
 Competition betwixt creditors of donee and faculty creditor, *ib.*
 Faculty creditor by personal bond postponed to real creditors of donee, i. 42-3.
 Competition of faculty creditors with personal creditors of donee, *ib.*
 Donor's personal creditors with faculty creditor, *ib.*
 Diligence by creditor of holder of faculty after his death to attach faculty, how far competent, i. 43-4.

AND SECURITIES, real effect of decree of sale in absence of holders of, ii. 259-60.

BURDENS RESERVED—continued.**AND SECURITIES—continued.**

Real burdens and securities to be paid out of price of land sold under sequestration, ii. 344-5.

What real securities entitled to preference, *ib.*

Effect of inhibition, *ib.*

See SECURITIES—DEBITA FUNDI.

PUBLIC, i. 739.

Land-tax, *ib.*

Repairs of churches, etc., i. 739-40.

JUDICIAL BURDEN of jedge and warrant, i. 784-5.

By EXCAMBION and real warrandice, i. 733-4.

EFFECT OF RIGHTS held under qualifications and conditions, i. 300-1.

See QUALIFIED RIGHT.

BURGAGE SUBJECTS—

Completing conveyances, and securities over, i. 721-2.

Sasine, *ib.*

Recording, i. 722.

Sasine on heritable bond over, to be held in feu of granter, *ib.*

Judicial burden on, by jedge and warrant, i. 784-5.

BURGH, privilege of arresting debtors within, ii. 430-1.

See WARDING.

BUSTS or Models, property in, i. 119-20.**BUYER—**

Claim of, against seller for delivery, etc., i. 476-7.

Where price not paid, *ib.*

Where price paid and goods undelivered, i. 477-8.

Damages, *ib.*

Direct damage, i. 478.

Constructively direct, i. 479-80.

Control of equity as to damages, *ib.*

At what point of time is estimate of direct damage to be struck, *ib.*

Of the buyer's rejection of goods sold for which he is unable to pay, i. 253-4.

See VENDEE—SALE—DELIVERY—STOPPING IN TRANSITU.

CALICO PRINTERS, lien of, ii. 102-3.**CALLS for money by trustee, how creditors bound for, ii. 322-1.**

Where expense exceeds fund, whether creditor with lien bound to contribute, *ib.*

CANONS of ranking of creditors with real securities, in competition with preferences by exclusion, ii. 404-5.**CAPTAIN of ship, i. 554-5.**

Whether entitled to salvage, i. 639-40.

Captain and crew, insufficiency of, in a question of seaworthiness, i. 598-9.

See SHIPMASTER.

CAPTION—

Imprisonment on, ii. 49-50.

Warrants of caption, ii. 435-6.

Horning, days of charge, *ib.* note.

Denunciation, *ib.* note.

Letters of caption, *ib.*

AND HORNING to infer bankruptcy, ii. 159-60.

Must be regular, *ib.*

CAPTURE extinguishes seamen's claim for wages, i. 564.

Claim revives on recapture, i. 565.

Recapture, salvage for, i. 639-40.

Who entitled to claim as joint captors, *ib.*

Capture by pirates a peril of the sea, i. 606-7.

Capture extinguishes claim for freight, i. 619-20.

See SHIP—INSURANCE—SEAMEN.

CARELESSNESS of drivers of coaches, claims by passengers for, i. 491-2.**CARGO—**

Obligation on shipmaster in landing, i. 604-5.

On the shipper as to furnishing, i. 612-3.

CARGO—continued.

Quantity, i. 612-3.

Time, i. 613-4.

Contribution on, for general average, i. 616-7.

Loss on, adjustment of, i. 636-7.

Valuation and adjustment of loss on cargo under insurance, i. 660-1.

Where part of package damaged, i. 661-2.

Where there is a valued policy, i. 662-3.

Consignment of cargoes at sea, ii. 13-4.

Hypothec on, for average loss, ii. 39-40.

Ranking of creditors on, ii. 406-7.

Sale of ship and cargo for necessities, i. 583-4.

CARRIAGE of Goods, effect of possession under the contract for, i. 275-6.

Negligence of seller in following directions as to carriage, i. 475, 476-7.

Delivery of goods to shipmaster or carrier, effect of, in transferring, i. 219-20.

BY LAND, HIRING OF, i. 490-1.

Claim by carrier on bankruptcy of owner of goods, *ib.*

Claim by owners against carrier, i. 491-2.

By passengers in stage-coaches for carelessness or unskilfulness of drivers, *ib.*

Negligence in carriage of goods, i. 492-3.

Principals liable for servants, i. 493-4.

What sufficient to charge carrier with goods, *ib.*

The delivery requisite, *ib.*

See NAUTÆ CAUPONES.

LIEN FOR, ii. 94-5.

For freight of goods carried by water, *ib.*

Property over which it extends, *ib.*

Luggage, ii. 95-6.

Claim against consignee in bill of lading, *ib.*

Delivery divests the lien, ii. 96-7.

Lien for land carriage, ii. 97-8.

To proprietors of waggons and stage-coaches, *ib.*

CARRIER—

Delivery of goods in hands of carrier, i. 212-3.

Delivery of goods to carrier for carriage to the buyer, i. 219-20.

Where a receipt taken to buyer, *ib.*

Restrictive receipt, *ib.*

General receipt, *ib.*

What held authority to grant a receipt, i. 222-3.

CLAIM BY CARRIER on bankruptcy of owners of goods, i. 490-1.

Claim against him by owners of goods, i. 491-2.

By passengers in stage-coaches, for negligence of drivers, etc., *ib.*

Responsibility for negligence in carriage of goods, i. 492.

Principals liable for servants, i. 493-4.

What sufficient to charge carrier with goods, *ib.*

What sufficient delivery of the goods, *ib.*

Liable for porters, carters, etc., i. 494-5.

Responsibility under the edict *Nautæ Caupones*, etc., i. 496.

Limitation of responsibility, i. 501-2.

See NAUTÆ CAUPONES, ETC.—DELIVERY—STOPPING IN TRANSITU.

CART—

Delivery into seller's carts, i. 183-4.

Into buyer's carts, *ib.*

See DELIVERY.

CASAREGIS—

Il Consolato del Mare, i. 547-8.

Biographical notice of, *ib.* note.

CASH ACCOUNTS—

Or credits with banks, cautionary obligation for, i. 384-5.

Nature and use of cash-credits, *ib.*

Nature and form of the bond of caution, i. 385-6.

CASH ACCOUNTS—*continued.*

Operations for which cautioners liable, i. 385-6.
 Obligations on the bank and the cautioners, i. 386-7.
 How cautioners may put an end to their responsibility, *ib.*
 Notice to the bank, *ib.*
 Death of cautioner, obligation on his representatives, *ib.*
 Claim in bankruptcy under the bond, how to be made, i. 387-8.
 Effect of change of persons concerned in the transaction, *ib.*

Change of partners of firm of a company, etc., *ib.*

HERITABLE SECURITIES for cash accounts or credits, i. 714-5.

Of the method of securing cash accounts against challenge on 1696, ii. 219-20.
 Objections to heritable securities for, *ib.*
 Attempts to reconcile such securities with law, ii. 220-1.
 Security in relief of cautioners for, ii. 222.
 Absolute disposition with backbond used as cover to future debts, ii. 225-6.
 Restricted by recording bond or judicial proceedings, *ib.*
 Heritable security for cash accounts allowed by statute, ii. 224-5.

Cash account with banker, *ib.*

With a merchant, *ib.*

Whether security for credit in commodities allowed, *ib.*

Where credit stipulates that operations shall be by bills, ii. 225-6.

Effect of recording backbond, where security is by absolute disposition and backbond, *ib.*

A cash account may be secured over moveables, independently of statute, *ib.*

See CREDITS—CAUTIONARY.

PAYMENTS IN, are not challengeable on 1621, ii. 187.

Nor on 1696, c. 5, ii. 200-1.

Cash includes circulating notes, ii. 201-2.

CASUALTIES—

Casualties of superiority, i. 22-3.

Non-entry duties, *ib.*

Declarator of non-entry, *ib.*

Relief, *ib.*

Composition for entry, *ib.*

Provisions against the evasion of casualties, i. 25-6.

Preference for, ii. 26-7.

See SUPERIOR—ENTRY.

CATHOLIC and secondary creditors, ranking of, ii. 416-7.

Creditor bound to claim against primary debtor, or to assign to the cautioner, *ib.*

And to claim equally against co-principals, or to assign, *ib.*

Bound to claim equally from two estates of same debtor where separate interests, *ib.*

Same where secondary creditors, ii. 417-8.

Where secondary creditors on one estate only, *ib.*

What interest sufficient to affect catholic creditors, *ib.*

Doctrine in moveables, ii. 418-9.

Distinction where catholic creditor interested, *ib.*

CATTLE, marking of, by buyer's mark, equivalent to actual delivery, i. 187.

Responsibility for safe custody of, i. 487-8.

Landlord's hypothec over, ii. 28-9.

CAUTION—

Bond of, in loosing arrestment, ii. 66-7.

For trustee, amount of, should be fixed by creditors, ii. 315-6.

Where no sum fixed, security must be given for whole intromissions, *ib.*

Of caution for composition, ii. 352-3.

Must extend to whole composition, *ib.*

Offer may be amended, one cautioner may engage for whole, and additional cautioners for specific sums, ii. 353-4.

CAUTION—*continued.*

Reservation of the estate in security and guarantee of cautioners, ii. 353-4.

If more than one cautioner, one or all must be responsible for whole composition; time for offering caution, *ib.*

Bond indispensable, ii. 354-5.

JUDICIAL, i. 396-7.

Inquiry concerning extent of caution *judicio sisti*, *ib.*

See CAUTIONARY OBLIGATIONS—JUDICIO SISTI.

CAUTIONARY OBLIGATIONS, or suretyship in general, claims on, i. 364-5.

Right of cautioners, *ib.*

Right of discussion, *ib.*

Of relief, *ib.*

Of division, *ib.*

Effect of a collateral obligation for payment of interest of a bond, *ib.*

Where principal debtor has failed, cautioners being solvent, *ib.*

Where creditor has claimed against debtor, *ib.*

Where cautioner pays the debt, i. 365-6.

Where creditor has not claimed, cautioner may prove as contingent creditor, *ib.*

Where creditor holds a security, cautioner has a *jus quæsitum* to insist that it be applied, *ib.*

Where more than one cautioner, creditor may demand debt from any of them, on assigning his remedy, *ib.*

Where one cautioner has a security on estate of principal debtor, *ib.*

Effect of it as against the creditors of the principal debtor, and as against the favoured cautioner, *ib.*

Whether he is bound to communicate the benefit to the other cautioners, i. 367-8.

Cases in which the benefit may be peculiar to the cautioner favoured, *ib.*

Where a cautioner has a collateral security over funds of a third person, i. 368-9.

Where cautioners have failed, principal debtor being solvent, *ib.*

Where both cautioners and principal are insolvent, *ib.*

Relief amongst bankrupt estates of cautioners, i. 369-70.

Where principal debtor and one or more of the cautioners have failed, the others being solvent, i. 371-2.

Where there are many cautioners, i. 372-3.

Relief amongst them, *ib.*

Co-obligants for an annuity, ranking against, and their relief, i. 373-4.

EXTINCTION of cautionary obligations, i. 373-4.

Commentary on the Act 1695, c. 5, establishing the septennial limitation or prescription, *ib.*

Who have the benefit of it, i. 374-5.

How the term of cautioner's obligation may be extended, i. 375-6.

Effect of the expiration of the term, i. 376-7.

Discharge of principal debtor, *ib.*

Discharge of a co-cautioner, *ib.*

Discharge of security or of debtor from custody, *ib.*

Acceptance of composition from principal debtor, *ib.*

Compromise for valuing annuity, i. 377-8.

Implied discharge from negligence, *ib.*

FOR FAITHFUL PERFORMANCE of an office, i. 380-1.

For bank agent, *ib.*

Cautioner's security from bank's vigilance, *ib.*

Claims on such bonds, i. 380-1.

Effect of provisions against suspension without consignation, i. 381-2.

Date from which interest is chargeable, *ib.*

Cautioners for messengers, *ib.*

Cautioners for notaries, i. 383-4.

General rules of responsibility by cautioners for performance of office, *ib.*

CAUTIONARY OBLIGATIONS—*continued.*FOR FAITHFUL PERFORMANCE—*continued.*

- Cautionary obligation for cash account, i. 384-5.
- Are bills covered by it? i. 385-6.
- Liability of cautioner's representatives, i. 386-7.
- How to claim in bankruptcy, i. 387-8.
- Effect of a change of the creditor, *ib.*
- Change of the debtor, *ib.*
- Claims on letters of credit or guarantee, *ib.*
- Claims on judicial bonds of caution, i. 396-7.
- Judicio sisti*, *ib.*
- Judicatum solvi*, i. 400-1.
- Caution in suspension or advocacy, i. 401-2.
- Bond of presentation, *ib.*
- Cautionary obligations not gratuitous in meaning of 1621, c. 18, ii. 176-7.
- Where granted in relief of cautioners, not challengeable on 1696, ii. 210, 219-20.

[NOTE on the effect of the provisions of the MERCANTILE LAW AMENDMENT ACT as to guarantees,] i. 402 sqq.

CAUTIONER—

- Security to cautioner engaging for prior debt not challengeable on 1696, ii. 210-1.
- Security to, not challengeable as future debt, ii. 219-20.
- Security to cautioner for cash account, ii. 222-3.
- Cautioner for trustee in sequestration, ii. 315-6.
- Must reside in Scotland, *ib.*
- Should be named to creditors, *ib.*
- Cautioners for composition, whether may retract on alteration of circumstances, ii. 353.
- Rights of the cautioners, ii. 353-4.
- Assignment to them, *ib.*
- Cannot interrupt bankrupt in management where they have no active title, *ib.*
- Have no assignment to estate of bankrupt without express agreement, *ib.*
- Septennial limitations, *ib.*
- Claims against cautioners for composition, ii. 353, 356.
- Effect of discharge by composition against cautioner, ii. 357.
- Principal creditor agreeing does not discharge cautioners, *ib.*
- Distinction betwixt agreeing to private composition, and to a composition under a sequestration, *ib.*
- Cautioner for bank agent, i. 380-1.
- For messengers, i. 381-2.
- For notaries, i. 383.
- For cash account, i. 384-5.
- Judicial cautioner, i. 396-7.
- In loosing arrestment, ii. 66-7.
- See CAUTIONARY.

OBLIGATIONS OF CAUTIONERS limited by Act 1695, c. 5, i. 373-4.

See CAUTIONARY.

LIEN TO CAUTIONERS where indebted to person for whom they are sureties, ii. 117-8.

Extent of the lien; distinction of English and Scottish laws, ii. 118-9.

CAUTIONARY OBLIGATIONS.

CELLAR—

- Goods delivered into public warehouse or cellar for convenience of shipmaster or carrier, held to be *in transitu*, i. 216-7.
- Marking of such goods by buyer completes the delivery, *ib.*
- Landlord's hypothec over *invecta et illata* in, ii. 30.

CERTIFICATE to bankrupt in England, ii. 379-81.

- By trustee in sequestration, of concurrence to composition, ii. 350.
- To bankrupt applying for *cessio*, ii. 478.
- Of registry of ships, i. 152-3.
- The badge of ownership, *ib.*

CERTIFICATE—*continued.*

- Recital of it in bill of sale, i. 155-6.
 - Of the endorsement on certificate on a transfer of the ship, i. 156.
 - Duties of the shipmaster as to keeping and exhibiting the certificate, i. 556-7.
 - See REGISTRY.
- CERTIFICATION—
- Decree of, effect of, in securing purchaser at judicial sale, ii. 257-9.
 - Sale by apparent heir has no certification, ii. 260.
 - Effect of, in ranking, ii. 266.
 - Decree of, *contra non producta*, ii. 249.

CESSIO BONORUM—

- Difference in principle and effect between *cessio* and discharge, ii. 469-70.
- Effect of *cessio* in confining discharges to proper objects, *ib.*
- General principle of the law of *cessio*, ii. 470-1.
- History of *cessio*, *ib.*
- In France, in Scotland, ii. 471-2.
- Summary of the law of *cessio*, ii. 472-3.
- Title to pursue, *ib.*
- Imprisonment for a month necessary, *ib.*
- Must be uninterrupted, ii. 473-4.
- Summons may be raised before expiration of month, *ib.*
- Bill of health no bar, *ib.*
- Not necessary to continue imprisonment till decree, ii. 474-5.
- Debtor not in prison at decree, *ib.*
- Must be subject to Court when decree pronounced, *ib.*
- Where creditor abandons diligence within the month, *ib.*
- Court would interpose to prevent oppression by successive abandonments, *ib.*
- Imprisonment in Abbey jail, *ib.*
- Imprisonment must be for debt, *ib.*
- Imprisonment on *meditatio fugæ* warrant, ii. 475-6.
- Debtor *ex delicto* barred, *ib.*
- Debtor for damages, *ib.*
- Debtor *ad factum præstandum*, *ib.*
- Debtor must be in power of Court at decree, ii. 476.
- And out of sanctuary, *ib.*
- Must be insolvent, *ib.*
- Foreigner pursuing *cessio*, *ib.*
- Oath not by anticipation, *ib.*

OF THE ACTION—

- Persons to be called, and what incumbent on pursuer to establish, ii. 476-7.
- Conclusions, ii. 477-8.
- Creditors must all be cited, *ib.*
- Evidence of imprisonment, *ib.*
- Debtor not bound to prove innocence, *ib.*
- Proof of insolvency, *ib.*
- Whether person whose solvency doubtful has the benefit, *ib.*
- Where a sequestration is depending, ii. 478.
- Certificate by the trustee, *ib.*
- Where trustee refuses, *ib.*

OF THE DEFENCES, and what incumbent on opposing creditors, ii. 478-9.

- Defences on the merits, *ib.*
- Fraudulent bankrupt not entitled to *cessio*, *ib.*
- Smuggling, ii. 479-80.
- Liquor Act, *ib.*
- Fraudulent dealings, *ib.*
- Delicts detached, *ib.*
- Fraud hurtful to the creditors, *ib.*
- Aliment of bastard, ii. 480-1.
- Extravagance, *ib.*
- Concealment of funds, *ib.*
- Want of books, *ib.*
- Discretionary power; refusal *hoc statu*, ii. 481.

CESSIO BONORUM—*continued.*OF THE DEFENCES—*continued.*

- Onus probandi*, ii. 481.
- Interlocutor, *ib.*
- Temporary refusal, ii. 481-2.
- Effect of judgment of refusal, *ib.*
- How to be resumed, *ib.*
- Refusal continues the imprisonment, *ib.*
- Where liberation necessary for debtor's defence, *ib.*
- Judgment finding title to *cessio*, ii. 482-3.
- Disposition *omnium bonorum*, *ib.*
- Oath, *ib.*
- Remedy against delay, *ib.*
- What funds to be assigned, *ib.*
- Working tools, *ib.*
- Rules as to assigning stipends, salaries, etc., ii. 483-4.
- Leases with exclusion, *ib.*
- Decree of *cessio*, *ib.*
- Effect as personal protection, *ib.*
- Subsequent debts, *ib.*
- Revival of diligence, *ib.*
- Proceedings against debtor acquiring property, *ib.*
- Effect on diligence against funds, *ib.*
- Effect on diligence begun, ii. 485-6.
- Effect of conveyance, *ib.*
- New acquisitions, *ib.*
- What may be reserved, *ib.*

CHALLENGE—

- Of heir's voluntary conveyance by ancestor's creditors, i. 770-1.
- See ANCESTOR.
- Of alienations to conjunct and confident persons under 1621, c. 18, ii. 171-2.
- Title to challenge, *ib.*
- Deeds challengeable, ii. 174-5.
- Description of conjunct and confident persons, *ib.*
- Consideration for deed, ii. 178-9.
- Question of grantor's solvency, ii. 179-80.
- Effect of lapse of time, ii. 181-2.
- Form of the action, *ib.*
- Effect of the nullity, ii. 182-3.
- Of alienations without onerous consideration reducible at common law, ii. 184-5.
- Under second branch of 1621, of conveyances to the prejudice of diligence begun, *ib.*
- Challenge on 1696, c. 5, ii. 191-2.
- Of securities for prior debts, ii. 194-5.
- Title to challenge, *ib.*
- Form of the action, ii. 195.
- Deeds liable to challenge, *ib.*
- Effect of the reduction, ii. 216-7.
- Of securities for future debts, ii. 217.
- Challenge of fraudulent preferences at common law, ii. 225.
- Fraud and collusion necessary, *ib.*
- Aided by statute, ii. 226.
- Whether bankrupt may acquire right to challenge on 1696, ii. 195-6.
- Of a composition contract unfairly accomplished, ii. 355-6.
- Grounds of reduction, *ib.*
- Effect of it, ii. 356.
- Challenge of trust-deeds under 1621 and 1696, ii. 388-9.
- Under the Sequestration Act, ii. 390-1.
- Personal exception against challenge, ii. 393-4.
- Assignment to bankrupt of right to challenge preferences, ii. 351-2.
- Must be made part of negotiation for discharge, and expressly assigned, *ib.*
- Creditors with preferences must be certified of the reservation intended, ii. 352.
- See FRAUDULENT ALIENATION.

CHANGES on property, effects of, as to the question of ownership, i. 294-5.

- On the creditor in a cash account; on the debtor, effects as to cautioner's responsibility, i. 387-8.
- By destination, effect as to heritable and moveable, ii. 2-3.
- Of partners in a company, effect on obligations, ii. 525.
- See SPECIFICATION—FRAUD.

CHARGE OF HORNING—

- Whether begins litigiousity in challenge on 1621, ii. 186.
- Where it is proper to give charge of horning before raising adjudication, the charge will be held to begin litigiousity, *ib.*
- Days of, must expire before pointing, ii. 57.
- Days of charge, ii. 435, note.
- To ENTER HEIR to property to which debtor has succeeded, i. 747-8.
- Special charge, general and special charge, i. 776-7.
- Heir not obliged to answer till expiry of *annus deliberandi*, *ib.*
- Heir refusing to enter, *ib.*
- Charges to enter by ancestor's creditors, previous to adjudication, i. 750-1.
- General charge, *ib.*
- Action of constitution, *ib.*
- Special charge, *ib.*
- Where heir renounces, i. 751.
- Defects in charge, i. 778.
- What sort of charge necessary in adjudication of simple heritage, i. 794-5.

CHARGING superiors, i. 755-6.

CHARTER and SASINE—

- Completion of adjudger's right by, i. 743-4.
- Possession with, for forty years after expiry of legal gives an irredeemable title, i. 744-5.
- Retention of charter by superior, in security of casualties, i. 25-6.

CHARTERED COMPANIES, i. 100-1, ii. 4, 545.

CHARTERED SHIP, i. 585-6.

CHARTER-PARTY of affreightment, general principles of the contract, i. 585-6.

- Does not absolutely require writing, i. 586.
- May be proved by owner's oath, *ib.*
- When goods on board, bill of lading a sufficient charter-party, *ib.*
- Affreightment of whole ship, *ib.*
- Of part, *ib.*
- Ships may be hired for the voyage or a particular time, *ib.*
- Analysis of the contract, i. 588-9.
- Hiring of the ship, *ib.*
- Obligations of the owners and master, *ib.*
- Obligations of the merchant, *ib.*
- Of ships on general freight and bills of lading, i. 589-90.
- Advertisement of ship on general freight, *ib.*
- Bill of lading, *ib.*
- Of engaging freight in a general ship, *ib.*
- No engagement with owners effectual unless intimated to master, *ib.*
- Merchant coming on chance must yield preference, if master has engaged, or owners agreed and intimated to master for unoccupied room, *ib.*
- Bills of lading, i. 590-1.
- Chief use to fix goods on master, *ib.*
- See BILL OF LADING.

CLAIMS on CONTRACTS OF AFFREIGHTMENT, ON THE BANKRUPTCY OF THE SHIPOWNERS, i. 595-6.

- In relation to the loading, *ib.*
- As to goods taken on board, i. 596-7.
- Master or owners liable for goods in bill of lading, *ib.*
- Of taking goods on board, *ib.*
- Care and skill requisite, *ib.*

CHARTER-PARTY—*continued*.CLAIMS ON CONTRACTS OF AFFREIGHTMENT—*continued*.

- Custom of the port regulates responsibility, i. 596-7.
 - Goods must be properly stowed, *ib*.
 - Claims as to condition of the ship, i. 597-8.
 - Must be seaworthy, *ib*.
 - Ignorance of defects no defence against owner's responsibility, *ib*.
 - Sufficiency of ship, rigging, and tackle, *ib*.
 - Captain and crew, i. 598-9.
 - Pilot, *ib*.
 - Bills of health, licences, and necessary papers, i. 601-2.
 - Claims in relation to the conduct of the voyage, i. 602-3.
 - Ship must be ready at port of delivery, *ib*.
 - Sailing, *ib*.
 - Bound not to sail in a gale, *ib*.
 - Sailing with convoy, i. 602-3.
 - Rules of responsibility as to sailing with convoy, *ib*.
 - Course of the voyage, i. 603-4.
 - Delay or deviation by storm or enemy, *ib*.
 - Master not bound to send goods in another ship, *ib*.
 - Claims as to termination of voyage and delivery, i. 604-5.
 - Obligation on shipmaster as to delivery,—landing goods, *ib*.
 - Weighing goods, etc., *ib*.
 - Master acquits himself by delivering goods to wharfingers, i. 605-6.
 - Responsibility of owner and master under edict *Nautæ Caupones*, *ib*.
 - Exceptions in charter-party from responsibility, i. 606.
 - Departure from proper course, i. 608.
 - Loss by failure of contract, how estimated, *ib*.
 - Power of calling at intermediate ports, *ib*.
 - Statutes limiting responsibility, *ib*.
 - Owners not liable for fire, i. 609-10.
 - Nor beyond value of ship and freight, *ib*.
 - Nor for gold, silver, jewels, etc., unless in bill of lading, *ib*.
 - Whether for pilot, i. 610-1.
 - Whether master liable in case of fire, *ib*.
 - Damage by spilling corrosive liquids, *ib*.
 - Embezzlement by master or mariners, i. 611-2.
 - Cases where master may be liable, the owners free, *ib*.
 - Where master liable, though goods not in bill of lading, *ib*.
 - Proportional distribution among claimants, where owners only liable to value of ship and freight, *ib*.
 - Where bill of lading bears contents unknown, *onus probandi* on merchant, *ib*.
 - Difficulty where commodity in quantity, *ib*.
- CLAIMS ON THE BANKRUPTCY OF THE MERCHANT OR SHIPPER, i. 612-3.
- Obligations on merchant or shipper under the charter-party, *ib*.
 - To furnish a cargo, *ib*.
 - To pay freight, i. 613.
 - Who liable for, i. 615.
 - When due, i. 616.
 - Paid in advance, i. 619.
 - Dead freight, i. 620.
 - Demurrage, i. 621-2.
 - Lay days, *ib*.
 - Days of demurrage, *ib*.
 - Where no lay days stipulated, i. 623-4.
 - Commencement of demurrage, *ib*.
 - Collision of ships, i. 625-6.
 - On whom loss falls, i. 626.
 - General average, i. 629.
 - Salvage, i. 638.
 - Contracts of insurance, i. 643-4.
- See FREIGHT—DEMURRAGE—COLLISION—AVERAGE—INSURANCE.

CHATELS. In England, doctrine of reputed ownership restricted to goods and chattels, i. 269-70.

CHIEF, extent in, ii. 41-2.

CHILDREN—

- Claims by, independently of special contract, i. 678-9.
- Legitim, *ib*.
- Share of goods in communion, *ib*.
- Cannot compete with creditors for legal provisions, i. 680-1.
- May compete with creditors for their mother's share of common fund, where she died during husband's solvency, *ib*.
- Cannot claim on father's estate for legitim, *ib*.
- Distinction as to claims between legitimate and natural children, *ib*.
- Whether aliment to natural child be not a proper debt, *ib*.
- Provisions under special contract, i. 684-5.
- The conception of provisions regulates their claims to preference, or to rank as creditors, *ib*.
- Where they have the character merely of heirs, *ib*.
- Effect of this against father, i. 685-6.
- Where they have the character of creditors, *ib*.
- Jus crediti*, *ib*.
- Claims under postnuptial contract, i. 687-8.
- Provisions in favour of, whether onerous in sense of Act 1621, c. 18, ii. 181-2.

See CONJUNCT RIGHTS.

CHOSE in action, i. 100-1.

CHURCH and MANSE—

- Expense of repairs not *debitum fundi*, i. 739-40.
- Arrears of those burdens, *ib*.

CIRCUMVENTION, facility, and lesion, restitution on, i. 136-7.

See RESTITUTION.

CIRCUITOUS re-exchange, i. 429-30.

See BILLS.

Circuitous transaction to confer a preference, challengeable at common law, ii. 229-30.

CITATION of creditors in a *cessio*, ii. 476-7.

Of a company, ii. 507.

Citation of, in a sequestration, ii. 564.

CLAIM in a confirmation, ii. 77.

CLAIMS—

- Production of, in ranking and sale, do not render debt heritable, ii. 6.
 - By ancestor's creditor, in ranking and sale, to acquire a preference, i. 769-70.
 - Production of claims in ranking and sale, how enforced, ii. 249-50.
 - Term for production, *ib*.
 - Decree of certification *contra non producta*, *ib*.
 - Proof of claims, ii. 265-6.
 - Stops prescription, ii. 266-7.
 - State of claims, and order of ranking, *ib*.
- CLAIMS IN SEQUESTRATION, and proof of debts, ii. 304.
- Production of claim stops prescription, *ib*.
 - Requisite to have this effect, *ib*.
 - Oath of verity, ii. 304-5.
 - Production of account, and grounds and vouchers, ii. 309.
 - Whether necessary in all cases to produce copy account, *ib*.
 - What meant by copy account, *ib*.
 - Objections to admission, ii. 310-1.
 - Admission, and enrolling claim, *ib*.
 - Objections, ii. 361.
 - Judgment of trustee on claims, ii. 362.
 - Classing of debts, ii. 364.
 - Preferable creditors, *ib*.
 - Personal creditors, *ib*.
 - Ranking, ii. 364-5.
- See PROOF OF DEBT—RANKING.

CLAIMS—*continued.*

CLAIMS UNDER A TRUST-DEED, whether competent to limit time for production of, ii. 383.

ON CONTRACTS AND OBLIGATIONS, i. 312-3.

Illegal contracts and obligations, i. 317-8.

On debts considered as onerous, future, or contingent, i. 331-2.

On unilateral obligations, i. 351-2.

On mutual contracts, i. 454-5.

Effect of payments, intromissions, etc., on claims of creditors holding securities, ii. 424.

See PAYMENT.

CLARE CONSTAT—

Precept of, i. 736-7.

To whom competent to be granted, i. 737-8.

CLASSING of debts in sequestration, ii. 364.

Preferable creditors, *ib.*

Must value and deduct security, ii. 306-7.

How far creditors may alter valuation where it undergoes a change, *ib.*

Whether may claim dividend where it precedes sale of subject burdened, ii. 363.

Personal creditors, *ib.*

Pure debts accumulated with interest to first deliverance, ii. 364-5.

Future debts suffer deduction of interest till term of payment, *ib.*

Contingent debts, how amount fixed, *ib.*

Ranking, ii. 365.

CLAUSE of pre-emption, i. 25, 27.

De non alienando, *ib.*

Irritant and resolute clauses in entails, i. 44-5.

Clause of devolution in articles of sale, ii. 254-5.

CLERGYMAN—

Benefice of, in England, liable to sequestration, i. 123-4.

How far clergyman's stipend attachable in Scotland, i. 124-5.

Must assign part of stipend before obtaining *cessio*, ii. 483.

CLERK—

Delivery to vendee's servants, clerks, or agents, same as delivery to vendee himself, i. 214-5.

Arrestment in hands of, ii. 69.

Implied mandate to clerk, signing bills, i. 509.

Institorial powers of, i. 510-1.

CLOSE confinement, ii. 439.

Distinction between prisoner for debt and *in meditatione fugæ*, ii. 456.

See IMPRISONMENT.

COACHES—

Owners of, their responsibility for drivers, i. 491.

Obligations on *Nautæ Caupones*, etc., i. 496-7.

Lien on luggage of passengers for hire, ii. 97.

See NAUTÆ CAUPONES.

COAL, liberty of working, whether belongs to a liferenter, i. 60-1.

CODE de Commerce, i. 549-50.

COGNITION and sale by minors, ii. 239.

See SALE.

COGNOSCING of persons insane or fatuous, i. 131-2.

COLLATERAL undertaking on bills, i. 425, 428.

Obligation in a bond for payment of interest, i. 129-30.

Collateral securities, ranking of creditors with, ii. 416.

COLLATION, i. 95.

Right to collate succession, i. 96-7.

To whom the right belongs, *ib.*

Heir also sole executor, is not required to collate with the relict, *ib.*

Collation among descendants and collaterals, *ib.*

Where there are two heirs of conquest and of line, *ib.*

Whether the one is entitled to collate without the other, *ib.*

What share one of several heirs is entitled to if they do not all concur, *ib.*

COLLATION—*continued.*

The heir entitled to collate must be also one of the next of kin, i. 96-7.

Exclusion of the privilege of collation, *ib.*

It will not bar the claim for legitim, *ib.*

Right of the heir to share the moveables without collation, i. 97-8.

Where, not being *alioquin successurus*, he takes the heritable estate not as heir *ab intestato*, but as heir of provision, or by conveyance, *ib.*

Where he takes the estate not directly from the deceased, but from one more remote, *ib.*

Where the person so claiming is heir *alioquin successurus*, *ib.*

Heirs portioners, i. 98-9.

Where the heir succeeds to an estate abroad, *ib.*

Where he claims under the English statute of distributions, *ib.*

Mode of giving effect to the several rights in collation, *ib.*

An insolvent heir cannot dispense with his privilege of collating as against his creditors, *ib.*

Obligation on heir to dispose before collation and confirmation as an executor, *ib.*

Settlement of collation by private contract, *ib.*

By judicial settlement, *ib.*

Exercise of heir's privilege by his creditors, *ib.*

COLLISION OF SHIPS—

Indemnification of loss from, i. 625-6.

Pure accident; actual or presumed fault; where impossible to say who is to blame, *ib.*

OF SETTLING DAMAGE BETWEEN THE SHIPS, i. 626-7.

Ship in fault must indemnify loss, *ib.*

Loss by pure accident, or act of God, falls where it lights, *ib.*

Where the neglect or fault is inscrutable, this an average loss to be divided equally, *ib.*

Consideration of English law on this point, i. 627-8.

Where ships of unequal value, whether they contribute equally or proportionally, according to their value, i. 628-9.

Limitation of shipowner's responsibility, *ib.*

Whether cargo of ship suffers contribution, *ib.*

Whether cargo damaged by collision has benefit of contribution, *ib.*

No defence to ship in fault, that ship under direction of pilot, i. 629-30.

OF SETTLING DAMAGE BETWEEN SHIP AND CARGO, i. 552-3.

Loss from fault of master, or by accident, or where fault inscrutable, *ib.*

COLLUSION and fraud necessary to challenge on common law, ii. 226-8.

Collusion to obtain bankrupt's discharge, ii. 359-60.

COLLUSIVE Possession and Reputed Ownership, i. 269-70.

See REPUTED OWNERSHIP.

PAYMENTS challengeable on 1696, ii. 204-5.

At common law, ii. 228.

COMEDIAN, whether salary of, attachable, i. 126-7.

COMMENTARY on the Act 1621, ii. 171.

On second branch of it, ii. 184.

On the Act 1696, ii. 191.

On the statutes introducing equality among adjudgers, i. 753-4.

On statutes conferring preference on ancestor's creditors, i. 765-6.

On laws establishing equality among creditors doing diligence against personal or moveable estate during debtor's life, ii. 72.

On Act of Sederunt 1662, equalizing diligence after death, ii. 82.

COMMENTATORS on maritime law, i. 545-6.

COMMISSARIES, confirmation by, ii. 76.

COMMISSION of military officer—

Sale or exchange of, i. 121-2.

COMMISSION—*continued.*

Whether creditors may compel a sale, i. 122.

Voluntary sale, *ib.*

OR HIRE OF MERCANTILE AGENTS—

Rate of, i. 515-6.

Of trustee in sequestration, ii. 320.

COMMISSION AGENT—

Transfer of goods in his warehouse, how completed, i. 198-9.

Commission agent making advances on goods consigned to him, i. 294-5.

DEL CREDERE, i. 394-5.

See DEL CREDERE.

COMMISSION OR MERCANTILE AGENCY, i. 505-6.

Procurator; institorial power; exercitorial power, i. 506-7.

Factor's agents, brokers; description of, *ib.*

Constitution of factory, i. 508-9.

Powers, *ib.*

Power of attorney—letter, *ib.*

Implied mandate, *ib.*

Consigned goods, *ib.*

Procurator, i. 509-10.

Accredited servants, *ib.*

Præpositura, *ib.*

Institorial power, i. 510-1.

Commission or hire, rate of, i. 515-6.

Diligence prestable, *ib.*

Extent of authority and power of factor, i. 516-7.

His power to pledge goods of principal, i. 517-8.

Termination of factory, i. 522-3.

See FACTORY.

CLAIMS ON BANKRUPTCY OF PRINCIPAL, i. 526-7.

By creditors of principal against third parties, *ib.*

Where factor acted in his own name, third parties have compensation, *ib.*

Claim also affected by factor's lien or right under *del credere* commission, *ib.*

Right of creditors of principal to recover against third parties, *ib.*

Claims against the factor, i. 530-1.

Under his responsibility for diligence, *ib.*

Claims against principal's estate, *ib.*

By factor, *ib.*

By those dealing with factor, *ib.*

Where agent transacted *factorio nomine*, *ib.*

Where contract not in principal's name, i. 536-7.

Remedy against principal not hurt by private agreement between principal and factor, nor though principal paid price to factor, nor by factor failing with balance due principal, *ib.*

Where notice given of principal, and third party chooses to rely on factor, he will not also have claim against principal, *ib.*

Though factor contracts in his own name, principal bound when his name and interest disclosed, *ib.*

Del credere commission affects only settlement between principal and factor, i. 537.

Will not deprive buyer of compensation against principal, *ib.*

Principal liable for neglect or fraud of agent, *ib.*

CLAIMS ON BANKRUPTCY OF FACTOR, i. 537-8.

By agent's estate against third parties, *ib.*

Against the principal, where factor has made advances, i. 539-40.

By third parties against agent's estate, *ib.*

Where principal known, no claim against agent, *ib.*

Except where he engages personally, exceeds instructions, or guilty of fraud, misrepresentation, or negligence, *ib.*

Claims by principal, *ib.*

Where agent has gone beyond instructions, *ib.*

VOL. II.

COMMISSION OR MERCANTILE AGENCY—*continued.*CLAIMS ON BANKRUPTCY OF FACTOR—*continued.*

Where factor had *del credere* commission, i. 544-5.

For negligence, neglect to insure, etc., *ib.*

COMMISSIONERS under a sequestration—

Their election and powers, ii. 320.

Election of, *ib.*

Qualification to vote, ii. 302.

To be elected, *ib.*

Agents ineligible, *ib.*

Commissioner becoming bankrupt, *ib.*

Failure of the nomination, *ib.*

Duties of the commissioners, ii. 321-2.

Office gratuitous, ii. 322.

Removal, *ib.*

Should concur with the trustee in compounding and submitting claims, *ib.*

See SEQUESTRATION.

ARRESTMENT IN HANDS OF, ii. 70-1.

Commissioner cannot swear to verity of debt due constituent, ii. 305.

COMMITMENT of bankrupt refusing to answer at examination, ii. 325-6.

Ceases on disclosure, *ib.*

Cannot commit at examination for perjury—must prosecute criminally, *ib.*

COMMODATE, contract of, i. 274-5.

COMMODITIES, pledge of, ii. 20-1.

COMMON AGENT in ranking and sale, ii. 247-8.

Right of electing, *ib.*

Notice of election, ii. 248-9.

Qualification to vote, *ib.*

Majority, *ib.*

Disqualification to be elected, *ib.*

Disputes concerning election, *ib.*

Duties, *ib.*

Answerable on summary application, ii. 249.

Whether can purchase, ii. 250-1.

Committee of creditors to control him, *ib.*

Common agent in multiplepointing, ii. 279-80.

COMMON LAW—

Of alienations without onerous consideration reducible at common law, ii. 184-5.

Case of fraud to be made out, *ib.*

Effect of narrative, *ib.*

Matter to be proved, *ib.*

Of fraudulent alienations and securities objectionable at, ii. 225-6.

Principle of common law, *ib.*

Aided by statute, ii. 226-7.

Not abrogated, *ib.*

System of the laws against fraud, ii. 227-8.

Dispositions *omnium bonorum* to individual creditors, *ib.*

Where deed not professedly *omnium bonorum*, *ib.*

Payment anticipated, ii. 228-9.

Must be collusive, *ib.*

Concealment and false appearance necessary to challenge security, *ib.*

Creditor must participate in collusion, ii. 229-30.

Circuitous transactions, *ib.*

Bestowing preferences unasked, *ib.*

Bankruptcy under the Acts not necessary, ii. 231-2.

Advancing money to an insolvent, *ib.*

Concealment of security, ii. 232-3.

COMMON PROPERTY, or conjunct rights, i. 61-2.

See CONJUNCT RIGHTS.

COMMUNICATION—

Of payments or securities received abroad after first deliverance in sequestration, ii. 365-6.

Of Eases by cautioner suing for relief, how far demandable, i. 365-6.

Of proceeds of poided goods, ii. 280-1.

COMMUNIO BONORUM, i. 678-9.

Husband, full administration, *ib.*What it comprehends, *ib.*Exceptions, *ib.*

COMPANY, or partnership, ii. 499-90.

Whether may be made bankrupt under 1696, ii. 157-8.

Shares of, how attached, ii. 507.

Delectus personæ, ii. 508.

Public company, constitution of, ii. 545.

Chartered companies, ii. 4.

How stock attached, *ib.*, i. 100, 101.

Share in, subject to sequestration, ii. 286-7.

Company creditors voting for trustee on partner's estate must value and deduct security of company, ii. 306-7.

Ranking of company debts on partner's estate, ii. 364-5.

Stock, ii. 197.

Moveable, ii. 3-4.

Lease to a, expires on its bankruptcy, where assignees excluded, i. 78-9.

Sequestration of companies under Bankrupt Statute, ii. 286-7.

One company becoming member of another, ii. 514-5.

See PARTNERSHIP—SEQUESTRATION.

COMPENSATION, or set-off, and of the balancing of accounts on bankruptcy, ii. 118-9.

Distinctions in the doctrine of compensation, *ib.*Between retention and compensation, *ib.*

History of the doctrine in England, ii. 119.

In Scotland, ii. 120.

Nature and circumstances of debts which may be compensated, ii. 122-3.

Distinctions where the estate solvent or insolvent, *ib.*Where parties solvent, the debts must both be liquid, except in balancing of accounts on bankruptcy, *ib.*

Money deposited, ii. 122-3.

Debt extinguished by negative prescription, *ib.*Debts must be mutually due before bankruptcy, *ib.*

Concurrence at date of bankruptcy, ii. 123-4.

In what cases compensation extinguishes interest, *ib.*Compensation pleadable by one having interest, *ib.*

PARTIES WHO MAY PLEAD COMPENSATION, ii. 124-5.

Must be debtor and creditor in their own right, *ib.*Trustees or administrators, *ib.*Principal and agent, *ib.*Mercantile factor dealing in his own name subject to compensation, *ib.*Where he deals *factorio nomine*, ii. 125-6.Where he holds a *del credere* commission, *ib.*

BETWEEN PARTIES TO INSURANCE CONTRACT, ii. 125.

Balancing accounts on broker's failure, ii. 126.

Payment of premiums to broker discharges underwriter's claim, *ib.*Settlement of accounts between insured and broker, *ib.*Where accounts not settled, but premiums entered in account between insured and broker, *ib.*Whether insured, on broker's failure, can plead compensation against underwriter's demand for premiums, *ib.*

Compensation on insurance accounts, ii. 127-8.

Whether compensation on other debts, *ib.*After payment of premiums by broker, *ib.*Questions betwixt bankrupt estate of broker and insured, *ib.*Balancing accounts on underwriter's failure, *ib.*

Balancing between underwriter's creditors and broker, ii. 128-9.

Return premiums, whether to be set off by broker, *ib.*

Loss due by underwriter to insured not the subject of compensation by broker, ii. 129-30.

Except where he has *del credere* commission, or has made advances, ii. 130-1.Broker taking policies in his own name, *ib.*His name not in policy, *ib.*

COMPENSATION—continued.

BETWEEN PARTIES TO INSURANCE CONTRACT—continued.

Where he is mentioned merely as agent, ii. 130-1.

Balancing accounts between underwriter's creditors and the assured, *ib.*Compensation by insured against underwriter for losses, return premium, etc., *ib.*

Balancing accounts on failure of insured, ii. 131.

Compensation of claim for premiums by return premiums and losses, *ib.*

BETWEEN MASTER AND SERVANT not recognised, ii. 131-2.

Against assignee's creditors doing diligence, *ib.*

Against trustees, ii. 132-3.

Company and partners, *ib.*

Against the Crown, ii. 55-6.

BETWEEN COMPANY AND PRIVATE DEBTS, ii. 553-4.

General rule, *ib.*Setting off debt by a partner against a company claim, *ib.*Claim against company met by debt due to a partner, *ib.*Effect of bankruptcy, *ib.*

Compensation after dissolution, by a partner, of his individual debt against company creditor, ii. 555-6.

Compensation by one company against the other where two firms, ii. 556-7.

See PARTNERSHIP.

THIRD PARTIES TRANSACTING WITH FACTOR in his own name, i. 526-7.

Vendee has compensation against principal, although factor claiming against him has *del credere* commission, i. 537-8.

Claim against owners for repairs on ship where they are indebted to master, i. 584-5.

Compensation by master of freight against claim for repairs, i. 585-6.

Order of ranking of claim of compensation, ii. 406-7.

EFFECT OF COMPENSATION, or set-off, in diminishing debt, ii. 290-1.

Whether an objection to constitution of debt, i. 775.

Effect of, against adjudication, i. 776-7.

Whether the hypothec of law agent subject to compensation of a debt due by his client to adverse party, ii. 35-6.

Whether pleadable against the Crown, ii. 55-6.

Not competent to an arrestee after decree of forthcoming, ii. 64-5.

See COMMISSION—PARTNERSHIP—FACTOR.

COMPETENT and omitted, or proponed and repelled, pleas under this description will not affect decree of sale, ii. 259-60.

COMPETITION between creditors and heirs of entail, i. 47-8.

Preference of sasines in competition, i. 720-1.

As depending on the nature of the precept, state of the titles, etc., i. 722-3.

Depending on sasine of the claimant, i. 723.

On sasine in another person, i. 725.

Ranking of reserved burdens in competition, i. 731-2.

Pari passu preference of adjudications, i. 754-5.

Between creditors of ancestor and heir on heritable estate, i. 763-4.

On moveable estate, ii. 85-6.

See ANCESTOR.

Creditors of ancestor adjudging *hereditas jacens*, and creditors of heir attaching the arrears of rent, i. 752-3.

Competition of landlord with Crown, ii. 33-4.

With creditors, *ib.*

Of Crown with diligence of subject, ii. 50-1.

With landlord, ii. 52-3.

Of poindings with Crown, and other securities, ii. 61-2.

Of arrestments, with other diligence and securities, ii. 69-70.

Of assignation and confirmation, ii. 81, note.

COMPETITION—*continued.*

- Competition of creditors of deceased with diligence during his life, ii. 83-4.
- Where no diligence, ii. 84.
- Creditors of ancestor and executor, ii. 85-6.
- Trusteeship, ii. 302-3.
- Of trustee with creditors abroad, ii. 341-2.
- On failure of composition contract, ii. 357-8.
- Of trustee with mid-impediments to the completion of his title, ii. 340-1.
- Of two adjudications in implement, i. 783-8.
- ON A SINGLE FEUDAL ESTATE—
- Betwixt creditors of bankrupt himself, ii. 402-3.
- Order of ranking creditors holding one security each, *ib.*
- Superior, simple infetments; burdens by reservation, *ib.*
- Terce, courtesy, adjudgers, *ib.*
- Adjudgers with each other, ii. 403-4.
- ON MOVEABLE FUND, ii. 405-6.
- On goods in general, ii. 406.
- On debts, *ib.*
- On ship, *ib.*
- On freight, *ib.*
- On cargo, ii. 406-7.
- On subjects of an action, *ib.*
- On rents, *ib.*
- On corn-stacks, *ib.*
- On profits, *ib.*
- OF CREDITORS ENTITLED TO PREFERENCES BY EXCLUSION, ii. 406-7.
- Of inhibitors with adjudgers and real securities, *ib.*
- Canons of ranking, ii. 413-4.
- Catholic and secondary creditors, ii. 416-7.
- See RANKING.
- OF CREDITORS UNDER A TRUST-DEED AND NON-ACCEDING, ii. 386-7.
- Completion of trustee's right regulates competition, *ib.*
- Of trust-deed and sequestration, ii. 387-8.
- See TRUST-DEED.
- Of holders of bills of lading, i. 591-2.
- OF REAL RIGHTS.
- See SASINE—SECURITIES—ADJUDICATION.
- COMPLETION of adjudication, i. 743-4.
- In implement, i. 783.
- Of heir's title, i. 747.
- Titles in trustee in sequestration of heritable property, ii. 337-40.
- Titles of bankrupt not complete, ii. 337-8.
- Moveable property, ii. 344.
- Estate abroad, ii. 341-2.
- Of voluntary securities over simple heritage, i. 789-90.
- Of judicial securities, i. 794-5.
- Of voluntary securities over moveables, ii. 10.
- Of assignments, ii. 15.
- Of securities in feudal subjects, ii. 562-3.
- Burgage, ii. 568-9.
- Of trustee's title under trust-deed, ii. 386.
- COMPOSITION for entry with superior, i. 22-3.
- See ENTRY.
- COMPOSITION CONTRACT betwixt bankrupt and creditors under a sequestration, ii. 348.
- See SEQUESTRATION.
- BY COMPANIES, ii. 566.
- By one partner, creditors reserving remedy against the rest, *ib.*
- Stipulation for assignation to claims, *ib.*
- Effect of company composition where partner bound as such, and also as an individual, *ib.*
- PRIVATE COMPOSITIONS for settling insolvency, ii. 398.
- Nature of the agreement, *ib.*
- Evidence of the contract, *ib.*
- Formal deed—holograph offer accepted, *ib.*

COMPOSITION CONTRACT—*continued.*

- PRIVATE COMPOSITIONS—*continued.*
- Where deed not signed while creditors assembled, should be before witnesses, ii. 398.
- Whether falls under privilege of *res mercatoria*—where payments, etc., follow on informal deed, *ib.*
- Whether one present at meeting where composition proposed, and not dissenting, bound, *ib.*
- CONDITIONS IMPLIED in such contracts, ii. 398-9.
- Equality of creditors, *ib.*
- Challenge of stipulation for higher composition, *ib.*
- Reduction on ground of fraud, *ib.*
- Payments to be made from future funds, ii. 399.
- Unanimity, *ib.*
- May creditors interfere with cautioners by diligence or sequestration to enforce payment from debtor? *ib.*
- EFFECTS OF PRIVATE COMPOSITION CONTRACTS, ii. 400.
- Refusal of composition notes, *ib.*
- Delivering composition bills, and getting up old documents—breach of contract, *ib.*
- Revival of original debts, *ib.*, 356-7.
- Where discharge absolute, and debtor bankrupt after part of instalment paid, ii. 357.
- Cautioner paying composition cannot rank for original debt, ii. 354.
- Equalizing payments, *ib.*
- COMPOUNDING and submitting claims, powers of trustee and commissioners as to, ii. 321-2.
- COMPRIZING or Apprizing, i. 740-1.
- COMPUTATION of solvency, ii. 180-1.
- Of sixty days under deathbed, i. 84-5.
- CONCEALMENT and misrepresentation in the contract of sale—
- Restitution on the ground of, i. 262-3.
- Fraudulent concealment, i. 263-4.
- Of insolvency, *ib.*
- Of impending bankruptcy, i. 266-7.
- Presumed fraudulent concealment, *ib.*
- Of actual bankruptcy, i. 267-8.
- See FRAUD.
- By one broker who employs another to get insurance, i. 544-5.
- Misrepresentation and concealment, effect of, in insurance contract, i. 665-6.
- Misrepresentation of day of sailing, *ib.*
- By saying that part of same risk already insured, *ib.*
- Concealment of state of the ship, i. 667-8.
- Of ship being a running ship, *ib.*
- Of destination, etc., i. 668-9.
- Of fate, actual or suspected, of ship, *ib.*
- Of information after order for insurance given, but before policy underwritten, *ib.*
- CONCEALMENT of funds a bar to obtaining *cessio*, ii. 480.
- See FRAUD.
- CONCEALMENT and false appearances at granting security, effect of, in a challenge on common law, ii. 228.
- Concealment of security for prior debt challengeable at common law, ii. 232.
- See BANKRUPT.
- CONCURRENCE of Judge-Admiral to arrestments on board ship, ii. 63.
- Concurrence of creditors in ranking and sale where original pursuer's title objected to, ii. 241.
- OF BANKRUPT TO SEQUESTRATION, ii. 285.
- See SEQUESTRATION.
- CONCURSUS *debiti et crediti*, ii. 122-3, 124.
- See COMPENSATION.
- CONDITIONAL concurrence to bankrupt's discharge, ii. 352-3.
- Acceptance of bill, i. 423.
- Endorsation, i. 426.
- Offer, i. 343.
- Sale, i. 469.

- CONDITIONS in feudal conveyances for forcing entry with superior, i. 25-6.
 Stipulations, *ib.*
 Personal obligations, *ib.*
 Conditions of the grant, *ib.*
 Conditions not recorded, i. 26-7.
 Declarator to have condition inserted in the titles, *ib.*
 Stipulation lawful, i. 27-8.
 Clause of pre-emption, *ib.*
 Prohibition to sub-feu, i. 28.
 Limitations by declaration of special uses, i. 29-30.
 Trust-estates, *ib.*
 Reserved burden, i. 38.
 Entail, i. 43-4.
 Liferent and fee, i. 52-3.
 See TRUST—ENTAIL—LIFERENT and FEE—BURDEN.
- IN SALE, i. 256-7.
 Suspensive conditions, i. 257.
 Dissolving conditions, i. 259.
Pactum legis commissoriae, *ib.*
 In contract of sale, i. 463-4.
 Implied, *ib.*
 As to fitness and soundness, *ib.*
 Exceptions, i. 464-5.
Caveat emptor, *ib.*
 Delay in challenging, *ib.*
 Usage, i. 465-6.
 Express conditions, *ib.*
 Bill in course, *ib.*
 Must be good, i. 469-70.
 Sale of goods on arrival, *ib.*
 By samples, *ib.*
 By taste, i. 470-1.
- IN COMPOSITION CONTRACTS, ii. 348, 356.
 Reservation of estate by creditors, *ib.*
 Assignment to bankrupt of right to challenge preferences, *ib.*
 In private compositions, ii. 398.
 In trust-deeds, ii. 382.
 See TRUST-DEED.
- IN DEEDS as affecting the doctrine of approbate and reprobate, i. 142-3.
 See APPROBATE and REPROBATE.
- AND QUALIFICATIONS IN RIGHTS in the person of the debtor, effect of, against purchasers and creditors, i. 300-1.
 In land rights, *ib.*
 Real rights, *ib.*
 Personal rights, i. 301-2.
 In *jura incorporalia* unconnected with land, i. 302-3.
Assignatus utitur jure auctoris, *ib.*
 Distinctions in the construction of this rule, *ib.*
 Conditions inherent in the right, *ib.*
 Conditions extraneous, as latent trusts, *ib.*
 In moveables, i. 304-5.
 Possession the badge of property in moveables, *ib.*
 Qualification of this rule, *ib.*
 Purchaser at market, or otherwise, how far secure, *ib.*
 Effect of personal engagements by the person having the right as to third parties, i. 306-7.
 Stellionate, i. 307-8.
- PREFERENCES depending on conditions in real or personal rights, i. 732-3.
 In feu-contracts, *ib.*
 Retention of charter for advances, *ib.*
 Personal rights, *ib.*
 Real warrandice and excambion, i. 733-4.
- CONFIDENT, ii. 175-6.
 See CONJUNCT and CONFIDENT.
- CONFIDENTIAL friends and relations, alienations to, ii. 174-5.
 See ACT 1621.
- CONFIRMATION by Commissaries, ii. 76-7.
 Confirmation as executor nominate or dative, ii. 77-8.
 Edict, who may claim the office, *ib.*
 Confirmation the executor's title, ii. 78-9.
 Letters of administration, where necessary, *ib.*
 Proceedings competent to creditors of deceased, ii. 79-80.
 How personal estate liable in England after death, *ib.* note.
 In Scotland, *ib.*
 Proceedings where executor has confirmed, ii. 80-1.
 Diligence to be used by creditors for completing their right, *ib.*
 Vitious intromission of executor, ii. 81-2.
Omissa vel male appretiatia, *ib.*
 Where no executor is confirmed, *ib.*
 Where claimant's debt requires constitution, *ib.*
 Creditors of deceased competing, notice in Gazette, ii. 82-3.
 Equalizing diligence after death, commentary on Act of Sederunt, *ib.*
 Privileged debts, ii. 83-4.
 Competition where debtor made bankrupt, *ib.*
 Where not bankrupt, ii. 84-5.
 Where no diligence during life, *ib.*
 Competition between creditors of ancestor and executor, ii. 85-6.
 Ranking of creditors by confirmation, ii. 406.
 Of base infeftment, i. 723-4.
 Mid-impediment, *ib.*
 Of common agent in ranking and sale, ii. 248.
 Of trustee on bankrupt estate, ii. 315.
 Caution, *ib.*
 Petition, *ib.*
 Contested election, confirmation by Court, ii. 316-7.
 Where succession of trustees, ii. 317.
- CONJUNCT and CONFIDENT persons—
 Alienations to, ii. 174.
 Reducible by Act 1621, c. 18, ii. 175.
 Conjunct includes brothers, sons-in-law, uncles, stepsons, uncles by affinity, sisters and brothers-in-law, *ib.*
 Confident includes partners in trade, servants, factors, and confidential men of business, *ib.*
 Whether it includes an ordinary agent, *ib.*
Onus probandi of conjunct and confident on challenger, *ib.*
 Conjunct and confident person may vote on bankrupt estate, ii. 304.
 Cannot be trustee, ii. 302.
- CONJUNCT FEE and LIFERENT, i. 53-4.
 Between husband and wife, i. 54-5.
 Husband held fiar, unless wife's relations favoured, *ib.*
 If subject comes by wife, she held to be fiar, *ib.*
 Where fee destined to survivor, wife held fiar if she survive, *ib.*
 Where subject destined to husband and wife and their heirs, *ib.*
 Where subject came by wife as tocher, *ib.*
 Construction of such rights as between parent and child, *ib.*
- CONJUNCT RIGHTS, OR COMMON PROPERTY, i. 61-2.
 Heirs-portioners, *ib.*
 How joint proprietors may accomplish a division, i. 62-3.
 How creditors of a joint proprietor may obtain division of his share, *ib.*
 Effect of particular destination to 'two or more persons and their heirs,' or to them 'in conjunct fee,' *ib.*
 Where to two 'jointly and the survivor and their heirs,' *ib.*
 'To two jointly and the heirs of one of them,' *ib.*
- CONJUNCTION of adjudications, i. 760-1.
- CONSENSUAL CONTRACTS, constitution of, i. 335-6.
- CONSENT, requisite of, in conventional obligations, i. 313-4.
 Effect of error in vitiating consent, *ib.*

CONSENT—*continued.*

- Of constraint, force, or fear, i. 314.
- Fraud, i. 316.
- Terror, *ib.*
- Intoxication, *ib.*
- See CONCURRENCE.

CONSENTS to a preference, ii. 132.

CONSIDERATION for deed under 1621, ii. 175.

- Provisions, ii. 176.
- Valuable, ii. 177.
- Onerous, *ib.*
- Evidence, ii. 178.
- See EVIDENCE.
- Alienations without consideration, ii. 184.
- Debt without, i. 331-2.
- Consideration in obligations and contracts, where immoral or inductive to crime, i. 317-8.

CONSIGNATION of price of lands in judicial sale, ii. 256-7.

- Renders price moveable, ii. 6.

CONSIGNEE money is heritable till declarator, ii. 6.

CONSIGNMENTS of goods for sale and return, effect of possession under, i. 287-8.

- For advances and sale, i. 294-5.
- Failure of factor, and principal paying bills, *ib.*
- Lien of factor where principal fails and goods unsold, *ib.*
- Claim by bill-holders, where both principal and factor fail, and lien of factor's estate on goods in relief, *ib.*
- Whether bill-holder has the benefit of factor's lien, *ib.*
- Implied mandate to consignees to sell goods, etc., i. 508-9.

OF GOODS AT A DISTANCE, in security or payment of debt, ii. 11.

- Cargoes at sea, *ib.*
- To creditor directly, *ib.*
- Doctrine of appropriation, ii. 12.
- To a factor for behoof of creditors, *ib.*
- For behoof of particular creditors, *ib.*
- Of bills of lading, ii. 13.

CONSOLATO del Mare, i. 547-8.

CONSTRAINT, effect of, in vitiating a contract, i. 314-5.

CONSTITUTION of debt previous to adjudication, i. 750.

- Accelerating action, i. 762.
- Objections to the constitution of the debt, i. 775-6.
- In what cases constitution necessary, *ib.*
- Of the various ways in which debts may be constituted, i. 312-3.

See OBLIGATIONS—CONTRACTS.

Constitution of debt previous to confirmation as executor-creditor, ii. 81.

Granting obligations with a view to, how far challengeable on 1696, ii. 197.

CONSTRUCTION—

- Of usury laws, i. 327-8.
- Of joint and several obligations, i. 361-2.
- Rules of construction of mutual contracts, i. 455-6.
- See CONTRACTS.

CONSTRUCTIVE bankruptcy, ii. 166.

See BANKRUPTCY.

Constructive delivery, i. 181-2.

Examples of, i. 187-8.

See DELIVERY.

Constructive liens admitted at common law, ii. 106.

Constructive damage, i. 479-80.

See SALE.

CONTEST for trustee on bankrupt estate, ii. 302.

Expense, ii. 312.

For common agent in ranking and sale, ii. 248.

CONTIGUITY of bankruptcy as presumptive of fraud, i. 266-7.

See FRAUD.

CONTIGUOUS lands, sasine in, i. 715-6.

CONTINGENT and future debts, i. 332-3.

Distinction betwixt English and Scottish law as to ranking of, *ib.*

CONTINGENT—*continued.*

Grounds of, i. 332-3.

Competition of contingent and future debts with debts having *parata executio*, i. 333-4.

Principle of English law as to future and contingent debts, *ib.*

Reformation of English law by 6 Geo. IV., i. 334, note.

Claims for annuities and other contingent debts, i. 352-3.

Strict legal rule for ranking and diligence, i. 354-5.

Inhibition on, ii. 136.

Arrestment on, ii. 64.

See ANNUITIES.

CONTINGENT DEBT will not support petition for sequestration, ii. 288.

Creditor for, not entitled to vote at meetings, ii. 308.

A creditor claiming on estate of surety not a contingent creditor, ii. 307-8.

Amount of, how to be settled in order to ranking, ii. 365.

Ranked as pure debts, directions of statute being observed as to dividends, *ib.*

Dividends on, to be lent out on interest, ii. 365-6.

Contingent creditor entitled to concur in bankrupt's discharge, ii. 371-2.

Contingent interest, conveyance of, challenged under 1621, proof of value of, ii. 150-1.

CONTRABAND OF WAR—

Commodities falling under this description are excepted from the right of neutrals in trading with belligerents, i. 324-5.

Relaxations in the description of contraband of war, *ib.*

CONTRABAND OF TRADE, or smuggling contracts, i. 325-6.

Usurious contracts, i. 327-8.

Effect of illegality of debt against third parties, i. 330-1.

Debt partly illegal, i. 331-2.

CONTRACTS and obligations—

General principles of, i. 312-3.

Conventional contracts, i. 313-4.

Consent requisite, *ib.*

Effect of error, *ib.*

Constraint, i. 314-5.

Force or fear, *ib.*

Fraud, i. 316-7.

Lesion, *ib.*

Intoxication, *ib.*

Of immoral contracts, or *contra bonos mores*, i. 317-8.

Gaming, i. 318-9.

Wagers, i. 319.

Liquor Acts, i. 320.

Contracts against public policy, *ib.*

Restraints on marriage, *ib.*

Marriage brokerage contracts, i. 321-2.

Restraints on natural liberty, *ib.*

Against freedom of election, i. 322-3.

Contracts against public policy, *ib.*

Of war policy, *ib.*

Neutrals, i. 323-4.

Licences, *ib.*

Contraband of war, i. 324-5.

Blockade, *ib.*

Alien enemy's debt, etc., i. 325-6.

Effect of illegality, i. 330.

CONSTITUTION OF, i. 334.

Mercantile, excepted from the solemnities of deeds, i. 341-2.

Constitution of such contracts by letters of correspondence, i. 342-3.

Offer and acceptance, i. 343-4.

Acceptance must be *debito tempore*, *ib.*

What delay allowed, *ib.*

It binds the bargain, *ib.*

Offer to sell, limitation of completion till arrival of acceptance, i. 344-5.

CONTRACTS—*continued*.CONSTITUTION OF—*continued*.

- Acceptance must meet the offer, i. 344-5.
- Provisional acceptance, *ib*.
- Revocation of offer by death or incapacity, *ib*.
- Order for goods, *ib*.
- Minor acting in *re mercatoria*, bound as if major, *ib*.
- Of *locus penitentiæ, rei interventus*, and homologation, *ib*.
- See OBLIGATIONS.

MUTUAL CONTRACTS, i. 454-5.

- General effect of reciprocal obligations of the parties, *ib*.
- General rules of construction of mutual contracts, i. 455-6.
- Where words precise and unambiguous, *ib*.
- Where meaning fixed by usage, i. 456-7.
- Place of contracting, *ib*.
- Written agreement supersedes previous conversations and communings, *ib*.
- Effect of inducements or representations to engage, i. 457-8.

Contracts in general terms, *ib*.

- Where an ambiguity impedes the execution of the contract, *ib*.

- Where the words cannot be reconciled, *ib*.
- See SALE—LOCATION—PARTNERSHIP, ETC.

OF HIRING OR LOCATION—

- Claim under, i. 480-1.
- Loss or injury of property falls on owner, i. 481-2.
- Hiring of moveables, *ib*.
- Claims by lessee or hirer on bankruptcy of lessor, *ib*.
- Claim by lessor, i. 482-3.
- Diligence prestable, *ib*.
- Hiring of labour, i. 484-5.
- Claims on bankruptcy of employer, i. 486-7.
- On bankruptcy of workman, *ib*.
- Periculum, i. 487-8.
- Diligence prestable, *ib*.
- Safe custody, *ib*.
- Skill, i. 488-9.
- Hiring of carriage by land, i. 490-1.
- Claim by carrier, *ib*.
- By passengers and owners of goods, i. 491-2.
- See NAUTÆ CAUPONES, ETC.

OF COMMISSION or mercantile agency, i. 505.

- Determination of, i. 522.
- Claims under, i. 526.
- See COMMISSION.

MARITIME—

- Relative to equipment of vessel, i. 551.
- Shipshusband, i. 552.
- Shipmaster, i. 554.
- Hiring of seamen, i. 557-8.
- General principles of the contract, *ib*.
- For repairs and furnishings, i. 567-8.
- Bottomry and *respondentia*, i. 577-8.
- For employment of ship on general or special freight, i. 585-6.
- Charter-party of affreightment, i. 586.
- Contract of Insurance, i. 643.
- See SHIP.

OF MARRIAGE—

- Claims of wife and children under, i. 680.
- Antenuptial contract, i. 681.
- Postnuptial contract, i. 686-7.
- Provisions in, onerous in sense of 1621, ii. 176-7.

OF INSURANCE against loss at sea, i. 643-4.

- Against fire, i. 671.
- On life, i. 675.

OF SEPARATION, i. 688-9.

- See PROVISIONS—MARRIAGE.

MUTUAL, between debtor and creditors, by trust-deed and deed of accession, ii. 392-3.

- See TRUST-DEED.

CONTRACTS—*continued*.

OF PARTNERSHIP, ii. 499, 500.

- See PARTNERSHIP.

CONTRIBUTION towards expense of management under sequestration—

- Whether creditor bound to answer calls for money, ii. 343-4.
- Where expense exceeds funds, ii. 322-3.
- Contribution for loss by accidental collision of ships, i. 721.
- For loss by general average, i. 629.
- Property liable, i. 635-6.
- See COLLISION—AVERAGE.

CONVENTIONAL hypothecs, ii. 24-5.

- Conventional provisions to wife and children, how made effectual to compete with creditors, i. 682-3.
- See PROVISIONS.

Conventional liferents, i. 52-3.

Conventional obligations and contracts, i. 313-4.

CONVEYANCE of moveables *retenta possessione*, i. 272-3.

- Distinction between possession newly given and possession reserved, *ib*.

- Not enough to justify continuance in possession, that conveyance was only in security, *ib*.

Same doctrine prevails in England, *ib*.

- In England, it justifies possession that conveyance conditional, i. 273-4.

- In Scotland, conveyance in relief to a cautioner not good where symbolical delivery only given, *ib*.

Suspensive conditions in sale, *ib*.

- Difficult to justify retained possession of furniture, implements of trade, etc., *ib*.

- Conveyance of furniture to a creditor *retenta possessione* not effectual against diligence of another creditor, *ib*.

Where seller gives notice by public advertisement, *ib*.

- Sufficient justification of possession in person of seller, that all delivery possible in circumstances is given, i. 274-5.

See REPUTED OWNERSHIP.

BY CREDITORS TO PURCHASER at judicial sale, ii. 260-1.

- By bankrupt to trustee, ii. 337.

Does not require *ad valorem* stamp, *ib*.

- This the proper way of transferring bankrupt property abroad, ii. 341-2.

- Voluntary conveyance by heir, inefficacy of, to defeat ancestor's creditors, i. 770-1.

- Conveyance to conjunct and confident persons, in prejudice of creditors, ii. 174-5.

See ACT 1621.

- Without onerous consideration, as reducible at common law, ii. 184-5.

Conveyance in prejudice of diligence begun, *ib*.

See ACT 1621.

IN PREJUDICE OF CREDITORS, challengeable on 1696, c. 5, ii. 191-2.

See ACT 1696.

- Conveyance *omnium bonorum* to individual creditor, where other debts render granter insolvent, ii. 153-4.

- To particular creditors challengeable at common law, ii. 226-7.

- Conveyance by debtor applying for Act of Grace, ii. 447-8.

By debtor pursuing *cessio*, ii. 482-3.

FEUDAL, CONDITIONS IN, i. 25-6.

- Must enter record, *ib*.

- Conveyance to creditors with infeftment, renders debts heritable, ii. 4-5.

Conveyance merely personal, *ib*.

- Conveyances to trustee for creditors under a trust-deed, ii. 384-5.

CONVOY—

- Obligation to sail with, i. 602-3.

- CONVOY**—*continued*.
 Rules of responsibility under this warranty, i. 602-3.
 Demurrage for, i. 623-4.
 Claim of conveying ship recapturing for salvage, i. 640-1.
- CO-OBLIGANTS**—
 Claims in bankruptcy against, where a partial payment, ii. 426-7.
 Co-obligants for an annuity, ranking of, i. 393-4.
 Responsibility and relief among co-obligants in joint and several obligations, i. 361-2.
- COPARTNERSHIP**, ii. 499.
 See **PARTNERSHIP**.
- COPYRIGHT**, i. 110-1.
 See **LITERARY PROPERTY**.
- CORN**—
 Delivery of growing corn by symbols held good to exclude creditors, i. 187-8.
 Whether transit would be held complete, *ib.*
 Landlord's hypothec over, ii. 28-9.
 STACKS, ranking of creditors on, ii. 406-7.
- CORPOREAL SUBJECTS**—
 Of property in moveables corporeal, i. 145-6.
 Distinguished as heritable or moveable, ii. 1.
 See **SECURITIES**.
- CORPOREAL and INCORPOREAL**, i. 100-1, ii. 1.
 See **HERITABLE and MOVEABLE**.
- CORPORATIONS** may be made bankrupt, ii. 157-8.
 Chartered companies, i. 3-4, ii. 545.
- CORRESPONDENCE**—
 Bargain settled by, i. 342-3.
 Offer must be accepted, i. 343-4.
 What delay allowed, *ib.*
 Acceptance binds the bargain. See **OFFER**.
- CORROBORATION**, bond of—
 Accumulation of principal and interest by, i. 696-7.
 Effect of, in rendering debt heritable, ii. 4.
- CORRUPT election of trustee**, ii. 303-4.
 Discharge of bankrupt, ii. 360.
 Composition, ii. 355.
- COUNTER-CLAIMS**, effect of, in diminishing debt, ii. 122, 305-6.
 See **COMPENSATION**.
- ACCOMMODATION BILLS** or cross paper, ii. 420-1.
 Doctrine of, *ib.*
 Rules of ranking, *ib.*
 Effects of the several ways of disposing of cross paper, ii. 422-3.
- COUNTING** creditors in number and value, mode of, ii. 331, 352.
- COURSE** of trade, transactions and payments in, excepted from challenge on 1696, c. 5, ii. 202-3.
 Lien by, ii. 102-3.
- COURSE** of voyage, i. 588-9.
 See **VOYAGE**.
- COURT OF ADMIRALTY**, i. 546-7.
COURT OF EXCHEQUER, ii. 40-1.
- COURT OF SESSION**—
 Its equitable interposition in facilitating adjudications, i. 762-3.
 Jurisdiction in mercantile bankruptcy, ii. 283, 375.
 Incidental applications, *ib.*
 Statutory and common law jurisdiction, *ib.* et seq.
- COURTESY** or curiality—
 Husband's right of, i. 58-9.
 Nature of the right, i. 59-60.
 Requisites to its constitution, *ib.*
 Extent of it, i. 60-1.
 It vests *ipso jure*, *ib.*
 Criterion of preference, *ib.*
 Extent and exercise of the liferenter's right, *ib.*
 See **LIFERENT**.
- CREDIT**, letter of—
 Claims on, i. 387-8.
 Different kinds of letters of credit, i. 388-9.
 Distinction between letter of credit and mere letter of introduction, i. 389-90.
 Limitations of guarantees and letters of credit, i. 390-1.
 Limitation as to person, i. 391-2.
 Limitation as to time, i. 392.
 See **GUARANTEE**.
- CREDITS** with banks—
 Cautionary obligation for, i. 384-5.
 Cash-credits, history of, heritable securities for, i. 714-5.
 Mode of securing cash accounts, ii. 219-20.
 Credits with merchants, ii. 227-8.
 See **ACT 1696—CASH-CREDITS**.
- CREDITORS**, conveyances by, to purchaser at judicial sale, ii. 260-1.
HERITABLE SALES by creditors, ii. 269-70.
- CHALLENGE** BY, on 1621, c. 18, ii. 171-2.
 On second branch of Act 1621, ii. 184-5.
 Of alienations without onerous consideration, *ib.*
 On the Act 1696, c. 5, ii. 191-2.
 See **ACTS 1621 and 1696—ALIENATION**.
- CREDITORS, COMMITTEE** OF, to control common agent in ranking and sale, ii. 250-1.
 Petitioning creditor in sequestration, nature and amount of his debt, ii. 288-9.
 His duty, ii. 291-2.
- UNDER A SEQUESTRATION** in their deliberative capacity, ii. 330.
 Qualification to vote, ii. 353.
 Mode of proceeding at meetings, ii. 330-1.
 Power of bringing resolutions under review, ii. 331-2.
 Whether bound to advance money, ii. 343-4.
 Individual creditor or bankrupt may pursue claim abandoned, ii. 344-5.
- EXTRAJUDICIAL SETTLEMENTS** with creditors, ii. 381-2.
 See **TRUST-DEED—ARRANGEMENTS**.
- LAWS FOR ESTABLISHING EQUALITY** amongst, in diligence against moveables, ii. 72-82.
- CREDITORS OF ANCESTOR**—
 Their preference over heritable estate, i. 763-4.
 Competition of diligence between creditors of ancestor and heir, i. 765-6.
 Effect of heir's voluntary conveyance against ancestor's creditors, i. 770-1.
 Creditor of ancestor and executor competing on moveable estate, ii. 85-6.
 See **ANCESTOR**.
- EFFECT OF FRAUD** and personal exceptions against creditors, i. 309-10.
- CREDITORS HOLDING SECURITIES** over feudal estate—
 Order of ranking of, ii. 402-3.
 Over moveable, ii. 405.
 Catholic and secondary, ii. 416-7.
 See **RANKING**.
- CREDULITY**, oath of—
 By agent, guardian, etc., petitioning creditor, ii. 291-2.
 By agent, manager, or guardian, where creditor abroad or incapable, ii. 304-5.
- CREW** of vessel—
 Sufficiency of, in question of seaworthiness, i. 598.
 Whether entitled to salvage, i. 639-40.
 Evidence of, as to loss, i. 658-9.
 See **SEAMEN**.
- CRIME**, obligations or agreements inductive to, no foundation for a claim, i. 317-8.
- CRIMINALS** not entitled to benefit of Act of Grace, ii. 445.
 Nor *cessio*, ii. 474.
 Nor sanctuary, ii. 461.
 Aliment of, falls on public, ii. 445-6.

CROSS BILLS, or counter-accommodations—

- Doctrine of, ii. 420-1.
- Principle of ranking, *ib.*
- Good considerations for each other, *ib.*
- Commentary on cases settling doctrine, *ib.*
- There can be no double ranking, *ib.*
- Effects of several ways of disposing of cross paper, ii. 422-3.
- Originally counterparts, *ib.*
- Accidental crossing, ii. 423.
- Dividend is payment, ii. 424.
- Discharge universal in Scotland, *ib.*

CROWN—

- Effect of Crown's diligence in competition with adjudications, i. 781-2.
- No preference over heritable estate in Scotland, i. 782-3.
- Excluded altogether, unless Scottish diligence used, *ib.*
- Comes in *pari passu* with other adjudgers, without preference, *ib.*
- Competition with landlord, ii. 33-4, 52-3.
- Crown's preference by extent, ii. 40.
- Extents in chief, ii. 41.
- Extents in aid, ii. 44.
- Process for making effectual hypothec for Excise duties, ii. 49.
- Remedy after debtor's death, *ib.*
- Opposition to writs of extent, ii. 50-1.
- Rules of preference between the king and subject, *ib.*
- With landlord, ii. 52-3.
- Lien available against Crown, ii. 53-4.
- Whether compensation, ii. 55-6.
- Or privileged debts, *ib.*
- See EXTENT.
- Ranking of Crown for duties on goods in general, ii. 406-7.
- By extent, *ib.*
- Ranking on debts in general, *ib.*
- King's debtor denied privilege of sanctuary, ii. 462-3.
- Effect of Crown's extent, as creditor of a partner, against company creditors, *ib.*

CULPA LATA, *levis culpa*, *culpa levissima*, i. 482-3.

CURATORS—

- Deeds by minors with curators, without their consent, i. 129-30.
- Where they concur, *ib.*
- See RESTITUTION.

CURIALITY or COURTESY, i. 58-9.

CUSTODIER, delivery of goods in hands of, i. 194-5.

See DELIVERY.

CUSTODY—

- Buyer unable to pay price may reject goods, and take them into his cellar *custodia causa* for behoof of seller, i. 256-7.
- Goods may even be rejected, though taken into custody by clerk or warehouseman acting without orders, *ib.*
- See REJECTION—DELIVERY.
- Diligence prestable as to custody, in hiring of labour, i. 487-8.
- See LOCATION.
- Effect of change of, in transferring property, i. 194-5.
- CUSTOM or usage, effect of, in construing mutual contracts, i. 456-7.
- On contract of sale, i. 465-6.
- Effect of a tenant's claims arising from local custom, i. 70-1.
- Lien by, ii. 102-3.

DAMAGE from perils of sea, i. 606-7.

- What are perils of the sea, i. 607, 652.
- Damages for breach of charter-party, how estimated, i. 608-9.

DAMAGE—*continued.*

- Damage by spilling corrosive liquors, i. 610.
- By unskilful navigation, i. 664-5, 603, 608.
- From collision of ships, i. 625.
- Accidental damage, or by act of God, i. 626, 606-7.
- General average, i. 629-30.
- What damage may be claimed against insurers as a partial loss, i. 660-1.

See LOSS—NAUTÆ CAUPONES, ETC.—AVERAGE INSURANCE.

DAMAGES—

- Claim for, by seller against buyer, on stoppage *in transitu*, i. 250-1.
- Whether claim for damages can support petition for sequestration, ii. 288.
- Claim for buyer on seller's bankruptcy, i. 477.
- Direct damage, i. 478.
- Constructively direct, i. 479-80.
- Where direct loss not fraudulent, equity restrains excessive damages, i. 478-9.
- Settling amount of damage, time when to be struck, *ib.*
- Equity interposes also as to constructive damage, i. 479-80.
- Claims of, under contracts of hiring; by lessee for damages on lessor's bankruptcy, i. 482-3.
- By lessor, *ib.*
- For neglect, or diligence prestable, in contracts of hiring, doctrine and rules of, *ib.*
- Claim by workman on employer's bankruptcy, i. 486-7.
- By employer, *ib.*
- In *locatio custodiæ*, or safe custody, neglect, i. 487-8.
- Damages for want of skill in professional men and artists, i. 488-9.
- Claims by passengers in stage-coaches for carelessness or unskilfulness of coachmen, i. 491-2.
- For negligence in carriage of goods, i. 492-3.
- Claims on edict *Nautæ Caupones*, etc., i. 494, 605.
- How damages from breach of charter-party to be estimated, i. 608-9.
- From collision of ships, i. 625-6.
- DIFFERENCE between a claim for damages on breach of pecuniary obligation and on breach of an ordinary contract, i. 691.
- See INTEREST.
- INTEREST NOMINE DAMNI, i. 691-2.
- Whether prisoner for damages entitled to *cessio*, ii. 475-6.
- Damages for abuse of *meditatio fugæ* warrant, ii. 457-8.
- For refusal to grant it, *ib.*
- For breach of *supersedere*, ii. 469-70.
- CLAIMS FOR, i. 697-8.
- Chief point of inquiry in questions of damage, *ib.*
- Such questions sent by statute to Jury Court, i. 698-9.
- Claim for damages may be made effectual in bankruptcy, *ib.*
- Bankruptcy or insolvency no ground for mitigating or enlarging damages, *ib.*
- Liquidate damages, i. 699-700.
- See PENALTIES.
- DAMNUM FATALE, what is considered such, to free from liability under contract of location, i. 487-8.
- Under edict *Nautæ*, etc., i. 499-500.
- See CHARTER-PARTY—INSURANCE.
- DATE of deeds challenged *ex capite lecti*, i. 84-5.
- Of deeds challengeable on 1696, c. 5, how to be taken, ii. 267-8.
- Of heritable securities, *ib.*
- Recording of sasine the rule, ii. 213-4.
- Conveyance where debtor not infeft, *ib.*
- Conveyance without precept, ii. 214-5.
- Of assignation of moveable funds, ii. 215-6.
- Drafts, conveyance of moveables, bills, endorsements, *ib.*
- OF ACTUAL BANKRUPTCY, criterion of, ii. 164-5.
- Of bankruptcy by sequestration, *ib.*

DATE—*continued.*OF ACTUAL BANKRUPTCY—*continued.*

Under 1696, c. 5, ii. 164-5.

Date of imprisonment, of taking sanctuary, of resistance and absconding, ii. 165-6.

Of equivalents where debtor abroad or privileged, *ib.*Effect of a suspension, *ib.*

OF RECORDING SASINES, i. 719, 722.

OF HOLOGRAPH DEEDS, i. 341-2.

DAYS—

Survivance of the granter of a deed for sixty days bars a challenge on deathbed, i. 83-4.

Computation of the sixty days, i. 84.

Sixty days of retrospective bankruptcy, how computed, ii. 166-7.

Deathbed, *ib.*

LAY DAYS, i. 621-2.

Days of demurrage, *ib.*

Working or running days, i. 623-4.

OF GRACE in bills, i. 434-5.

OF CHARGE on horning, ii. 435-6, note.

Must expire before poinding, ii. 57-8.

LAWFUL, execution of warrants must be on, ii. 456-7.

Meditatio fugæ and criminal warrants, an exception, *ib.*

DEAD FREIGHT, i. 620-1.

Nature of, *ib.*Distinction betwixt, and demurrage, *ib.*No lien for, *ib.* note.

DEATH—

Effect of, in recalling mandate, i. 522-3.

Of pursuer of ranking and sale, ii. 241-2.

Of debtor after granting mandate for sequestration, ii. 286-7.

Proceedings by creditors on death of insolvent debtor, ii. 495-6.

Effect of, in dissolving partnership, ii. 524.

Notice, ii. 529.

Adjudication of debtor's property after, i. 749-50.

Remedy to Crown after, ii. 49.

Diligence after, ii. 76-7.

Declarator of trust on trustee's death, ii. 386-7.

DEATHBED—

Right of creditors to adopt the heir's challenge on deeds on, i. 80-1.

Commentary on the law of deathbed, *ib.*Objects of the law, *ib.*

Legal character of deathbed, i. 81-2.

Liege poustie, *ib.*

Nature of the disease, i. 82-3.

The granter of the deed must have been sick of his last illness, *ib.*Where, though sick, the granter perishes by accident, *ib.*Death by a different disease from that which granter had at date of the deed, *ib.*Where the diseases are in close connection, *ib.*The disease need not be what is called mortal, *ib.*

Presumption of continued illness, i. 83.

Counter presumptions and evidence of liege poustie, *ib.*

SURVIVANCE FOR SIXTY DAYS, i. 83-4.

Rule of computation of the term of sixty days, i. 84-5.

Proof of the date of the deed, *ib.*Holograph deeds, *ib.*False date, *ib.*Presumption of liege poustie by going to kirk or market, *ib.*Commentary on the Act of Sederunt 29th February 1652, *ib.*

Proof of strength, i. 85.

The granter must appear without support, *ib.*Interpretation of this rule, *ib.*

The act must be done publicly, i. 85-6.

What is held a market in this question, *ib.*

VOL. II.

DEATHBED—*continued.*SURVIVANCE FOR SIXTY DAYS—*continued.*

Whether equivalents are admissible to prove liege poustie, i. 85-6.

Refutation of the presumption arising from presence at kirk or market, i. 86-7.

DEEDS LIABLE TO CHALLENGE ON DEATHBED, *ib.*

Deeds directly prejudicial to the heir, i. 87-8.

Deeds of alienation *inter vivos*, *ib.*Gratuitous, *ib.*Onerous alienation reducible if spontaneous, *ib.*Sale of land, *ib.*Extent of reduction in such case, *ib.*

Creation of burdens and securities, i. 88-9.

Assignations, *ib.*Leases, *ib.*Sale of wood, *ib.*Settlements and dispositions *mortis causa*, *ib.*Bonds of provision, *ib.*

Discharges of heritable securities on deathbed, i. 88, 89.

Deeds indirectly prejudicial to the heir, i. 89-90.

Conversion of a subject from heritable to moveable, *ib.*Deed made in liege poustie, but delivered on deathbed, *ib.*Moveable bonds, legacies, etc., indirectly affecting the heir, *ib.*Purchase of land with destination past the heir, *ib.*Deed in fulfilment of an obligation demandable against the heir, *ib.*

MEANS TAKEN FOR EVADING THE LAW OF DEATHBED, i. 90-1.

Power granted in a Crown charter to dispoise or contract debt on deathbed, *ib.*Reservation of a power to convey or burden in a settlement, *ib.*Right by marriage contract to the heir subject to provisions to be granted even on deathbed, *ib.*Filling up on deathbed a blank deed executed in liege poustie, *ib.*Where the heir's right has been excluded by a liege poustie deed, *ib.*

Where the deed of exclusion contains a power of revocation, and a new settlement is made on deathbed, i. 91-2.

Effect of the revocation on deathbed of the liege poustie deed, *ib.*Conditional revocation, *ib.*Implied revocation, *ib.*Trust excluding heir, with power to declare uses on deathbed, *ib.*Effect of an obligation by heir not to challenge, *ib.*

Effect of the doctrine of approbate and reprobate in a challenge on deathbed, i. 141-2.

EXERCISE BY CREDITORS OF THE RIGHT OF CHALLENGE, i. 92-3.

Description of heirs entitled to challenge, *ib.*Heir apparent, *ib.*Heir of provision, *ib.*

Nature of the title when it is required, i. 93-4.

Where heir dies in apparenacy, *ib.*Action maintainable only in character of heir *alioqui successurus*, *ib.*Summons otherwise libelled inept, *ib.*Title of the creditors to prosecute in room of the heir, *ib.*Exclusion of the creditors by the heir's approbation, *ib.*What is considered homologation by the heir, *ib.*Ratification on deathbed, *ib.*Where the heir is insolvent, *ib.*Where the ratification gives a preference to heir's creditor, *ib.*Deathbed a *labes realis* in a conveyance, i. 299-30, note.

DEBITA FUNDI—

Adjudication upon, i. 752-3.

Use of it, i. 753-4.

Expense of repairing church and manse, whether, i. 739.

DEBITA FUNDI—*continued*.

Land-tax not, i. 739.
Duties to superiors, i. 723-4.

DEBT—

Execution for, i. 3-4.
Diligence, real and personal, *ib*.
Of the several kinds of estates responsible for, i. 18-9.
Imprisonment for, ii. 428-9.
See DEBTS.

DEBTOR—

Finding caution *judicio sisti*, may take sanctuary, i. 398-9.
Debtor *ad factum præstandum* not entitled to Act of Grace, ii. 446.
Nor sanctuary, ii. 461.
Nor *cessio*, ii. 475.
Of extrajudicial settlements between insolvent debtors and their creditors, ii. 381, 488-9.
See TRUST-DEEDS—ARRANGEMENTS.
Whether debtor may concur in sequestration after a trust-deed, ii. 490-1.
King's debtor not entitled to sanctuary, ii. 462-3.
Insolvent debtor, laws for relief of, in England, ii. 470-1.
See EXTENT—PRISONER—MEDITATIO FUGÆ—CESSIO—SANCTUARY—SEQUESTRATION.

DEBTOR AND CREDITOR—

General view of the law of, i. 3-4.
Execution for debt or diligence, real and personal, *ib*.
For enforcing payment against the estate, i. 5-6.
Against moveables, i. 6-7.
Against the person, *ib*.
Effect of insolvency on diligence, i. 7-8.
Examination of bankrupt law of Scotland and England, i. 9-10.

DEBTS—

Of debts as a fund of payment to creditors, i. 100.
Government stock, *ib*.
Bank stock, i. 100-1.
Policies of insurance, i. 102-3.
Patent rights and literary property, *ib*.
Of the original constitution of debt, i. 312-3.
See OBLIGATIONS—CONTRACTS—DEBTS, PURE, FUTURE, AND CONTINGENT, i. 332-3.

HOW DEBTS TRANSFERRED, ii. 15-6.

Originally not transferable without consent of debtor, *ib*.
Indirect method of conveying debts, *ib*.
Requisites of the actual delivery and transference of debts, *ib*.
Assignment, *ib*.
Debts assignable, *ib*.
Intimation, ii. 16-7.
Regular form of intimation, *ib*.
Notary cannot act both as procurator and notary, *ib*.
Instrument of intimation should not be general in describing sum, *ib*.
Intimation to one of several debtors in a bond sufficient, *ib*.
Or to treasurer of an hospital, or to clerk and manager of a trading company who enter it in their books, *ib*.
In absence of debtor from the country, intimation to person managing his affairs sufficient, *ib*.
Notarial intimation not absolutely requisite, *ib*.
Equivalents, production of assignation in an action where debtor a party, ii. 17-8.
Debtor a party to deed of conveyance, *ib*.
Where he acknowledges by letter the assignee's right, *ib*.
Verbal promise instructed by written evidence, *ib*.
Payment of interest or part of principal, *ib*.
Debtor accepting assignee's draft for sum in bond; draft presented and protested, *ib*.
Private knowledge not enough, *ib*.
Nor that debtor witness to the assignation, *ib*.

DEBTS—*continued*.HOW DEBTS TRANSFERRED—*continued*.

Nor that a letter has been written to him to which no reply, ii. 17-8.
Where debtor not in the country, *ib*.
Certain assignations require no intimation, *ib*.
Assignations in bankruptcy, *ib*.
Judicial assignations; by marriage; English assignations, *ib*.
English assignation of Scottish funds requires intimation, *ib*.
Assignation necessary to convey diligence, *ib*.
Or dividends, ii. 18-9.

MONEY DUE BY OPEN ACCOUNT may be conveyed by assignation, draft, order, or bill of exchange, i. 19-20.

How transfer completed, *ib*.
Instrument of protest where bill not accepted the proper evidence, *ib*.
Book debts, *ib*.
Debt not proper subject of poinding, ii. 59.
Debt of petitioning creditor in sequestration, ii. 288-9.
Nature of debt to support petition for sequestration, *ib*.
Pure debt, *ib*.
Future debt, ii. 413-4.
Damages, *ib*.
Contingent debt, *ib*.
Amount of debt, ii. 289-90.
Amount of future debt, *ib*.
Of debt purchased at less than its amount, *ib*.
Proof of such debt, *ib*.
Accommodation bills, ii. 390, 304-5.
Where creditor had agreed to composition, *ib*.
Deduction of partial payments, *ib*.
Deduction of bill lost by undue negotiation, *ib*.
Challengeable payment does not diminish debt, *ib*.
Counter claims, ii. 305-6.
Effect of prescription, *ib*.
Proof of debts, ii. 310-1.
Future debt entitles creditor to vote, ii. 288.
Contingent debt cannot, ii. 308-9.
Debt bought at low price, how entitled to vote, ii. 289-90.

Sale of outstanding debts, etc., by trustee, ii. 344-5.

See PROOF—VOTE.

JUDGMENT OF TRUSTEE in sequestration on the debts, ii. 362-3.

Classing of debts, ii. 364-5.
Preferable creditors, *ib*.
Must value and deduct, *ib*.
Changes on value of security, *ib*.
Whether entitled to dividend preceding sale of subject burdened, ii. 363-4.
Personal creditor, *ib*.
Pure, future, contingent debts, *ib*.
Ranking, ii. 364.
Debts already due, securities for, after bankruptcy, ii. 191.

For future debts, ii. 217.

See ACT 1696—BANKRUPTCY—HERITABLE SECURITY.

PLEDGE OF DEBTS, ii. 22.

Debts as subjects of arrestment, ii. 69.
Debts in general, i. 312-3.
Obligations considered as legal or illegal, i. 317-8.
Effect of illegality of debt against third parties, i. 330-1.
See CONTRACTS.

DEBTS, ONEROUS, GRATUITOUS, PURE, FUTURE, OR CONTINGENT, i. 331-2.

Debt without consideration, *ib*.
Debts formerly excluded from English commission, i. 333-4.
Every lawful claim competent in bankruptcy in Scotland, *ib*.

DEBTS—*continued.*DEBTS, ONEROUS, ETC.—*continued.*

Grounds of this distinction between English and Scottish law, i. 333-4.

Of the various ways in which debts may be constituted, i. 334-5.

Solemn and formal deeds, i. 340-1.

Holograph writings, i. 341-2.

Writings in *re mercatoria*, *ib.*

Creditors by verbal agreement or open account, i. 347-8.

Bonds and obligations, i. 352.

Preferable debts, i. 711-2.

Securities over feudal estate, i. 711-2.

Voluntary securities, *ib.*

Judicial, i. 739-40.

Over estate simply heritable, i. 789, 794-5.

Over moveable estate, ii. 10, 40.

From possession, ii. 86.

By exclusion, ii. 132.

Privileged debts, ii. 142-3.

Objections to constitution of debt in adjudication, i. 775-6.

Personal and pecuniary debts are moveable, ii. 3.

Change on, as heritable or moveable, by supervening securities, ii. 4-5.

Claim in ranking, ii. 6.

Price of land sold, *ib.*

PROOF OF DEBTS in ranking and sale, ii. 265-6.

Stops prescription, ii. 266-7.

Scrutiny of, *ib.*

Enumeration of, in trust-deed, ii. 385-6.

EFFECT OF PAYMENTS and intromissions on claims of creditors holding securities, ii. 424-5.

See PAYMENTS.

IMPRISONMENT FOR debt, ii. 428-9.

See IMPRISONMENT.

DECLARATOR—

Action of, nature and use of it, i. 785-6.

Unknown in England, *ib.*

Summons, *ib.*

Effect of decree and infetment, *ib.*

Of non-entry, i. 22-3.

Of expiry of legal, in adjudications, i. 743-4.

How far necessary to render adjudger's right irredeemable, *ib.*

Declarator of partnership, ii. 562.

Of trust, ii. 386.

DECREE—

Of sale, an effectual adjudication for all the creditors as at first calling, ii. 243.

Effect of it in securing purchasers, ii. 257.

Against bankrupt, ii. 258.

Decree in absence of holders of real burdens, ii. 259-60.

Effect of minority, insanity, etc., *ib.*

Against the creditors, ii. 260-1.

Effect in accumulating debt, i. 697-8.

Decree of certification, effect of, in ranking and sale, ii. 249-50.

Decree of forthcoming, ii. 64-5.

Of multiplepointing, ii. 280-1.

Of confirmation of trustee, effect in vesting the estate, ii. 334, 337.

Of exoneration of trustee, ii. 373.

Discharging bankrupt, ii. 356-8.

Of approval of composition, ii. 358.

Decree of adjudication and abbreviate, i. 742-3.

Decree reserving objections *contra executionem*, i. 762-3.

Decree of *cessio*, how far a protection, ii. 481, 484.

Decree of constitution, defects in, i. 776-7.

DEDUCTIONS from debt in ascertaining petitioning creditor's debt in sequestration, ii. 290-1.

Where creditor has agreed to a composition, ii. 290.

DEDUCTIONS—*continued.*

Partial payment, ii. 290.

Bill lost by undue negotiation, *ib.*

Challengeable payment, *ib.*

Counter claims, ii. 290-1.

Of securities in oath of verity, ii. 291, 304.

From claim to vote, *ib.*

Company creditors voting on individual partner's estate, ii. 306-7.

Deduction of expenses from divisible fund, ii. 363-4.

Preferable creditors must value and deduct security before ranking, ii. 306-7.

Effect of changes on value of security, *ib.*

Deduction of dividends received from other estates, ii. 315-6.

Company debts claimed against partners, *ib.*

Of payment received abroad after first deliverance on petition of sequestration, *ib.*

Effect of payments, intromissions, etc., on claims of creditors holding securities, ii. 424-5.

See VALUATION—DEBTS—RANKING.

DEED of accession to trust for creditors, ii. 392-3.

See TRUST-DEED—CONVEYANCE.

DEEDS—

Solemn and formal, requisites of, i. 340-1.

Privileged deeds, i. 341-2.

See WRITINGS.

DEFECT—

Consequence of, in first adjudication, i. 761-2.

In adjudger's right, i. 773.

In charge, i. 778.

In opening up decree of sale, ii. 260-1.

Radical defect of title in debtor, effect of, against purchasers and creditors, i. 298-9.

See PERSONAL EXCEPTIONS—OBJECTIONS—ADJUDICATION.

DEFENCES against claim for loss by insured, i. 662-3.

Against intimation of adjudication, i. 760-1.

Against writ of extent, ii. 50-1.

By arrestee, ii. 63-4.

In a *cessio*, ii. 478-9.

See OBJECTIONS.

DEFENDING—

See FORCIBLY DEFENDING, ii. 166, 161, 165.

DEFUNCT—

Preference of creditors of deceased debtor on his heritable estate, i. 763-4.

On his moveable estate, ii. 85-6.

Suggestions as to the vesting and distribution of the executry of an insolvent debtor, where executor in infancy or abroad, ii. 86-7.

See ANCESTOR.

DELAY in intimating shipment of goods, i. 473-5.

In voyage by storm or enemy, i. 603-4.

See MORA—BILLS—BARGAINS.

DEL CREDERE COMMISSION—

Guarantee in consequence of, i. 394-5.

Nature of *del credere*, *ib.*

Who may undertake, *ib.*

Claims in consequence of, *ib.*

Implied guarantee of factor remitting money, i. 395-6.

Factor, on vendee's failure, claims as creditor, i. 537-8.

This does not bar compensation by vendee against principal, *ib.*

This compensation will discharge guarantee, *ib.*

Factor holding, entitled to plead compensation of a debt due by himself against person whose solvency he guarantees, ii. 125-6.

Lien of factor holding, ii. 111.

Lien of broker holding under *del credere*, ii. 115.

Power under, to settle loss, ii. 115-6.

See COMPENSATION—FACTOR.

DELECTUS PERSONÆ in leases, i. 71-2.

How far rights implying *delectus personæ* attachable by creditors, i. 122-3.

In partnerships, bars admission of heirs or assignees, ii. 508-9.

Where assignation allowed by contract, may partners object on cause shown? *ib.*

Not same *delectus personæ* in public as in private companies, *ib.*

See **PARTNERSHIP—LEASE**.

Delectus personæ in leases, i. 71-2.

DELIBERANDI, JUS, of heirs, i. 748-9.

See **ADJUDICATION**.

DELIVERY—

TRANSFERENCE of goods by sale and delivery, i. 176-7.

Of risk as the criterion of transference, i. 179.

Completion of transference by, i. 181.

Of delivery in general, *ib.*

General distinction between actual and constructive delivery, *ib.*

OF GOODS IN SELLER'S POSSESSION DIRECTLY TO THE BUYER, i. 182-3.

De manu in manum, *ib.*

Protracted course of delivery, *ib.*

Into seller's carts, i. 183-4.

By buyer's carts, *ib.*

Into buyer's warehouse, *ib.*

Into king's warehouse, *ib.*

Into a ship of buyer, i. 185-6.

Where ship on general freight for a particular voyage, *ib.*

Delivery of a key, i. 186-7.

Taking rent, examples of constructive delivery, i. 189-90.

Standing trees, growing corn, cattle, *ib.*

Where goods not fully manufactured, i. 188-9.

Subject must be in existence, though not finished, and price paid, *ib.*

Distinction between a generic and a specific purchase, i. 189-90.

Where no change of custody, *ib.*

Payment of warehouse rent, marking goods, *ib.*, i. 192-3.

Measuring out grain, *ib.*

Temporary possession of buyer for a specific purpose, *ib.*

Effect of taking samples, *ib.*

Delivery to a workman, *ib.*

Materials prepared for building, i. 193-4.

Machinery not yet erected, *ib.*

OF GOODS IN THE CUSTODY OF ANOTHER FOR THE SELLER, i. 194.

Goods in the hands of wharfingers, warehousekeepers, and agents, *ib.*

Transference in wharfinger's books, i. 194-5.

Notice to custodian of sale, *ib.*

Effect of acts of ownership by buyer, *ib.*

Payment of warehouse rent, marking goods, etc., *ib.*

Where goods in hands of workmen, i. 196-7.

Where anything still to be done by seller as to price or quantity, *ib.*

Delivery order for part of a large quantity, i. 198-9.

Goods in hands of commission agent, *ib.*

Commentaries on the Warehousing Acts, *ib.*

See **WAREHOUSING ACTS**.

OF GOODS WAREHOUSED AND UNDER BOND, i. 203-4.

Goods the property of warehouseman, *ib.*

Goods in the bond warehouse of third parties, i. 205-6.

Dock warehouses, *ib.*

The dock proprietors are custodians, *ib.*

Notice to the warehousekeeper, i. 206-7.

Transfer by endorsement of dock warrant in England, *ib.*

Practice in Scotland, *ib.*

Competition between purchasers of dock warrant and one purchasing with notice to dock company, *ib.*

DELIVERY—continued.

OF GOODS WAREHOUSED AND UNDER BOND—continued.

Goods in ordinary bond warehouses, practice as to transfers, i. 206-7.

Endorsed transfer of delivery note, *ib.*

Notice to keeper, i. 209-10.

Where no settled usage, or delivery note still with buyer, *ib.*

Where new owner changes the bond, *ib.*

What is sufficient notice to change the custody, and who is properly custodian, *ib.*

Keeper of warehouse, i. 210-1.

Effect of delivery begun, but not completed, i. 211-2.

Where goods with buyer, or with a third party, *ib.*

OF GOODS IN HANDS OF SHIPMASTERS AND CARRIERS, i. 212-3.

Goods at sea, *ib.*

Sale by bill of lading, *ib.*

Delivery and endorsement of bill, *ib.*

Whether equivalent to actual delivery, i. 213-4.

Effect of bill of lading in preventing stoppage, *ib.*

See **BILL OF LADING**.

DELIVERY TO A THIRD PERSON FOR THE BUYER, i. 214-5.

To servants, agents, etc., *ib.*

To a wharfinger, *ib.*

To a third person for buyer, to abide buyer's orders, i. 216-7.

To a factor authorized to dispose of the goods, *ib.*

To a middleman for forwarding the goods, *ib.*

Marking the goods as buyer's in the hands of middleman, *ib.*

Exercising acts of ownership while goods in this situation, as tasting, or taking samples, i. 219.

Whether creditor of buyer, arresting goods, held as taking actual delivery for buyer, *ib.*

Trustee or assignee in England may take delivery for buyer, *ib.*

Marking goods by assignee held actual delivery, i. 219-20.

Goods delivered for carriage, *ib.*

To shipmaster of general ship, *ib.*

To a carrier, wharfinger, or on board a smack, with address to the buyer, *ib.*

Effect of receipt by the carrier to the buyer, *ib.*

Delivery after notice to stop will not transfer, i. 222-3.

The effect of actual and constructive delivery the same where price has been paid, *ib.*

Where vendee has not paid price, *ib.*

See **STOPPING IN TRANSITU**.

DELIVERY OF LAND, mode of, i. 21-2. See **SASINE—LEASE**.

Delivery of ships, i. 145-6. See **SHIP**.

Delivery of goods challengeable on 1696, c. 5, ii. 195-6.

Returning goods, ii. 196-7.

Delivery, the date of conveyance in a challenge under the Act, ii. 215-6.

Delivery indispensable to transfer moveables, ii. 10.

To pledge, ii. 19, 22.

Damage for non-delivery under contract of sale, i. 477-8.

Undertaking of a carrier in respect to delivery, i. 493-4.

Obligation on shipmaster as to, i. 604-5.

DEMURRAGE—

Nature of, i. 621-2.

Lay days, *ib.*

Days of demurrage, *ib.*

Claim for, how regulated, *ib.*

Demurrage due at common law, *ib.*

WHERE THERE IS A SPECIAL CONTRACT, i. 621-2.

Freightier liable for every delay not dissolving contract, *ib.*

Crowded state of docks, *ib.*

Order of warehousing goods, *ib.*

Delay in unloading or loading, etc., i. 622-3.

Amount of damages where days of demurrage limited, *ib.*

DEMURRAGE—*continued.***WHERE THERE IS A SPECIAL CONTRACT**—*continued.*

Demurrage on a general ship, demurrage for convoy, i. 623-4.

Detention by adverse winds, frost, or embargo, will not continue or revive demurrage, *ib.*

Settling the days of demurrage, *ib.*

Running or working days, *ib.*

WHERE THERE IS NO SPECIAL CONTRACT for lay-days or demurrage, i. 623-4.

Time allowed for loading and unloading, *ib.*

Detention of ship after customary time, *ib.*

Where delay by state of docks or particular mode of delivery, *ib.*

Where fault with shipper or consignee, i. 624-5.

Want of notice of arrival to consignee, *ib.*

Error in entering ship's name at custom-house, *ib.*

Forcible detention after lay and demurrage days, *ib.*

Detention at request of shipper, *ib.*

Protest for demurrage, *ib.*

Ought to be made, but not indispensable, *ib.*

No lien for demurrage, ii. 95-6.

DENUDING of trust, ii. 391-2.

See **TRUST-DEED**.

DENUNCIATION accumulates debt, i. 696-7.

To have this effect, must be made at head burgh of debtor's residence, i. 697-8, note.

Must be within year and day of charge, ii. 435-6, note.

DEPENDING ACTION—

Inhibition on, ii. 136-7.

Arrestment on, ii. 64-5.

What is a depending action, *ib.*

In case of foreigner, must be preceded by arrestment to found jurisdiction, ii. 65-6.

Competent after appeal, *ib.*

See **ARRESTMENT**—**INHIBITION**.

DEPOSITION or pledge—

Of goods for advances, ii. 20-1.

Of debts, ii. 22.

Of title-deeds, ii. 23-4.

DEPOSITE—

Nature of, i. 276-7.

Depositor has right to restitution, and depositary has neither use nor disposal, *ib.*

Where depositary fraudulently sells, *ib.*

Proper and improper deposite, *ib.*

Of fungibles, i. 277-8.

Proof of their identity, *ib.*

Deposite of money cannot be retained on plea of compensation, ii. 127-8.

See **PLEDGE**.

DERELICT SHIPS, salvage on, i. 643-4.**DESCRIPTION** of lands in judicial sale, ii. 262-3.

Deduction for what not made effectual, *ib.*

Statements of value, etc., ii. 262.

Measurement, ii. 263-4.

Description of loss entitling to abandon, i. 654.

Of partial loss, i. 657-8.

See **INSURANCE**.

Description of conjunct and confident, ii. 175-6.

Description of bankruptcy, ii. 155-6.

Of debt in oath of verity, ii. 291-304.

DESERTION of seamen, a forfeiture of wages, i. 563-4.

Entering king's service, when voluntarily or by impress, *ib.*

DESTINATION in entails, i. 43-4.

Conjunct fee and liferent to husband and wife, i. 53.

Between parent and child, i. 54.

In conjunct rights, i. 61-2.

Destination of ship, concealment of, in insurance, i. 667-8.

Effect of destination in rendering moveable subject heritable, ii. 6.

DETENTION of ship—

Cases of, in which owners freed from liability, i. 607-8.

Whether detention any effect on the claim for freight, i. 619-20.

By adverse winds, frost, or embargo, will not continue or revive demurrage, i. 623-4.

Effect of hostile detention on seamen's claim for wages, i. 565.

Detention of bill implies acceptance, i. 423.

See **DEVIATION**.

DETERMINATION of mercantile factories, or mandate, i. 522-3.**DETINUE**, action of, in England, i. 269-70.**DEVIATION** from course of voyage by storm or enemy, i. 603-4.

Master not bound to send goods in another ship, but may detain them till ship refitted, *ib.*

Responsibility of owners for deviation, i. 550-1.

Power of calling at intermediate ports, *ib.*

Effect of deviation on contracts of insurance, i. 668-9.

What to be held deviation, *ib.*

Ignorance of insured no defence, *ib.*

Where liberty to call at port not named, but generally described, *ib.*

Deviation unavoidable, i. 669-70.

Onus probandi, *ib.*

Alteration of voyage different from deviation, *ib.*

Voids the contract, *ib.*

What is not held an alteration, i. 670-1.

DEVOLUTION, clause of, in articles of sale, ii. 254-5.**DIEM CLAUSIT EXTREMUM**, writ of, by Crown after debtor's death, ii. 49-50.**DIES INCCEPTUS PRO COMPLETO**, ii. 166-7.**DIETS** of examination of bankrupt fixed by sheriff, ii. 325-6.

Advertisement of, ii. 325.

Dispensation with second diet in constitution previous to adjudication, i. 762-3.

DIGNITIES and honours not alienable or attachable, i. 120-1.**DILIGENCE**—

REAL AND PERSONAL, general view of, i. 3-4.

How execution obtained, i. 4-5.

Diligence for enforcing immediate payment, i. 5-6.

Against land, *ib.*

Against moveables, i. 6-7.

Against the person, *ib.*

For intermediate security, i. 7-8.

Against land in England, i. 6, note.

Against moveables, *ib.* note.

Against the person, i. 6-7.

Effect of insolvency on diligence, i. 7-8.

General view of the principles of bankrupt law, *ib.*

Law of England and Scotland contrasted, i. 9-10.

Bankrupt law of England, i. 11.

Of Scotland, i. 13.

Diligence necessary to render bankrupt, ii. 159-60.

Acts of warding, *ib.*

Imprisonment on, not sufficient to constitute bankruptcy, *ib.*

By horning and caption, *ib.*

General letters of horning, *ib.*

Diligence must be regular, ii. 160-1.

Imprisonment on acts of warding, caption, etc., ii. 435.

Meditatio fugæ warrant, ii. 448.

See **IMPRISONMENT**—**BANKRUPTCY**.

AGAINST MOVEABLE PROPERTY—

Where debtor alive, and laws establishing equality among users of it, ii. 55-6.

Poinding, *ib.*

Poinding the ground, *ib.*

Personal poinding, ii. 57.

Arrestment and forthcoming, ii. 58.

Equalizing of diligence, ii. 72-3.

DILIGENCE—*continued.***AGAINST MOVEABLE PROPERTY**—*continued.*

Diligence after debtor's death, and laws establishing equality among creditors of deceased, ii. 76-7.
 General principle of liability of executors, ii. 79.
 How personal estate liable after death in England, *ib.* note.
 How liable in Scotland, ii. 79-80.
 Processes for distribution of moveables where debtor not a trader, ii. 275-6.

BY CROWN ON HERITABLE ESTATE, i. 781-2.

On moveable, ii. 40-1.
 Competition of diligence, with Crown's extent, ii. 51-2.
 Effect of multiplepointing in stopping diligence, ii. 278.
 Effect of ranking and sale, ii. 243.

CONVEYED BY ASSIGNATION, i. 428-9, ii. 18.

How far it may be in assignee's name, ii. 19.
 Litigiosity in, ii. 145-6.
 Competition of diligence against land between creditors of ancestors and heir, i. 765-6.
 What diligence requisite by ancestor's creditors to acquire preference, i. 766-7.
 Competition of diligence with Crown's extent, ii. 51-2.
 Ranking of creditors doing diligence, ii. 406-7.
 Effect of partial payments on diligence, ii. 424-5.

BEGUN—

Alienations in prejudice of, reducible under second branch of Act 1621, ii. 184-5.
 Extension of litigiosity, ii. 185.
 Title to challenge, ii. 185-6.
 There must be diligence begun, *ib.*
 Diligence must be such as would have attached subject alienated, *ib.*
 Must be regular, ii. 186.
 See **MORA**, ii. 187—**ACT 1621**.

PRESTABLE, or responsibility under contracts of hiring, i. 482-3.

Culpa lata, levis culpa, culpa levissima, ib.
Locatio custodiæ, i. 487-8.
 Skill of professional men and artists, i. 488-9.
 By mercantile factors, i. 515, 530.
 See **HIRING**—**SALE**—**RISK**.

DIMINUTION of claims, effect of payments, intromissions, etc., on securities, ii. 424-5.**DIRECT** alienations challengeable on 1696, c. 5, ii. 195.

Direct damage in contract of sale, claim by buyer for, i. 478-9.

Constructively direct, i. 479.

DISCHARGE of bankrupt, ii. 356, 366.

See **SEQUESTRATION**.

OF PRICE OF LANDS in judicial sale, ii. 257-8.

Of trustee, ii. 373.

OF CAUTIONERS, i. 374.

Implied, i. 377.

OF GUARANTEE, i. 394-5.

Discharge of factor with *del credere* commission by vendee having compensation against principal, i. 537-8.

Discharge of lien, ii. 88, 112.

Difference in principle and effect between *cessio* and discharge, ii. 379.

Effect of *cessio* in confining discharges to proper objects, *ib.*

EFFECT OF CERTIFICATE or discharge by the law of ANOTHER COUNTRY, and of discharge in Scotland when pleaded in other countries, ii. 379-80.

Difficulty from *lex loci contractus, ib.*

Where debtor and creditor reside in the country where discharge granted, *ib.*

Whether creditor may follow discharged debtor to another country, *ib.*

Creditor's residence in another country, ii. 380-1.

Locality of contract, *ib.*

Place of payment seems to rule the effect of discharge, *ib.*

DISCHARGE—*continued.***EFFECT OF CERTIFICATE**—*continued.*

Peculiarities in the effect of the discharge in the country of bankrupt's residence, ii. 380-1.
 Effect of a commission of bankruptcy as a protection, *ib.*
 Effect of it in Scotland, ii. 381.
 Effect of English certificate limited, *ib.*
 Discharge in Scotland universal, *ib.*
Cessio bonorum, ib.
 See **FOREIGN**.

DISCLOSURE in a patent, i. 107-9.

See **PATENTS**.

DISCONTIGUOUS lands, *sasine* in, i. 715-6.**DISCOUNT**. Bills discounted in a single transaction are bought by the banker, i. 290-1.

See **BANKER**—**BILLS**—**USURY**.

DISCUSSION, right of, to cautioners, i. 364-5.**DISEASE** of the granter of a deed challenged on deathbed, nature of, i. 82-3.**DISHONOUR** of bills, notice of, i. 438-9.

Form of notice, *ib.*

Proof, i. 441-2.

Time, *ib.*

In foreign bill, *ib.*

Notes and inland bills, i. 442.

By whom to be given, i. 443.

To whom to be given, i. 444.

Equivalents, *ib.*

See **BILL**—**NEGOTIATION**.

DISPENSATION with second diets in constitution previous to adjudication, i. 762-3.

With minute-book, *ib.*

DISPOSAL of bankrupt estate, ii. 344.

Heritable property, *ib.*

Contrast of judicial and voluntary sale, ii. 344-6.

Voluntary sale, ii. 345.

Moveable property, ii. 344-5.

Outstanding debts, etc., *ib.*

Money, ii. 344-5.

DISPOSITION—

Absolute, with backbond for prior debt, challengeable on 1696, if backbond cancelled within sixty days, ii. 196-7.
 Nature of this deed, and criterion of preference, i. 619-20.

Sale by creditor under it, ii. 272.

Disposition and bond in security, i. 714-5.

Criterion of preference, i. 720-1.

Effect of this deed in terms of full conveyance, but expressly in security of a transaction of indefinite amount, i. 725-6.

Sale by creditor under the security, ii. 272-3.

Disposition *omnium bonorum* to particular creditors challengeable at common law, ii. 227-8.

By debtor obtaining Act of Grace, ii. 447-8.

By pursuer of *cessio*, ii. 482-3.

See **CONVEYANCE**.

DISQUALIFICATION to be common agent in ranking and sale, ii. 248.

To be trustee, ii. 302-3.

Conjunct and confident persons, *ib.*

Creditor with adverse interest, *ib.*

Inconsistency where candidate trustee on other estates, ii. 303.

Corrupt election, *ib.*

Candidate a bankrupt, *ib.*

Personal objection, *ib.*

See **TRUSTEE**—**QUALIFICATION**.

DISSOLUTION of marriage within year and day, i. 679.

After year and day, or birth of living child, i. 679-80.

OF PARTNERSHIP, ii. 520-1.

In relation to the parties, ii. 521-2.

By voluntary act of the parties, *ib.*

By expiration of the term, *ib.*

DISSOLUTION—*continued*.OF PARTNERSHIP—*continued*.

Tacit renewal, ii. 521-2.

May be at any time where no term fixed, *ib*.Whether renunciation by a partner dissolves the concern, *ib*.

Power of dissolution must be exercised fairly, ii. 522-3.

Must not be fraudulent, *ib*.

Even where term fixed, may take place on cause shown, ii. 523-4.

What held a fixed term, *ib*.

By death, renunciation, or incapacity of partners, or change of firm, ii. 524-5.

Dissolution in relation to third parties, ii. 528-9.

Notice of dissolution by death, ii. 529-30.

By bankruptcy, *ib*.By renunciation, *ib*.

Notice to customers, ii. 530-1.

To strangers, ii. 531-2.

Power of partners after dissolution, ii. 533-4.

Settlement of the company's affairs, ii. 535.

See PARTNERSHIP.

DISSOLVING conditions in sale, i. 259-60.

DISTRIBUTION of moveables where debtor not a trader, ii. 275-6.

General remarks, *ib*.

Multiplepinding, ii. 276-7.

Forthcoming, ii. 280.

Of poinded goods, *ib*.

Distribution of estate under sequestration, ii. 361-4.

By dividends, ii. 365-6.

Of insolvent estates, where no sequestration, ii. 232.

See SALE—RANKING—DIVIDENDS—TRUST-DEED.

Distribution proportional among freighters for damage, where owners liable only to the extent of value of ship, i. 611-2.

See CONTRIBUTION.

DIVIDENDS under a sequestration, ii. 365-6.

See SEQUESTRATION.

ASSIGNATION NECESSARY to carry dividends, ii. 19-20.

Effect of dividend in discharging debt, ii. 424-5.

Trustee cannot buy dividends, ii. 319-20.

UNDER A TRUST-DEED, ii. 397-8.

Trustee becoming bankrupt after dividend advertised and part paid, *ib*.

DIVISIBLE FUND, ii. 361.

Deductions from it, ii. 362.

DIVISION of the price of lands in judicial sale, ii. 267-8.

Scheme of, and decree, *ib*.

DIVISION, fund of, ii. 361-2.

Payments after first deliverance, *ib*.Alienations in satisfaction or payment after that date, *ib*.Bank interest forms part of fund, *ib*.Penal interest, *ib*.

Deductions from fund, ii. 363-4.

SCHEME OF, preparatory to dividend, ii. 364-5.

OF FUNDS AMONG CREDITORS in bankruptcy, ii. 401-2.

Fund of division, *ib*.Of the fund in general, *ib*.On whom accidental defalcation falls, *ib*.Fund appropriated to particular creditors only by decree of division, *ib*.

Expense of interim warrants, ii. 402-3.

See RANKING.

OF PROFIT on dissolution of partnership, ii. 536-7.

RIGHT OF, AMONG CAUTIONERS, i. 364-5.

BRIEVE OF, AMONG HEIRS PORTIONERS, i. 62-3, note.

DIVORCE, effect of, on the legal rights of parties in the marriage contract, i. 679-80.

Husband insolvent, *ib*.Where he is solvent, *ib*.Divorce of wife, *ib*.

DOCK WAREHOUSES, i. 205-6.

DOCK WARRANTS, a mode of transferring goods in dock warehouses, i. 206-7.

See DELIVERY.

DOMICILE—

Effect of bankruptcy in the country of debtor's domicile, ii. 375-6.

Law of, regulates personal estate, ii. 376-8.

Real estate, ii. 378.

See FOREIGN—BANKRUPTCY—ARRESTMENT.

DOMINIUM DIRECTUM ET UTILE, i. 711-2.

DOMINIUM UTILE, or vassal's estate, i. 20-1.

Investiture proper and improper, *ib*.Sasine, the *modus transferendi*, *ib*.Preference of the first infeftment, *ib*.Where the seller's right is merely personal, *ib*.

Conveyance with precept by one not himself infeft, i. 21-2.

Transference of *dominium utile*, i. 711-2.By voluntary conveyance, *ib*.Judicial, *ib*.

See SUPERIOR—CONDITIONS.

DORMANT PARTNER, evidence of, ii. 510-1.

Must be notified at dissolving, ii. 533-4.

How to proceed against, ii. 561-2.

See PARTNERSHIP.

DOUBLE SECURITIES, ranking of, ii. 413-4.

Double securities over one estate, ii. 414-5.

Adjudication by creditor holding heritable security, *ib*.Uses of such diligence, *ib*.For what to be ranked, *ib*.Creditor holding voluntary security adjudging, *ib*.

Second adjudication, ii. 415-6.

Where two or more subjects, over each of which securities for same debt, *ib*.Double securities over separate estates, *ib*.

Creditors holding collateral securities over property not belonging to bankrupt, ii. 416-7.

See RANKING.

DRAFTS, a mode of transferring debt, ii. 19-20.

Acceptance by debtor, or protest for non-acceptance, completes the transfer, *ib*.

AND ENDORSATIONS of bills, how far challengeable on 1696, c. 5, ii. 196.

See DEBTS—BILL—ACT 1696.

DRAWER OF BILL, claim against, by payee, i. 429-30.

Liability for re-exchange, *ib*.Circuitous re-exchange, *ib*.

Claim by drawer, i. 431-2.

Bill found unsigned in his repositories may be signed by his representatives, *ib*.His claim against drawee, *ib*.

Claim against drawer by endorsee, i. 432-3.

See BILL.

DRAWING OF BILLS, i. 420-1.

Bill must be signed by drawer to produce summary execution, *ib*.

Act of drawing implies obligation that payee shall accept, i. 421-2.

Where bill drawn in representative character, it should be so specified, *ib*.Foreign bills drawn in sets, *ib*.

DRUNKENNESS, effect of, in vitiating contracts, i. 316-7.

DUNGHILLS, whether heritable or moveable, ii. 2-3.

DUTIES (king's), warehousing of goods for, i. 198-9.

See WAREHOUSING.

Bond for king's duties, ii. 19-20.

Hypothec for, ii. 26-7.

Ranking of Crown for duties on goods, ii. 406-7.

On debts, *ib*.

To SUPERIOR, i. 22.

Preference for, i. 723.

Hypothec for, ii. 26-7.

- DWELLING-HOUSE, how far a sanctuary, ii. 461-2.
 English law, *ib.*
 Scottish, *ib.*
 See HOUSES.
- DYER'S lien, ii. 102, 105.
- DYVOUR, or bankrupt, obtaining *cessio*, habit to be worn by, ii. 471-2.
 See CESSIO.
- EASES, how far cautioners are bound to communicate, i. 365-6.
- EDICT in confirmations, ii. 77-8.
Nautæ Caupones, etc., i. 495-6.
 See NAUTÆ.
- EFFECTUAL adjudication, i. 755-6.
 See FIRST EFFECTUAL ADJUDICATION.
- ELECTION—
 Doctrine of, in England, as analogous to approbate and reprobate, i. 141-2.
 In partnership, of firm, where ambiguously used, *ib.*
 Company having separate concerns under same firm, *ib.*
 See PARTNERSHIP.
- OF COMMON AGENT in ranking and sale, ii. 247.
 Of trustee, ii. 312-15.
 Of commissioners, ii. 320-2.
- CONTRACTS AGAINST the freedom of, i. 322-3.
- ELECTIVE FRANCHISE, i. 22-3.
- ELEGIT, writ of, i. 6, note.
- EMBARGO upon ships does not discharge seamen's claims for wages, i. 565-6.
 Effect of embargo before voyage, i. 566-7.
 On owner's claim for freight, i. 619-20.
- EMBEZZLEMENT of goods on board ship, responsibility of owners and master for, i. 611-2.
 Goods not in bill of lading, *ib.*
 See NAUTÆ CAUPONES, etc.
- Embezzlement of funds, and alienations to relations and confidential friends, ii. 170.
 See ACT 1621.
- EMOLUMENTS of trustee in sequestration, ii. 320.
- ENDORSEMENT of bills, i. 425-6.
 Endorsement in blank, *ib.*
 In full, *ib.*
 May be restrictive or conditional, i. 426-7.
 Without recourse, *ib.*
 For a part bad, *ib.*
 Where bill payable to a company, *ib.*
 After term of payment, *ib.*
 Will not carry diligence, i. 427-8.
 Endorsation as a collateral security, i. 428-9.
 Blank endorsements, danger of, where bill lost, *ib.*
- OF BILLS AND DRAFTS, how far challengeable on 1696, c. 5, ii. 196-7.
 Dates of, how to be taken, ii. 215-6.
- OF BILLS OF LADING, i. 212, 594.
- ENDORSEE of bill, his claim against acceptor and drawer, i. 431.
 Requisites of due negotiation, i. 432-3.
 What exceptions pleadable against endorsee after term of payment, i. 427-8.
- ENDORSEMENT on certificate of registry of a ship, i. 156.
 Of bill of lading, i. 212, 594-5.
 Of delivery note, i. 208-9.
 See BILL OF LADING—SHIP—DELIVERY.
- ENDURANCE of leases, i. 65-6.
 Of partnership where no term fixed, ii. 521.
 Of protections, ii. 298.
- ENEMY, deviation from voyage by, i. 603-4.
 See ALIEN, i. 325-6.
- ENGLAND, Bank of, i. 100-1.
- ENGLISH LAW—
 Diligence against land in England, i. 6-7, note.
 Against moveables, *ib.* note.
 Against the person, i. 7-8, note.
 Examination of the bankrupt laws of England and Scotland, i. 9-10.
 Bankrupt law of England, i. 11.
 English double bonds, claim on, i. 351.
 Penal bond, adjudication on, i. 776-7.
 Courts, decisions of, in maritime and mercantile questions, authority of, in Scotland, i. 549-50.
 English assignments require no intimation, ii. 17-8.
 Where of Scottish funds intimation necessary, *ib.*
 Distinction between English and Scottish law as to imprisonment for debt, ii. 429.
 Statute merchant of England, ii. 430.
 History of ordinary imprisonment in England, ii. 431-2.
 Contrast with Scottish law of imprisonment, ii. 434-5.
 English law of protection to bankrupt, ii. 469-70.
 Laws for relief of insolvent debtors, ii. 470-1.
 Right to moveables in England after death vests *ipso jure*, ii. 76-7.
 See FOREIGN.
- ENGRAVINGS, property in, i. 119-20.
- ENTAILS, i. 43.
 Commentary on the Act 1685, c. 22, *ib.*
 Fetters of entail, i. 43-4.
 Restraining words, *ib.*
 Prohibitions against selling, contracting debt, altering the order of succession, *ib.*
 Fetters cannot be extended by implication, *ib.*
 How to bar creditors, i. 44-5.
 Irritant and resolute clauses, *ib.*
 Doctrine of construction of entails, *ib.* note.
 Persons against whom the restraints are directed, *ib.*
 Institute, *ib.*
 How to be described so as to include him, *ib.*
 Who are heirs? i. 45-6.
 Where the entail is institute, *ib.*
 Can entail exclude his creditors? *ib.*
 Mutual and onerous entails, i. 46-7.
 Remedy where the entail's debts exceed the value of the estate, *ib.*
 Where his debts only encumber the estate, *ib.*
- REQUISITES OF EFFECTUAL ENTAILS, i. 46-7.
 Recording, *ib.*
 Infertment, i. 47-8.
 Omission of conditions, *ib.*
 Competition of creditors with substitutes, *ib.*
 Where the entail is incomplete, i. 48-9.
 Where the irritant and resolute clauses have been omitted in the infertment, *ib.*
 Cases of Smollet and Sheuchan, i. 49-50.
 Where the entail not completed is the sole title, *ib.*
 Diligence competent to creditors, i. 50.
 Against rents, etc., *ib.*
- RIGHT OF HEIR IN POSSESSION, i. 50-1.
 Power to cut woods, *ib.*
 Can this power be adjudged by creditors? i. 51-2.
 Heir may work mines, etc.; but where not already opened up, can his creditors do so? *ib.*
 Heir of entail cannot pull down mansion-house and dispose of materials, *ib.*
 Assignment of funds to a son to invest in terms of an entail, and so invested, effect of, against son's creditors, *ib.*
 Where estate under strict entail, a succeeding heir not liable for debts of an apparent heir three years in possession, i. 710-1.
 Entail not recorded till immediately before death of apparent heir, the creditors of apparent heir not entitled to adjudge estate in the person of the next substitute, *ib.*

ENTAILS—*continued.*RIGHT OF HEIR IN POSSESSION—*continued.*

- Power of heirs of entail to grant leases, i. 65-6.
- Where there is no prohibition against alienation, *ib.*
- Where there is such prohibition, i. 66-7.
- What length of lease is held an alienation, *ib.*
- Where there is a prohibition to dispoise, i. 67-8.
- Power of heirs to burden estate for improvements under 10 Geo. III. c. 51, i. 70.
- Completion of heir's right for, i. 793.

CONVEYANCE OF HEIR'S LIFE INTEREST may, under Act 1621, be challenged by creditors, ii. 178.

Whether conveyance of heir's faculty to cut timber may be challenged, *ib.*

If heir has made contract of sale of timber on estate, the transfer of price may be challenged, *ib.*

Effect of entail in barring heir from pursuing a ranking and sale, ii. 241.

See HEIR—LEASE.

ENTRY with superior, i. 22-3.

Non-entry duties, *ib.*

Relief, *ib.*

Composition for entry of singular successors, *ib.*

Origin of entry by composition, and how it may be forced, i. 23-4.

Amount of the composition, and deductions demandable, *ib.*

In lands, *ib.*

In houses, *ib.*

Property subfeued, *ib.*

Where the subfeu has been for an elusory subfeu duty, or under true value, in consideration of a grassum, i. 24-5.

Deduction of the teinds, *ib.*

Composition by the adjudger of a superiority, i. 24-6.

By heirs of entail, *ib.*

Entry of a corporation, *ib.*

Evasions of casualties and remedies, *ib.*

Retention of charter, i. 25-6.

Stipulations, *ib.*

Personal obligations, *ib.*

Conditions of the feudal grant, *ib.*

See CONDITIONS.

ENTRY, SHORT—

Bills in the hands of a banker, short entered, are the property of customer, i. 290-1.

Bills entered generally in account are not the property of banker, unless he has given customer credit on them, and allowed him to draw on it, *ib.*

ENTRY OF HEIRS, i. 747, 748-9.

Effect in barring heir from pursuing a ranking and sale, ii. 241-2.

See HEIR BENEFICIO INVENTARII.

ENTRY IN WAREHOUSE BOOKS, effect in transferring, i. 194, 205, 208.

ENUMERATION of debts in a trust-conveyance, ii. 385-6.

EQUALITY among creditors, commentary on the statutes introducing it among adjudging creditors, i. 753-4.

Where debtor alive, i. 754-5.

Accelerating adjudications, i. 762.

Where debtor is dead, i. 763-4.

COMMENTARY ON THE LAWS ESTABLISHING equality among creditors doing diligence against personal or moveable estate during debtor's life, ii. 72-3.

History of the laws for equalizing diligence against moveables, *ib.*

Pari passu preference of arrestments and poindings, ii. 73-4.

Proceedings in order to take benefit by the statutes, ii. 74-5.

Rendering debtor bankrupt, *ib.*

Creditors must use such diligence as may entitle to *pari passu* preference with diligence to be levelled, *ib.*

VOL. II.

EQUALITY—*continued.*COMMENTARY ON THE LAWS ESTABLISHING—*continued.*

Where the diligence to be levelled is an arrestment, ii. 74-5.

Where it is a poinding, *ib.*

Effect of sequestration, ii. 75-6.

Where the arrestment has been loosed, ii. 76-7.

Bonus of ten per cent. abolished, *ib.*

Equalizing diligence after debtor's death, ii. 82-3.

Commentary on Act of Sederunt 28th February 1662, *ib.*

Pari passu preference of creditors using diligence within six months, ii. 83-4.

Contrast of *pari passu* preference of adjudgers with this, *ib.*

Competition with arrestments, etc., during the debtor's life, *ib.*

If the debtor has been rendered bankrupt, *ib.*

Where he has not, ii. 84-5.

Where no diligence during debtor's life, *ib.*

Creditors of ancestor and executor, ii. 85-6.

See MULTIPLEPOINDING—FORTHCOMING—POINDING.

MEASURES OF CREDITORS to prevent preferences, ii. 490-2.

By reduction under 1696, c. 5, ii. 198-9.

Under 1621, ii. 171, 184.

In private composition, ii. 399.

See ALIENATION.

PRACTICAL CONSULTATIONS as to arrangements between insolvent debtors and their creditors to secure equality, ii. 488.

See ARRANGEMENTS.

EQUITY, stopping *in transitu* grounded on, i. 226-7.

Control of, on excessive damages, in contract of sale, i. 478.

Over penalties in bonds, i. 699.

Equitable interposition of Court of Session in accelerating adjudications, i. 762-3.

Control of, in sales by heritable creditors, ii. 271.

Relief in equity against writs of extent, ii. 50.

EQUIVALENTS of imprisonment to infer bankruptcy, ii. 160-1.

Of intimation of assignation, ii. 16, 17.

See ASSIGNATION.

Of protest and waving negotiation of bills, i. 444-5.

See BILLS.

ERASURE in instrument of sasine, i. 716-7.

See OBJECTIONS.

ERROR, effect of, in vitiating a contract, i. 313-4.

Error in substantials, *ib.*

In the person, i. 314-5.

As to price or consideration, *ib.*

As to quality of the subject, *ib.*

Errors in instrument of sasine, i. 716-7.

See OBJECTIONS.

ESCAPE of prisoner, liability of magistrates for, ii. 437-8.

Search after escape, ii. 438-9.

ESTATE, bankrupt, vesting of, in trustee, ii. 333-4.

Future estate, ii. 334-5.

Management, sale, and recovery of estate, ii. 342-4.

Disposal of heritable estate, ii. 344-6.

Judicial, contrasted with voluntary sale, *ib.*

Voluntary sale, ii. 345-6.

Of moveable estate, ii. 344.

Outstanding debts and funds unrecovered, sale of, *ib.*

FEUDAL, securities over, i. 711, 739-40.

Ranking of creditors with securities over, ii. 402.

Estate unfeudalized, securities over, i. 789, 794-5.

Ranking of creditors with preferences, ii. 405.

Moveable estate, securities over, ii. 10.

Ranking on, ii. 405.

See SECURITIES.

ESTATES, of the several kinds of, responsible for debt, i. 18-9.

EVICTION, i. 690-1.

See WARRANTICE.

EVICTIO from purchaser at judicial sale, ii. 259-60.

See WARRANTICE.

EVIDENCE—

Of onerous consideration given for deeds challenged under Act 1621, ii. 178.

Onus probandi on receiver, *ib.*

Narrative of deed to conjunct and confident, not evidence, *ib.*

Where deed to a stranger, narrative sufficient evidence, *ib.*

Holder of deed not entitled to his oath in support of narrative, *ib.*

In supporting deed, not necessary to prove that highest price possible got for subject, ii. 179.

In estimating value of contingent interest, not admissible to take value *ex eventu*, *ib.*

Where deed objected to is a bond or bill, *ib.*

A previous obligation, *ib.*

OF BANKRUPT'S CONCURRENCE to sequestration, ii. 285.

Death of bankrupt after granting mandate, ii. 286.

Of claims in sequestration, ii. 304.

Effect of answers at bankrupt's examination as evidence, ii. 329.

Evidence of concurrence of creditors to bankrupt's discharge, ii. 349.

Of concurrence to composition, ii. 352.

See SEQUESTRATION—PROOF.

OF INTENTION TO ABSCOND, necessary to support *meditatio fugæ* warrant, ii. 452.

Of imprisonment to infer bankruptcy, ii. 461.

To pursue a *cessio*, ii. 477.

Proof of debts, i. 347-8.

In question of triennial prescription, i. 349, 350.

Evidence of partnership, ii. 509.

Of the completion of a private composition contract, ii. 398.

In matters of ownership of vessels, i. 159.

EXAMINATIONS of bankrupt under sequestration, ii. 325.

See SEQUESTRATION.

EXCAMBION, i. 732.

Warrantice implied, i. 738.

Contract of, *ib.*

Criterion of the right, *ib.*

EXCEPTION. Whether nullity under 1621 may be pleaded by way of exception, ii. 181-2.

EXCEPTIONS to the rule of the Act 1696, c. 5, ii. 200-1.

Payments in cash, *ib.*

Cash includes circulating notes, ii. 201-2.

Transactions and payments in ordinary course of business, ii. 202.

Nova debita, ii. 210.

Distinctions as to *nova debita*, *ib.*

Security not completed till after advance, ii. 207-8.

Where completion requires debtor to interfere, ii. 208-9.

Security supposed to be completed at first, *ib.*

Security completed after advance of money, ii. 209-10.

Security to cautioner engaging for prior debt, ii. 210-1.

In securities for future debts, security to cautioner engaging at time, *ib.*

Conveyance in real warrantice, *ib.*

Security for discharge of office, *ib.*

Part of sum only advanced, *ib.*

Money not paid on day sasine completed, *ib.*

Heritable security for cash account, ii. 219-20.

Personal exceptions to claim of preference, ii. 132.

To challenge of trust-deed, ii. 392.

To endorse of bill after term of payment, i. 426-7.

Effect of, against creditors and purchasers, i. 297-8.

Personal exceptions and conditions in rights, effect of, against purchasers and creditors, i. 306.

Exception of fraud, i. 309.

See PERSONAL EXCEPTIONS.

EXCHANGE, Re-exchange, what? i. 429-30.

Liability of acceptor for, *ib.*

Direct re-exchange, *ib.*

Circuitous re-exchanges, *ib.*

Liability of drawer for, *ib.*

See BILLS.

EXCHEQUER, Court of, ii. 40-1.

Proceeding before, as to writs of extent, ii. 41-2.

Motions to set aside extents, ii. 50-1.

Relief against, in equity, *ib.*

Whether a caption may be obtained in Exchequer, so as to render debtor bankrupt, ii. 491.

Exchequer bills, i. 100-1.

Hypothec for, ii. 39.

EXCISE DUTIES—

Bonding goods for, ii. 19-20.

Preference of Crown for, ii. 49-50.

See EXTENT.

EXCLUSION—

Preferences by, ii. 132, 143-7.

Rules of ranking, ii. 406-7.

Competition of inhibitors, adjudgers, and heritable creditors, *ib.*

Canons of ranking, ii. 413-4.

See RANKING.

OF ASSIGNEES AND SUBTENANTS, i. 72, 73.

See LEASE.

EXCLUSIVE PRIVILEGE, by patent or copyright, i. 102-3, 110.

EXECUTION for debt, i. 3-4.

Diligence, real and personal, *ib.*

General view of the law in England and Scotland, *ib.*

Execution of horning at debtor's dwelling-place, after forty days' absence from Scotland, insufficient to infer bankruptcy, ii. 142-3.

Execution of arrestment, form of, ii. 64, note.

Of writ of extent, ii. 43.

Summary, on bond of caution for composition, ii. 461-2.

On bills, i. 364, 429.

Of pouncing, ii. 58.

Of horning, ii. 435.

Of caption, *ib.*

Of search, ii. 437.

Of inhibition, ii. 134.

Of *meditatio fugæ* warrants, ii. 456.

May be on Sunday, *ib.*

Sanctuary no bar to execution, but debtor must be secured within it, *ib.*

Personal protection no bar, *ib.*

EXECUTOR, how appointed, ii. 77-8.

Executor nominate or dative, *ib.*

Confirmation his title, *ib.*

Proceedings to obtain confirmation, *ib.*

Edict, *ib.*

Claim, *ib.*

Who are entitled to the office, and in what order, ii. 78-9.

Confirmation, *ib.*

Testament testamentary and testament dative, *ib.*

Nature of the office, *ib.*

Inventory to be given up by him, *ib.*

Principle of executor's liability for debts of deceased, ii. 79-80.

Executor nominate or dative, proceedings against, ii. 80-1.

His retention for debt due him by deceased, *ib.*

Diligence by creditors for completing their right, *ib.*

Vitious intromission by neglecting to confirm, ii. 81-2.

Omissa vel male appretiatia, *ib.*

Executor-creditor, *ib.*

Competition with an assignation, *ib.* note.

Commentary on Act of Sederunt 28th February 1662, equalizing diligence after death, ii. 82-3.

Executor entitled to pay privileged debts, ii. 83-4.

EXECUTOR—*continued*.

Competition with arrestments, etc., during debtor's life, ii. 83-4.

If debtor made bankrupt, *ib.*

If not made bankrupt, ii. 84-5.

Where no diligence during debtor's life, *ib.*

Competition between creditors of deceased, and of executor, ii. 85-6.

Whether accessories to land descend to heir or executor, i. 786-7.

See HERITABLE and MOVEABLE—ACCESSION.

EXECUTRY vests without confirmation, i. 136-8.

EXEMPTIONS from imprisonment.

See PROTECTION.

EXERCITORIAL power, i. 506-7.

See FACTORY—COMMISSION—SHIPMASTER.

EXHIBITION and arrestment for attaching bills, ii. 69-70.

EXONERATION and discharge of trustee, ii. 373.

Of bankrupt, ii. 367.

EXPENSES—

Of process, from what date interest chargeable on, i. 693-4.

Of contest for trusteeship laid on losing party, ii. 315.

Of contest for common agent, ii. 248.

OF SEQUESTRATION—

Whether creditors liable to calls of money for, ii. 343-4.

Expenses of sequestration form a deduction from divisible fund, ii. 361.

Rule as to expenses where creditors hold heritable security, ii. 346-8.

Rule as between heritable creditors themselves, *ib.*

Personal creditors with relief, ii. 348.

Relief against heritable securities, *ib.*

Expenses on bills of exchange, liability of acceptor for, i. 429-30.

What expenses covered by penalty in bonds, etc., i. 701-2.

Expenses of funeral, ii. 147.

See SEQUESTRATION.

EXPIRATION—

Of litigiousity, ii. 150.

Of mercantile factories, i. 522-3.

Limited mandates expire on performance, i. 526-7.

EXPIRY of legal of adjudications, declarator of, i. 743-4.

See ADJUDICATION.

EXPRESS conditions of sale, i. 465-6.

Warranties in insurance, i. 662-3.

Express or implied obligation to pay interest, i. 690-1.

Express agreement, lien by, ii. 103-4.

EXTENT—

Writ of, Crown's preference by, ii. 40-1.

Revenue laws of England extended to Scotland by the Union, *ib.*

History of the Crown's preference, *ib.*

Doctrine of Crown's preference and writs of extent, ii. 41.

EXTENTS IN CHIEF, ii. 41-2.

Nature of the process, *ib.*

Extents in chief of the first degree, *ib.*

Where debt to king is by bond, *ib.*

By simple contract, ii. 42-3.

How amount of debt ascertained, *ib.*

By a partnership, *ib.*

By an individual partner, *ib.*

Affidavit to the debt, *ib.*

Fiat, the teste of the writ, *ib.*

Extent, *ib.*

How writ tested, ii. 43.

Execution of extent, *ib.*

What to be attached under it, *ib.*

Sheriff summons witnesses, *ib.*

May third parties interrogate the witnesses to prove their property seized under the extent? *ib.*

EXTENT—*continued*.**EXTENTS IN CHIEF**—*continued*.

General rules as to effects attachable, ii. 43.

Exception of *bona fide* cash payments, ii. 43-4.

Bona fide payment to Crown debtor after teste of writ, but before the caption of the inquisition, *ib.*

Bills must be due to be attachable, *ib.*

If accepted to Crown debtor, and endorsed by him, or accepted to third party, not attachable, *ib.*

Effect against future debts, *ib.*

Sheriff cannot sell or make money of goods; this done by *venditioni exponas*, *ib.*

Reversion, ii. 44.

Extents in chief, in the second, third, and fourth degrees, ii. 44.

Writ of extent against debtor to king's debtor, *ib.*

EXTENTS IN AID, ii. 44-5.

For benefit of Crown's debtor, *ib.*

History and abuse of extents in aid, ii. 45-6.

Remedy by 57 Geo. III. c. 117, *ib.*

Where debt due to king's debtor more than what due by him to Crown, ii. 46-7.

Where it is less, *ib.*

No extents in aid given to Crown's debtor by simple contract, *ib.*

Who entitled to extent in aid, ii. 48.

Nature of the debt due to Crown's debtor on extent in aid, ii. 48-9.

Affidavit, fiat, and form of extent in aid, *ib.*

Extent in aid in different degrees, ii. 49.

Process for making effectual hypothec for certain excise duties, ii. 49.

Of the king's remedy after debtor's death, ii. 49-50.

Writ *diem clausit extremum*, *ib.*

OPPOSITION TO WRITS OF EXTENT, ii. 50.

Appearing and claiming, *ib.*

Motions to set aside extents, *ib.*

Relief in equity, *ib.*

RULES OF PREFERENCE BETWEEN THE KING AND THE SUBJECT, ii. 50-1.

Competition between extent in chief and extent in aid, ii. 51-2.

Where more extents in chief than one, *ib.*

Competition with diligence of subject, *ib.*

In England, *ib.*

In bankruptcy, *ib.*

Effect of adjudication in a sequestration, ii. 52.

King's process excluded by a completed transference, *ib.*

Crown's right as against landlord, *ib.*

Where goods sold, but no warrant to pay, ii. 52-3.

Lien and pledge available against Crown, ii. 53.

Whether compensation or set-off, ii. 55-6.

Whether Crown preferable to privileged debts, *ib.*

Effect of extent of Crown, as creditor of a partner, against company creditors, ii. 551-2.

See CROWN.

EXTINCTION of cautionary obligations, i. 373-4.

Septennial limitation, *ib.*

Discharge of principal, i. 376-7.

Of a co-cautioner, *ib.*

Of a security, or from custody, *ib.*

Acceptance of composition, *ib.*

Compromise for valuing annuity, i. 377-8.

Implied discharge from negligence, *ib.*

Extinction of debt by payment and intromissions, etc., ii. 424-5.

Of interest by compensation, ii. 123-4.

See PAYMENT—DISCHARGE—CAUTIONARY.

EXTORTION of money to sign bankrupt's discharge illegal, ii. 356-8.

Of deed by force and fear, i. 314.

EXTRAJUDICIAL settlements with creditors, ii. 381, 392, 488.

See TRUST-DEED—SETTLEMENTS—ARRANGEMENTS.

EXTRAVAGANCE, whether a ground for refusing *cessio*, ii. 480.

EXTRINSIC qualities of oath, i. 350-1.

FACILITATING adjudications, i. 762-3.

To secure preference to ancestor's creditors, i. 767-8.

See ADJUDICATION.

FACILITY and Lesion, restitution on, i. 136-7.

FACTOR—

Factory or mandate, effect of possession in the course of, i. 278-9.

See MANDATE.

MAKING ADVANCES on goods consigned, i. 294-5.

Principal paying factor's bills may demand goods as his unalienated property, *ib.*

If principal fail, and goods remain unsold, has factor lien over goods to amount of his engagements? *ib.*

Where both fail while goods unsold, and bills in circle, *ib.*

Bill-holder has claim against each to effect of receiving full payment, *ib.*

Factor's estate has lien on goods to effect of entire relief and indemnification, *ib.*

Estate of principal entitled to demand goods after indemnification given from proceeds, or on full security being given to relieve factor and estate of the bills, *ib.*

Circumstances where bill-holder may claim benefit of factor's lien, *ib.*

MERCANTILE, i. 506-7.

Factor, agent, broker, description of, *ib.*

Constitution of mercantile agency, i. 508-9.

By writing or parole agreement, *ib.*

Power of attorney, *ib.*

In mercantile affairs, generally by letter, *ib.*

Consignee, general agent, *ib.*

Implied authority, *ib.*

Commission or hire, i. 515-6.

Diligence prestatable, *ib.*

Extent of authority, and power of factor, i. 516-7.

Construction of commission, *ib.*

If limited, to be strictly executed, *ib.*

Cannot delegate authority without express powers, *ib.*

Power to pledge, i. 517-8.

To impledge his own lien, *ib.*

To impledge for advances, *ib.*

Where he has no lien, *ib.*

Authority of civil and foreign law on this point, i. 519-20.

Commercial expediency, *ib.*

[FACTOR'S POWER TO PLEDGE UNDER THE STATUTES], i. 521 sqq.

DETERMINATION OF FACTORY, i. 522-3.

General rule, *ib.*

General power, *præpositura*, *ib.*

Effect of death, *ib.*

Bankruptcy, *ib.*

Insanity, i. 525-6.

Express revocation must be publicly known, *ib.*

Effect of revocation against factor, *ib.*

CLAIMS IN BANKRUPTCY under the contract of commission, i. 526-7.

On principal's bankruptcy, *ib.*

[Rights of the principal on agent's contracts against third parties, i. 526.]

Claims by the principal against the agent, i. 530.

Claims by the agent, i. 534.

Claims on factor's bankruptcy, i. 536, 537.

FACTOR—continued.

CLAIMS IN BANKRUPTCY—continued.

Against principal where factor has made advances, i. 539-40.

Against factor's estate by third parties, *ib.*

By principal for factor having gone beyond instructions, *ib.*

For negligence, neglect to insure, etc., i. 544-5.

[PERSONAL RESPONSIBILITY OF AGENTS], i. 540.

WITH DEL CREDERE COMMISSION, i. 394-5.

Nature of *del credere*, *ib.*

Claims in consequence of it, i. 394-5.

Liable on debtor's failure, *ib.*

Implied guarantee by factor making remittance, i. 395-6.

Where he lodges money on his own account, and banker fail, *ib.*

Compensation by debtor against principal will discharge him, i. 537.

See DEL CREDERE.

TRANSMITTING BILLS or goods to principal, how far affected by 1696, c. 5, ii. 205.

JUDICIAL, under sequestration of land estate, ii. 245.

Duties and powers, *ib.*

Becoming insolvent, ii. 247.

Whether allowed to purchase, *ib.*

Factor in multiplepointing, ii. 279-80.

INTERIM, ON BANKRUPT ESTATE, ii. 299-301.

WHERE CREDITOR ABROAD, or incapable, his factor may swear oath of credulity to verity of debt, ii. 291, 304.

Goods pledged and sold by factor, whether owner has restitution, i. 306-7.

Consignment of goods to, for behoof of creditors, ii. 12.

Arrestment in hands of, ii. 70.

LIEN OF, ii. 109.

Principle of it, *ib.*

In England, in Scotland, ii. 110.

Subjects of lien, *ib.*

Exceptions from it, *ib.*

Where goods under special appropriation, *ib.*

Lien extends over the price as well as the goods, ii. 111.

Where factor has a *del credere* commission, *ib.*

Bills subject to it, *ib.*

Extent of the security, ii. 112.

What it covers, *ib.*

What it does not cover, *ib.*

How lien is discharged, *ib.*

Broker has lien as factor, *ib.*

Ranking of lien, ii. 406.

FACTORY or Mandate, effect of possession under the contract, i. 278-9.

See MANDATE.

MERCANTILE, i. 505.

Constitution of, i. 508-9.

Commission, *ib.*

Diligence prestatable under, i. 515-6.

Power of factor, i. 516.

Determination, i. 522.

General mandate or *præpositura*, *ib.*

Effect of death, bankruptcy, insanity, *ib.*

Express revocation must be publicly known, i. 525-6.

Effect of revocation against factor, *ib.*

Limited mandates expire on performance, i. 526-7.

Claims in bankruptcy under the contract, *ib.*

See COMMISSION—FACTOR.

FACTUM PRÆSTANDUM, AD, claims under bond, i. 352.

How claim made in bankruptcy, i. 352-3.

Debtor denied benefit of Act of Grace, ii. 446-7.

Also privilege of sanctuary, ii. 462.

And *cessio*, ii. 475.

FACULTY, conveyance of, where strictly personal, whether challengeable on 1621, ii. 177-8.

RESERVED, or power to burden land, *ib.*

FACULTY—*continued.*RESERVED—*continued.*

- How constituted and exercised, i. 39, 41.
- Effect of faculty in competition, *ib.*
- Limited rights and faculties are heritable, ii. 2-3.
- See BURDEN.

FAIR LOSS in bottomry, i. 581-2.

FARM—

- Lease of agricultural farm, i. 72-3.
- Landlord's hypothec in, ii. 26-7.
- In grass farms, *ib.*
- Where a sublease, ii. 30-1.

FARM SERVANTS—

- Preference of, over landlord's hypothec, ii. 34.
- Wages of, preferable, ii. 240.

FATUOUS persons, restitution against deeds by, i. 131-2.

See RESTITUTION.

FAULT, or negligence, collision of ships by, i. 626-7.

See NEGLIGENCE—COLLISION.

FEAR, effect of, in vitiating contracts and obligations, i. 314-5.

FEE—

- Meaning of the term, i. 52-3.
- Fee and liferent, while subsisting together, mutual restraints on each other, *ib.*
- Fiduciary fee, i. 53-4.
- Conjunct fee and liferent, *ib.*
- To husband and wife, i. 54-5.
- Between parent and child, *ib.*
- Extent and exercise of liferenter's right, i. 60-1.
- Of the fiar's right, i. 61-2.
- Conjunct investment of money and land to husband and wife in, i. 682-3.
- See LIFERENT—PROVISIONS.

CONJUNCT RIGHTS, i. 61-2.

Joint proprietor may insist for separation of his share, i. 62-3.

Right extends to a share after deduction of debts, *ib.*

Where subject not capable of division, *ib.*

Right of creditors of joint proprietor, *ib.*

See CONJUNCT RIGHTS.

FEES. Jail fees, ii. 444-5.

FEMALE SAILOR, whether, has a claim for wages, i. 566-7.

FETTERS of an entail, i. 43-4.

FEU-CONTRACTS, conditions in, i. 732-3.

Retention of charter for advances, *ib.*

FEU-DUTIES, i. 23.

Preference for, i. 723-4.

Hypothec for, i. 26-7.

See SUPERIOR.

FEUDAL ESTATE, securities over, i. 711-2.

Order of ranking of creditors, with securities over, ii. 402-3.

Competition on a single feudal estate, *ib.*

See RANKING—BURDENS—HERITABLE SECURITIES.

FEUDAL GRANTS, conditions in, for securing casualties, i. 25-6.

FIAR, extent and exercise of his right, i. 61-2.

See LIFERENT and FEE—CONJUNCT RIGHTS.

FIAT of writ of extent, ii. 42-3.

FIERI FACIAS, writ of, i. 6-7, note.

FIRE, loss by—

Whether shipowners responsible for, i. 609.

Whether shipmaster, i. 610-1.

Responsibility for, under *Nautæ Caupones*, etc., i. 499.

INSURANCE against loss by, i. 671-2.

See INSURANCE.

FIRM of company—

Distinction between, and a descriptive name, ii. 516-7.

Action or diligence proceeds under, ii. 507-8.

Sequestration in name of firm, *ib.*

Where signed by partners, binds the company, ii. 503, 506.

Not necessary to constitute partnership, ii. 509.

FIRM—*continued.*

Effect of using it, ii. 510.

Ambiguous or equivocal firms, use of, effect as to third parties, ii. 558-9.

Change of, whether a sufficient notice of dissolution, ii. 530.

FIRST EFFECTUAL adjudication—

Description of, i. 755-6.

History of the perplexities in charging superiors, *ib.*

Rule as to first effectual by 33 Geo. III. c. 74, i. 757.

Whether rule applies to superior adjudging, i. 758-9.

The first effectual the criterion of the *pari passu* preference, *ib.*

Term within which adjudgers may take benefit of it, *ib.*

Publication of first effectual, i. 759-60.

Recording, *ib.*

What is the first effectual, i. 761-2.

Defects in, *ib.*

Effects of, in competition between ancestor and heir's creditors, i. 768-9.

FITNESS and soundness of goods, an implied condition in contract of sale, i. 463-4.

FIXTURES and machinery, whether heritable or moveable, i. 786-7, ii. 2.

FOENUS NAUTICUM, i. 579-80.

FORCE or fear, effect of, in vitiating contracts and obligations, i. 314-5.

FORCIBLY defending—

An equivalent of imprisonment to infer bankruptcy, ii. 161-2.

Proof of it, *ib.*

General proof admitted, *ib.*

Mode of proving date of resistance, ii. 165-6.

FOREIGN—

Mutual relation of Scottish and foreign laws in bankruptcy, ii. 375, 568.

Remedies in nature of bankruptcy against persons out of Scotland, *ib.*

Persons abroad, how subject to our courts, *ib.*

May be bankrupt, though cannot be sequestrated, ii. 569-70.

This sort of bankruptcy no effect beyond Scotland, *ib.*

MOVEABLE ESTATE—

Effect of bankruptcy in debtor's domicile, and of the proceedings against the estate, ii. 376, 569.

Determined on general principles, *ib.*

Personal estate regulated by law of domicile, *ib.*

Effect given in England to foreign proceedings, ii. 569-70.

In Ireland, ii. 570-1.

In Scotland, *ib.*

Moveable estate as to succession, follows law of domicile, *ib.*

Same in bankruptcy, *ib.*

Arrestment in Scotland posterior to an English commission of bankruptcy and assignment void, *ib.*

Diligence posterior to commission, though before assignment, void, ii. 571-2.

Diligence before teste of commission, but after bankruptcy, *ib.*

Company having domicile in different countries, *ib.*

Proceedings in either domicile comprehend whole personal estate, *ib.*

Title to pursue by assignees, ii. 572-3.

Accession to foreign trust-deed, *ib.*

Effect of the deed in Scotland, *ib.*

Effect of different decision in foreign country from what would be adopted here, *ib.*

Whether there is restitution of payments received abroad, *ib.*

English rule, *ib.*

Scottish, *ib.*

REAL ESTATE, ii. 378, 574.

How affected by bankruptcy beyond debtor's domicile, *ib.*

Territorial law regulates real estate, *ib.*

FOREIGN—*continued.*REAL ESTATE—*continued.*

English commission no effect against, in Scotland, *ib.*
Effect of a conveyance, *ib.*

EFFECT OF BANKRUPT'S CERTIFICATE or discharge, ii. 379, 575.

General principle, that debt discharged in law of one country will be discharged by another, *ib.*

Difficulty from *lex loci contractus*, creditor following discharged debtor to foreign country, *ib.*

Creditor's residence in foreign country, ii. 576-7.

Effect of locality of contract, *ib.*

Where debt payable in a particular country, place of payment seems to rule the discharge, *ib.*

Where the proceedings in bankruptcy include the whole estate, ii. 577-8.

Peculiarities in effect of discharge, *ib.*

Effect of a mere commission of bankruptcy as a personal protection, *ib.*

Effect of English certificate limited, ii. 578-9.

Discharge in Scotland universal, *ib.*

Effect of *cessio bonorum* in Scotland, *ib.*

TREATISES on maritime law, i. 547, 550-1.

PORT, power of shipmaster in, i. 554-5.

Repairs and furnishings to ships in, i. 573-4.

Hypothec for, *ib.*

BILLS drawn in sets, i. 421.

Time for notice of dishonour, i. 441-2.

See BILL.

SHIP, i. 145-6.

Whether liable to hypothec for repairs in this country, i. 574-5.

FOREIGNER having property in Scotland may be made bankrupt, but cannot be sequestrated, ii. 158-9.

May be arrested as *in meditatione fugæ*, ii. 454-5.

Pursuing *cessio*, ii. 476-7.

Arrestment against, ii. 65.

FORGED BILLS, circumstances in which person whose name is forged may be liable for, i. 414-5.

FORTHCOMING on arrestment, ii. 63-4.

Object of the action, ii. 64-5.

Parties, *ib.*

Arrestee's defences, *ib.*

Effect of decree, *ib.*

Where arrestment in security, *ib.*

Against cautioner in loosing arrestment, ii. 67-8.

See ARRESTMENT.

AS A PROCESS OF DISTRIBUTION, as in a multiplepointing, ii. 280.

FRAUD—

Of restitution on the ground of fraud in the contract of sale, i. 260.

Sale induced by fraud, i. 261.

Effect of, against buyer and his creditors, *ib.*

Distinction betwixt Scottish and Roman law respecting fraud, *ib.*

Distinction where fraud inducing, or only incident to the contract, i. 262-3.

Misrepresentation or concealment, *ib.*

Not every concealment that will taint a contract, *ib.*

Where circumstances left untold are such as purchaser ought to have known, *ib.*

Where not such as purchaser would naturally inquire into, *ib.*

How far seller bound to disclose, *ib.*

Concealment of insolvency, i. 263-4.

Whether person really insolvent bound to disclose, *ib.*

Mere insolvency on the face of books not sufficient to convict of fraud, i. 264-5.

Contracting after final resolution, *cedere foro*, i. 266-7.

Circumstances to establish this resolution, *ib.*

Continental law of presumed fraud from contiguity of bankruptcy, *ib.*

FRAUD—*continued.*

Presumed bankruptcy, i. 266-7.

Buyer failing a few days after receiving goods, *ib.*

Presumptive fraud *intra triduum*, once recognised, now abandoned, *ib.*

Presumption of fraudulent concealment, *ib.*

Bankruptcy immediately following a particular bargain, *ib.*

Concealment of actual bankruptcy, i. 267-8.

Effect of bankruptcy cannot regularly be removed but by restoration to solvency, *ib.*

Evidence of restoration, *ib.*

If bankruptcy, or absolute insolvency, supervene a contract fairly made, whether delivery effectual, i. 268-9.

Effect of concealment at time of delivery, *ib.*

EFFECT OF CHANGES ON PROPERTY entrusted to the bankrupt, i. 294-5.

Property acquired by fraud, i. 295-6.

Where goods fraudulently acquired have been disposed of and price not paid, original owner has preference on the price, *ib.*

Distinction where price already paid to bankrupt, *ib.*

Where money has been acquired by fraud, person defrauded entitled to indemnification in question with defrauder, i. 294-5.

Whether he is entitled to a preference on the common fund, *ib.*

Where bankrupt has possession of a subject on a legal contract, no fraudulent change can prevent owner from getting back subject if distinguishable, *ib.*

Accidental change on the subject, *ib.*

See SPECIFICATION.

EFFECT OF FRAUD and personal exceptions against PURCHASERS and creditors, i. 309-10.

Where right of bankrupt has been acquired by fraud, *ib.*

The objection of fraud has no effect against purchasers, *ib.*

But it is effectual against creditors, *ib.*

Effect of fraud in vitiating contracts and obligations, i. 316-7.

Fraud in combination with other circumstances, *ib.*

OF THE LAWS AGAINST FRAUD, ii. 227-8.

Necessary to challenge at common law, *ib.*

See FRAUDULENT—ALIENATION.

Fraud or embezzlement on board ship, i. 610, 611.

Of funds, i. 193.

Effect of fraud and concealment by bankrupt at his examinations on a subsequent composition contract, ii. 325-6.

Measures of creditors against fraud of insolvent debtor, ii. 491-2.

FRAUDULENT ACCESSION to trust-deed, ii. 394-5.

Dissolution of partnership, ii. 522.

Concurrence to bankrupt's discharge, ii. 371.

FRAUDULENT ALIENATIONS—

Of alienations to conjunct and confident persons, reducible under the Act 1621, c. 18, ii. 262-3.

Alienations in prejudice of diligence begun, ii. 184.

See ACT 1621.

WITHOUT ONEROUS CONSIDERATION, as reducible at common law, ii. 184-5.

Case of fraud to be made out, *ib.*

Effect of narrative, *ib.*

Matter to be proved, *ib.*

CHALLENGEABLE ON ACT 1696, c. 5, ii. 191-2.

Commentary on the Act, *ib.*

Securities for prior debts, ii. 194-5.

Title to challenge, *ib.*

Form of the action, ii. 195-6.

Deeds challengeable, *ib.*

Exceptions to the rule of the Act, ii. 200.

Date of deed, ii. 213.

Effect of reduction, ii. 216.

FRAUDULENT ALIENATIONS—*continued.*

- CHALLENGEABLE ON ACT 1696, c. 5—*continued.*
 - Securities for future debts, ii. 217-8.
 - History of frauds under cover of such securities, *ib.*
 - See ACT 1696.
- CHALLENGEABLE AT COMMON LAW, ii. 225-6.
 - Dispositions *omnium bonorum* to individual creditors, ii. 227-8.
 - Where not professedly *omnium bonorum*, *ib.*
 - Payment anticipated, ii. 228-9.
 - Concealment and false appearance, *ib.*
 - Circuitous transactions, ii. 229-30.
 - Bestowing preference unasked, *ib.*
 - Bankruptcy under the Acts not necessary to challenge, ii. 231-2.
 - Advancing money to insolvent not challengeable, *ib.*
 - Concealment of security, ii. 232-3.
 - Payments and transactions by bankrupt after sequestration, *ib.*

FRAUDULENT BANKRUPTCY, ii. 486.

- Statutes relative to it, *ib.*
- 1621, c. 18; 1696, c. 5; 54 Geo. III. c. 137, sec. 33; 7 and 8 Geo. IV. c. 20, *ib.*
- Description of the crime, ii. 487-8.
- Trial of it, *ib.*
- Form of proceeding, *ib.*
- Punishment, *ib.*
- Inferred from refusal to surrender or to answer at examinations, ii. 325-6.
- Persons guilty not entitled to privilege of sanctuary, ii. 461-2.
- Nor to *cessio*, ii. 478.
- Dealing in unlawful traffic, ii. 479-80.
- Not enough that bankrupt has been engaged in acts of swindling, but which have not occasioned his insolvency, *ib.*
- Extravagance, ii. 480-1.
- Concealment of funds, *ib.*
- Not keeping books, ii. 481.
- Onus probandi* on creditors, *ib.*
- How far the objections operate as a bar to future applications for *cessio*, ii. 481-2.

FREEHOLD qualification, i. 22-3.

FREIGHT—

- Special or general, hiring of ship on, i. 585-6.
- General principles relative to contracts of affreightment, *ib.*
- Charter-party, i. 586-7.
- Does not absolutely require writing, *ib.*
- May be proved by owner's oath, *ib.*
- Where goods on board, bill of lading sufficient, *ib.*
- Affreightment may be of whole or part of ship, *ib.*
- Analysis of the contract, i. 589.
- Obligations of owner and master, *ib.*
- Of merchant, *ib.*
- IN GENERAL SHIP, i. 589-90.
 - Two parts, advertisement and bill of lading, *ib.*
 - Of engaging freight in general ship, *ib.*
 - Master full power to engage, *ib.*
 - No agreement with owners effectual, unless intimated to master, *ib.*
 - Merchant coming on chance must yield preference, if master has engaged, or owners contracted for unoccupied room, *ib.*
 - Bills of lading, i. 590-1.
 - See BILL OF LADING.
- CLAIMS ON CONTRACTS OF AFFREIGHTMENT, i. 595-6.
 - On bankruptcy of owners, *ib.*
 - Responsibility for goods taken on board, *ib.*
 - Care and skill in taking on board, i. 596-7.
 - Stowage, *ib.*
 - Condition of the ship, i. 597-8.

FREIGHT—*continued.*

- CLAIMS ON CONTRACTS OF AFFREIGHTMENT—*continued.*
 - Seaworthiness, i. 597-8.
 - Captain and crew, pilot, i. 598-9.
 - Conduct of the voyage, i. 602-3.
 - Ready at port of delivery for receiving goods, *ib.*
 - Sailing, *ib.*
 - Must not sail in dangerous gale, *ib.*
 - Sailing with convoy, rules of responsibility under this warranty, i. 602-3.
 - Capture on intermediate voyage no breach of contract, *ib.*
 - Criterion of sailing with convoy, *ib.*
 - Separation by storm, i. 603-4.
 - Course of the voyage, *ib.*
 - Delay or deviation by storm or enemy, *ib.*
 - Termination of the voyage and delivery, i. 604-5.
 - Responsibility of owners and master under edict *Nautæ Cauponæ*, etc., i. 605-6.
 - See CHARTER-PARTY.
- ON THE BANKRUPTCY OF THE MERCHANT OR SHIPPER, i. 612-3.
 - Obligation to furnish a cargo, *ib.*
 - Quantity, *ib.*
 - Cargo not furnished, *ib.*
 - Ship not fully loaded, *ib.*
 - Freight rateable according to cargo, *ib.*
 - Time of furnishing cargo, i. 613-4.
 - Shipper's obligation to pay freight, *ib.*
 - What included under freight, i. 614-5.
 - Stipulations, *ib.*
 - Primage, or hat-money, petty average, *ib.*
 - Freight demandable before goods taken possession of by consignee, *ib.*
 - Difference between freights on time and freights in gross, or by measure of cargo, *ib.*
 - Freights on time, how calculated, *ib.*
 - Whether shipper liable for freight if goods delivered to third party without demanding it, *ib.*
 - Whether consignee or vendee liable, i. 615.
 - In what circumstances freight is due, i. 616-7.
 - If ship stopped, and goods carried forward, *ib.*
 - If goods arrive damaged, *ib.*
 - Whether can be abandoned for freight, i. 617-8.
 - Where goods stopped short of destined port, *ib.*
 - Whole freight due if master offer to carry them forward, *ib.*
 - Also *pro rata itineris*, if goods received by merchant, or abandoned to insurer, *ib.*
 - Where voyage divisible, i. 618-9.
 - Where goods stopped and freighter no means of completing voyage, merchant may abandon for freight, *ib.*
 - Where part of goods perished, *ib.*
 - Goods thrown overboard, *ib.*
 - Taken out prematurely, i. 619-20.
 - Ship captured, *ib.*
 - Other cases in which freight is or is not due, *ib.*
 - Parties may make particular stipulations as to payment of it, *ib.*
 - Dead freight, i. 620-1.
 - When right to freight commences, *ib.*
 - Where voyage stopped by Government, *ib.*
 - Homeward freight, *ib.*
 - Lay-days and demurrage, i. 621-2.
 - How affected by general average, i. 636, 637.
 - Claim for, by underwriters, where a ship insured with one set of underwriters, and freight with another, is abandoned for total loss, i. 656-7.
- LIEN FOR FREIGHT, ii. 94-5.
 - What secured by lien, *ib.*
 - Freight due for goods ejected under deduction of average, *ib.*
 - No lien for dead freight or demurrage, ii. 95-6.

FREIGHT—continued.

- LIEN FOR FREIGHT—continued.**
 - Extends over every part of goods in bill of lading, for the whole, ii. 95-6.
 - Where two parcels of goods in ship to same person, but in different bills of lading, *ib.*
 - On luggage of passenger, *ib.*
 - Where goods sent to a wharf or warehouse, ii. 96-7.
 - Lien against consignee of bill of lading, delivery divests the lien, *ib.*
 - How claim for freight preserved where goods landed in dock warehouse, i. 203-4.
 - Order of ranking of creditors on freight, ii. 406-7.
- FREIGHTERS**, obligations on, i. 588-9.
 - Hypothec on ship for their goods, ii. 38-9.
 - Ancient maritime law, *ib.*
 - Scottish law, *ib.*
 - Order of ranking on ship, ii. 406.
- FRIENDLY Insurance Company**, i. 675-6.
- Societies**, sums due by office-bearers privileged debts, ii. 150-1.
- FRUITS—**
 - Natural and industrial, whether heritable or moveable, ii. 1-2.
 - When removed from ground, *ib.*
 - Hypothec of superior on, ii. 26-7.
 - Of landlord, ii. 28.
- FUND** of division under sequestration, distribution of, ii. 361-4.
 - Payments and alienations after first deliverance, part of it, *ib.*
 - Bank and penal interest also, *ib.*
 - Expense of management, ii. 347, 364.
 - Of the fund in general, ii. 401-2.
 - On whom accidental defalcation falls, *ib.*
 - Appropriated to individual creditors only by decree of division, *ib.*
 - Expense of interim warrants, ii. 402-3.
 - See **RANKING**.
- FUNDED DEBT**, i. 100-1.
 - See **STOCK**.
- FUNDS** that may be attached for payment of a bankrupt's debt, general enumeration of them, i. 18-9.
- FUNERAL EXPENSES—**
 - A privileged debt, ii. 147-8.
 - What included under, *ib.*
- FUNGIBLES—**
 - Their nature, i. 274-5, note.
 - Deposit of, i. 277-8.
 - See **DEPOSITE**.
- FURIOSITY—**
 - Restitution against deeds by furious persons, i. 131-2.
 - Brieve of furiosity, *ib.*
 - Verdict, i. 132.
 - Description of furiosity as distinguished from idiocy, i. 133-4.
 - See **RESTITUTION**.
- FURNISHINGS** to ships, i. 567.
 - No lien for, ii. 97-8.
 - See **REPAIRS**.
- IN ACCOUNT**, evidence of, i. 347-8.
 - How far an alimentary fund may be attached for furnishings, i. 125-6.
- FURNITURE** of bankrupt may be bought by friends, and secured against his creditors, i. 125-6.
 - Conveyance of furniture *retenta possessione*, not available against creditors, i. 272, 273.
 - Furniture in dwelling-house, landlord's hypothec over, ii. 29-30.
 - What comprehended, *ib.*
 - Where furniture is hired or lent, how far attachable, ii. 30-1.
 - See **LANDLORD'S HYPOTHEC**.

FUTURE DEBT—

- Nature and amount of, to warrant petition of sequestration, ii. 288-9.
- Future debt in ranking suffers an abatement of interest till term of payment, ii. 364-5.
- Creditor for, may challenge on 1621, c. 18, ii. 173-4.
- Heritable securities for future debt, how far challengeable on 1696, c. 5, ii. 217-8.
- Securities for, over moveables, ii. 225-6.
- See **ACT 1696**.
- Inhibition for future debt, ii. 136-7.
- Arrestment, ii. 64.
- Future and contingent debts formerly excluded from ranking in England, i. 332-3.
- Distinction between English and Scottish law as to this, *ib.*
- Principle of the English law, i. 333-4.
- Reformation of the English law by 6 Geo. IV., i. 333-4.
- Whether may be taken under a writ of extent, i. 43-4.
- FUTURE ACQUISITIONS** by bankrupt. See **SEQUESTRATION**.
- GAMING—**
 - Debts for, void, i. 318.
 - Bills for, void, i. 319.
 - But available to *bona fide* holder, *ib.*
 - Wagers, *ib.*
- GAZETTE**, London and Edinburgh—
 - Advertisements in, of sequestration and meetings of creditors. See **SEQUESTRATION**.
 - Notice in Gazette, to produce claims in a ranking and sale, ii. 249.
 - Of the sale itself, ii. 253.
 - Of dissolution of partnership, ii. 531-2.
- GENERAL** mandate, expiration of, i. 522-3.
- AND SPECIAL ADJUDICATIONS**, i. 741-2.
 - See **ADJUDICATION**.
- FREIGHT**, i. 589-90.
 - Advertisement of general ship, *ib.*
 - Freight in general ships, how to be engaged, *ib.*
 - Demurrage on general ship, i. 622-3.
 - See **FREIGHT—DEMURRAGE—SHIP**.
- LETTERS OF HORNING**, ii. 159-60.
 - See **HORNING**.
- CHARGE**, i. 748, 750.
 - See **CHARGE**.
- AND PARTICULAR AVERAGE**, i. 581-2.
 - General average, i. 517-8.
 - In what circumstances, and for what losses, contribution for, may be demanded, i. 631-2.
 - Property liable to contribution, i. 635-6.
 - Mode of valuing and apportioning general average, i. 636-7.
 - Lien for, ii. 98-9.
 - See **AVERAGE**.
- LIEN**, ii. 87-8.
 - Benefit and design of general lien, ii. 105-6.
 - See **LIEN**.
- GENERIC** and specific purchase, distinction between, i. 179-80.
- GESTIO PRO HÆREDE**, i. 704-5.
- GOODS—**
 - Responsibility of carrier for, i. 492-3.
 - Obligation of owners and master for condition of goods in bill of lading, i. 591-2.
 - Obligation for care and skill in loading, i. 595-6.
 - Stowage, *ib.*
 - Goods sent on sale and return, how affected by the doctrine of reputed ownership, i. 287-8.
 - Consignment of goods at a distance in security or payment, ii. 11-2.
 - Transfer of bill of lading or invoice, ii. 13-4.

GOODS—*continued*.

- Ranking of creditors on, ii. 406.
- Responsibility of seller for quality of goods, i. 464-5.
- See CARGO—AVERAGE—BILL OF LADING—CARRIER.

GOVERNMENT STOCK, i. 100.

- Whether heritable or moveable, i. 100-1.
- Not arrestable, *ib.*
- Should be adjudged, *ib.*
- Transfer at the bank, *ib.*

GOVERNMENT LOANS, on deposit of goods, ii. 19-20.

See PLEDGE.

GRACE, ACT OF—

- Liberation of prisoners on, ii. 445-6.
- Act 1696, c. 31, reformed by 6 Geo. IV. c. 62, *ib.*
- Principle of the old Act, *ib.*
- Who entitled to the benefit, *ib.* note.
- Distinction between civil and criminal warrants of imprisonment, *ib.*
- Between fine and damages, ii. 445-6.
- Prisoners *ad factum præstandum* denied benefit, ii. 446-7.
- Rate of aliment, *ib.*
- Sum deposited for aliment, ii. 447-8.
- Debtor must swear that he is unable to aliment himself, *ib.*
- Intimation, *ib.*
- Conveyance *omnium bonorum*, *ib.*
- Effect of liberation, ii. 448-9.

GRACE, DAYS OF, in bills, i. 434-5.

GRAIN, measuring of, as an act of delivery, i. 192-3, 194-5.

GRANTS, feudal, of limitations by means of conditions in, i. 21-2.

GRASS farms, landlord's hypothec over, ii. 28-9.

Grass cut for sale, *ib.*

GRASS mail, lien for, ii. 99.

Hypothec for, ii. 28.

GRASSUMS, power to let leases for, i. 69-70.

- Effect as to purchasers, *ib.*
- As to lands under entail, *ib.*

GRATUITOUS obligations, i. 331-2.

Deeds, challenge of, on Act 1621, ii. 170-1.

See ACT 1621.

Gratuitous creditor may challenge under the Act, ii. 173-4.

Challenge of, at common law, ii. 184.

See ONEROUS, ii. 178.

Challenge by heir of gratuitous deeds on deathbed, i. 87-8.

GRAZING, cattle in fields for, landlord's hypothec over, ii. 28, 30.

GROUND, poinding of, ii. 55.

See POINDING THE GROUND.

GROUNDS and vouchers of debt, production of, in claiming on bankrupt estate, ii. 309-10.

Copy of account, *ib.*

If necessary in all cases to produce copy account, *ib.*

What meant by copy account, *ib.*

What comprehended under grounds and vouchers, ii. 310-11.

GROUNDS AND WARRANTS of adjudication, objections to, i. 775-6.

Not necessary to produce warrants after twenty years, i. 778-9.

GROUND-ANNUAL, nature of, i. 29-30.

GROWING CORN, effect of delivery by symbols, i. 187-8.

GUARANTEE or credit, letters of, claims on, i. 387-8.

Nature of letters of credit, i. 388-9.

Letters of recommendation and guarantee, *ib.*

Distinction between letter of credit and letter of introduction, *ib.*

Guarantees of single transactions, i. 389-90.

Stamp, whether required, *ib.*

Limitation of guarantees and letters of credit, i. 390-1.

VOL. II.

GUARANTEE—*continued*.

In respect of the transaction, i. 390-1.

Limitation as to person, i. 391.

Limitation as to time, i. 392-3.

Standing guarantee subsists till recalled, i. 393-4.

Whether letter of guarantee endorsable, *ib.*

Insurance of solvency, *ib.*

Del credere guarantee, *ib.*

Discharge of guarantee, i. 394-5.

Guarantee by mercantile factor having *del credere* commission, *ib.*

Claims in consequence of *del credere*, *ib.*

Implied guarantee, i. 395-6.

Departure from usual course in making remittances, *ib.*

GUIDON de la Mer, i. 548-9.

HABIT to be worn by debtor obtaining *cessio*, ii. 471-2.HACKNEY-COACHMEN, whether responsible on edict *Nautæ Caupones*, etc., i. 497-8.

HANSEATIC TOWNS, ordonnances of, on maritime law, i. 548-9.

HÆREDITAS JACENS, adjudication against, i. 751-2.

HAT MONEY, or *primage*, i. 614-5.

HEALTH—

Bill of, liberation of prisoner on, ii. 440-1.

Act of Sederunt as to, *ib.* note.

Construction of the Act of Sederunt, ii. 441.

Certificate of surgeon must be on oath, *ib.* note.

Restraint upon debtor freed on bill of health, ii. 441-2.

Provision for safe custody of prisoner, *ib.*

Security for his return to prison, ii. 442-3.

Responsibility of magistrates, *ib.*

What security may be required from debtor, *ib.* notes.

BILL OF, to ship sailing from suspected port, i. 601-2.

HEIR—

Of the right to adjudge the ancestor's estate for debts of the heir, i. 79-80.

Right of creditors to adopt the heir's challenge of deeds on deathbed, i. 80-1.

See DEATHBED.

Right of creditors to avail themselves of their debtor's other privileges as heir, i. 94-5.

Apparent heir's right to possession of the ancestor's estate, *ib.*

Right to levy rents, *ib.*

To cut woods, *ib.*

Heir's right to claim a share of the moveable estate with or without collation, i. 95-6.

Right to collate the succession, i. 96.

To share moveables without collation, i. 97-8.

See COLLATION.

Ratification by heir of exceptionable deeds, effect of, in barring restitution, i. 138-9.

OF PASSIVE TITLES, or the effect of debt against heirs and representatives, i. 702-3.

Passive representation, i. 703-4.

Heir entering by service, *ib.*

Heir of provision, *ib.*

Heir in moveables, *ib.*

Præceptio hæreditatis, i. 704-5.

Gestio pro hærede, *ib.*

Private acquisition of the estate, i. 705-6.

Vicious intromission, *ib.*

Limited representation, i. 706-7.

Entry *cum beneficio inventarii*, *ib.*

Limited responsibility from possession by apparent heir, for three years, in conferring on creditors a right against the next heir entering, i. 707-8.

See PASSIVE TITLES.

How to adjudge property to which debtor has succeeded, i. 747-8.

HEIR—*continued*.OF PASSIVE TITLES—*continued*.

- Where debtor enters, i. 747-8.
- Method of entering, *ib*.
- Refusing to enter, *ib*.
- Charges to enter, *ib*.
- Where heir renounces, *ib*.
- Creditors of heir and ancestor, *ib*.
- Annus deliberandi*, etc., *ib*.
- How to adjudge debtor's property after his death, i. 749-50.
- Heir entering, *ib*.
- Behaviour as heir, *ib*.
- Where heir does not assume the representation, i. 750-1.
- General charge, *ib*.
- Action of constitution, *ib*.
- Special charge, *ib*.
- Where heir renounces, i. 751-2.
- Competition on heritable estate between creditors of heir and ancestor, i. 765-6.
- Inefficacy of heir's voluntary conveyance to defeat ancestor's creditors, i. 770-1.
- See ANCESTOR.

OF ENTAIL, who are heirs, i. 45-6.

- Power of, to cut wood, work mines, etc., i. 50, 51.
- Conveyance of his life-interest challengeable on 1621, ii. 178-9.
- Entry of, with superior, i. 24.
- APPARENT, meaning of, in Act 1661, c. 24, i. 766-7.
- Of estates possessed by, as responsible for debt, i. 94-5.
- Ranking and sale by, ii. 237-8.
- See APPARENT HEIR.

AND EXECUTOR, accessories to land, whether descend to heir or executor, i. 786-7.

- Machinery, *fundo annexa*, *ib*.
- Rents, ii. 7-8.
- See HERITABLE AND MOVEABLE, ii. 1.

HEIRS PORTIONERS, there is no collation among them, i. 96-7.

- Whether an heir portioner, claiming a share of moveables, must collate, i. 98-9.

HERITABLE—

- Rights held under qualifications and conditions, effect of, against purchasers and creditors, i. 301-2.
- Real rights, *ib*.
- Personal right to land, *ib*.
- ESTATE, judicial sale and division of, ii. 232-3.
- Vesting of heritable estate in trustee under sequestration, ii. 337.
- Estate abroad, ii. 341.
- Sale of, ii. 344.
- Voluntary sale, ii. 345-6.
- Whether can be by private bargain, *ib*.
- Title of the purchaser, *ib*.
- Crown no preference on, i. 781-2.
- Order of ranking of creditors holding securities over, ii. 402-3.
- See RANKING—SALE—SEQUESTRATION.

HERITABLE AND MOVEABLE—

- Distinction of, ii. 1.
- Use of it, *ib*.
- Corporeal things distinguished by nature, connection, or distinction, *ib*.
- Nature of subject, ii. 1-2.
- Connection, *ib*.
- Fixtures, *ib*.
- Fruits, natural and industrial, woods, corn, grass, sown grass, *ib*. note.
- Corporeal moveables not connected with land, ships, *ib*.
- Destination, implied or express—materials of building, *ib*.
- Manure, dunghills, heirship moveables, ii. 2-3.

HERITABLE AND MOVEABLE—*continued*.

- Things incorporeal, ii. 2-3.
- Nature of subject, real rights, rights in security, servitude, etc., *ib*.
- Rights personal, *jus incorporale* of company stock, shares in public company, *ib*.
- Bank shares, ii. 4.
- Real rights incomplete, *ib*.
- Heritable bond without sasine, with conditional warrant for sasine, *ib*.
- Tract of future time, annuities, liferent of money, bank and Government stock, *ib*.
- Titles of honour, offices, ii. 4-5.
- Trust-estate, *jus crediti*, *ib*.
- Debts with security added, bond with assignation to heritable subject, where creditor absent, bond of corroboration, right taken to creditors *nominatim*, to trustees for creditors, *ib*.
- Claim in ranking, ii. 6.
- Effect of sale, voluntary, judicial, *ib*.
- Reversion, price consigned, *ib*.
- Destination, express or presumed, effect of judicial proceedings and diligence, *ib*.
- Effect of acts of debtor, consignation for redemption, ii. 6-7.
- Surety taken by tutors, *ib*.
- Bond excluding executors, *ib*.
- Bonds bearing interest, after term, before; provision for younger child, *jus mariti*, *ib*.
- Alternative given to adjudge or arrest, *ib*.
- Rents and interest, ii. 7-8.
- Rules as to vesting of rents, of annuities, *ib*.
- Legal and conventional terms, anticipating or postponing, *ib*.
- Rents of houses, *ib*.
- Of grass farm, *ib*.
- Payments connected with land by interest payable by conventional terms, *ib*.
- Arrears, distinction of heritable bond and adjudication, *ib*.
- Debt heritable to debtor and moveable to creditor, or *vice versa*, ii. 9-10.
- Price of lands, *ib*.
- Accessories to land, whether heritable or moveable, i. 786-7.
- See ACCESSION.
- HERITABLE SECURITIES—
- Voluntary, over feudal estate, i. 711-2.
- Preliminary history of heritable securities, *ib*.
- Wadset, *ib*.
- Infeftment of annualrent, i. 712-3.
- Heritable bond, *ib*.
- Bond and disposition in security, i. 713-4.
- Absolute disposition with backbond, *ib*.
- Securities in relief of sums and engagements, *ib*.
- Heritable security for cash account, i. 714-5.
- COMPLETION OF, AS THE CRITERION OF PREFERENCE, i. 715-6.
- Of sasine, *ib*.
- Recording, i. 717-8.
- See SASINE.
- Securities in burgage subjects, i. 721-2.
- Securities depending on sasine for preference, i. 723-4.
- Superior for feu-duties, *ib*.
- Effect of absolute disposition with backbond, i. 724-5.
- Indefinite security in terms of absolute conveyance, i. 725-6.
- Reserved burdens, *ib*.
- Personal rights, i. 732-3.
- Real warandice, excambion, i. 733.
- Objections to, i. 734.
- See OBJECTION—BURDENS.

HERITABLE SECURITIES—*continued*.

SECURITIES (JUDICIAL) ON LAND, i. 739-40.

Adjudication, i. 784-5.

Jedge and warrant, *ib*.

Over property simply heritable, i. 789.

Voluntary, *ib*.

Judicial, i. 794.

Whether accessories to land included under heritable securities, i. 786-7.

TO PARTICULAR CREDITORS after bankruptcy in satisfaction or security, ii. 191-2.

Commentary on the Act 1696, c. 5, *ib*.

For prior debts, ii. 194-5.

Title to challenge, *ib*.

Form of the action, ii. 195.

Deeds challengeable, *ib*.Direct alienations, *ib* et seq.

Indirect alienations, ii. 197-8.

Exceptions to rule of statute, ii. 200.

Payment in cash, *ib*.*Nova debita*, ii. 205-6.

Security completed after advance of money, ii. 209.

Security to a cautioner, ii. 210-1.

Deed must be within sixty days, ii. 213.

Date of heritable securities under the Act, *ib*.

Recording sasine the rule, ii. 213-4.

Where sasine not necessary to complete conveyance, *ib*.Conveyance where debtor not infeft, *ib*.

Without precept, ii. 214-5.

Effect of the reduction, ii. 216.

Securities for future debts, ii. 217-8.

No security for indefinite sums, ii. 218-9.

Description of securities for future debts, ii. 219.

Cash accounts, ii. 219-20.

See ACT 1696.

Effect of payments, etc., on heritable securities, ii. 424-5.

HERITABLE CREDITOR—

In competition with inhibitors, etc., ii. 406-7.

In competition with arrestor of rents, i. 793-4.

Whether liable for expenses of sequestration, i. 446, 448.

Of sales by creditors under powers contained in the securities, ii. 269-70.

History and nature of the power of sale in heritable securities, *ib*.

Effect of clause of sale against the debtor and his representatives, ii. 270-1.

Form of such securities, *ib* note.Effect of grantor's death, *ib*.

Rules in executing the power of sale, ii. 271-2.

Declarator unnecessary, *ib*.Control of equity, *ib*.Effect against subsequent securities, *ib*.

How far the difficulty where subsequent securities to be surmounted, ii. 272-3.

Where the security is by absolute disposition and back-bond unrecorded, *ib*.Bond and disposition in security, *ib*.

Effect of assignation to real securities, ii. 273-4.

Absolute conveyance provisionally, *ib*.

Suggestion of Legislative Act, ii. 274-5.

State of the law as to the effect of the power of sale, where there are subsequent securities, *ib*.

Where only personal creditors under a sequestration, ii. 275-6.

See SECURITIES—BURDEN—REAL WARRANTICE—LIFE-RENT—INFESTMENT.

HIRE, or commission of mercantile agent, i. 515-6.

HIRED furniture, hypothec over, ii. 29-30.

HIRING, contracts of—

Effects of possession under, as to question of ownership, i. 274-5.

In contract of hire for use, *ib*.HIRING—*continued*.

For work, i. 275-6.

For carriage, *ib*.

General principles of contracts of hiring, i. 480-1.

Claims under contracts of hiring, *ib*.Distinction betwixt hiring and sale, *ib*.

Risk of loss remains with owner, i. 481-2.

HIRING OF MOVEABLES, i. 481-2.

Claim by lessee on bankruptcy of lessor, *ib*.Subjects delivered, *ib*.Not delivered, *ib*.

On whom the risk of loss, i. 482-3.

Claim by lessor on lessee's bankruptcy, *ib*.Responsibility for neglect or diligence prestable, *ib*.

HIRING OF LABOUR, i. 484-5.

Where more done than was stipulated, *ib*.

Faulty performances, i. 485-6.

Work united with employer's property, *ib*.Work rendered useless, or destroyed, *ib*.Rules in such case, *ib*.

Claim on employer's bankruptcy, i. 486-7.

On workman's bankruptcy, *ib*.

Periculum, i. 487-8.

Diligence prestable, *ib*.Safe custody, responsibility for, *ib*.

Skill of professional men and artists, i. 488-9.

OF CARRIAGE BY LAND, i. 490-1.

Claim by carrier, *ib*.

By passengers in stage-coaches for carelessness or rashness of drivers, or overloading, i. 491, 492.

See NAUTÆ CAUPONES, etc.

OF SEAMEN, i. 557-8.

General principles of the contract, *ib*.Regulations for, by statute, *ib*.

See SEAMEN.

OF SHIP under contract of affreightment, i. 585, 586.

See SHIP—FREIGHT—CHARTER-PARTY.

HOLDING, base and public, i. 722-3.

Alternative, *ib*.

Burgage, i. 721-2.

Preference of sasines in these rights, *ib*.

Effect of obligation to infeft in fixing the holding, i. 723-4.

HOLIDAY, exemption from diligence on, ii. 453-4.

Exception of *meditatio fugæ* warrants, *ib*, ii. 456-7.

HOLOGRAPH OBLIGATIONS excepted from solemnities of deeds, i. 341-2.

Not proof of their dates, *ib*.Except *in re mercatoria*, where *onus* on objector, *ib*.

Prescription of, i. 341-3.

HOLYROOD HOUSE, ii. 461-2.

See SANCTUARY.

HOME PORT, power of shipmaster in, as to employment of ship, i. 554-5.

Repairs and furnishings in, i. 572.

What a home port? i. 575.

HOMOLOGATION, doctrine of, i. 139-40.

Judicial homologation, *ib*.Homologation as understood in Scottish law, *ib*.

By subsequent approbation of a deed, or by acquiescence, i. 140-1.

By the original party to a deed, *ib*.Of an imperfect obligation, *ib*.Of a null obligation, *ib*.By one not an original party to the deed, *ib*.Requisites of homologation to give effect to the approbatory act, *ib*.Subscription as a witness to a deed, *ib*.Effect of an heir witnessing a deathbed deed, *ib*.

Exclusion of homologation by protest, i. 141-2.

Effect of homologation, *ib*.Approbate and reprobate, doctrine of, *ib*.

HOMOLOGATION—continued.

- Homologation of trust-deed, ii. 393-4.
- Of private composition, ii. 398-9.
- Of a deathbed deed by the heir, i. 93-4.
- How it may be ineffectual as to his creditors, *ib.*
- See APPROBATE and REPROBATE.

HONOUR, claim by one accepting or paying bill on protest for, i. 425-6.

HONOURS and DIGNITIES not alienable or attachable, i. 120-1.

HORNING and CAPTION, diligence by, i. 7-8.

- To infer bankruptcy, ii. 159-60.
- General letters of, *ib.*
- Prohibited with certain exceptions, *ib.*
- Objections to regularity of horning and caption, ii. 160-1.
- Imprisonment, ii. 435-6.
- Warrant, *ib.*
- Horning, *ib.*
- Days of charge, *ib.* note.
- Caption, ii. 435.
- Execution, *ib.*
- Search, ii. 436.
- Apprehension, *ib.*
- Incarceration, *ib.*
- See IMPRISONMENT.

HOUSE of debtor, how far a sanctuary, ii. 461-2.

- In England, *ib.*
- In Scotland, *ib.*
- Houses within burgh, burden on, by jedge and warrant, i. 784-5.
- Hypothec of landlord in, ii. 29-30.
- See DWELLING-HOUSE.

HUSBAND AND WIFE, conjunct fee and liferent between, i. 54.

- Widow's terce, i. 55-6.
- Husband's interest in wife's estate, i. 58-9.
- Jus mariti* as to rents, etc., *ib.*
- Courtesy, i. 59-60.
- Criterion of husband's right, *ib.*
- See LIFERENT—TERCE—COURTESY.
- Legal rights of parties,—*communio bonorum*, i. 678-9.
- Claims by wife and children where no contract, i. 679-80.
- Under a special contract, i. 680-1.
- Postnuptial contract, i. 686.
- Contract or decree of separation, i. 688-9.
- Liability of wife to personal diligence, ii. 156-7.
- See MARRIAGE—WIVES—CHILDREN.

HUSBANDRY, implements of, hypothec on, ii. 28-9.

HYPOTHEC—

- Of hypothec in general, ii. 24-5.
- Distinction betwixt pledge and hypothec, *ib.*
- 1. Of conventional hypothecs, *ib.*
- On the Continent, *ib.*
- In Scotland not recognised, except in the contract of bottomry and *respondentia*, ii. 25-6.
- Hypothec of moveables by heritable bond rejected, *ib.*
- 2. Tacit hypothecs in general, *ib.*
- In Roman law, ii. 26-7.
- In Scottish law, *ib.*
- Superior for feu-duties, *ib.*
- Landlord's hypothec, *ib.*
- Hypothec of law agent, ii. 34-5.
- Hypothec for public duties, taxes, and Exchequer bills, ii. 39-40.
- Maritime hypothecs, i. 573, ii. 38.
- On ship for foreign repairs, i. 573.
- For seamen's wages, i. 562-3.
- For freight, ii. 38-9.
- On ship or cargo for average loss, ii. 39-40.
- For price of goods, i. 256-7.

HYPOTHEC—continued.

- Ranking of creditors holding right of hypothec, ii. 406-7.
- See BOTTOMRY — LANDLORD — SHIP — SEAMEN — LAW AGENT.

IDENTITY—

- Proof of, where fungibles deposited, i. 277-8.
- Effects of changes on property in question of ownership, i. 294-5.

IDIOT may be made bankrupt, ii. 156, 163.

- Incapable of consent, i. 127-8.
- Protected from imprisonment for debt, ii. 458-9.
- Restitution against deeds by idiots, i. 131-2.
- Brieve of idiocy, *ib.*
- Verdict, i. 132.
- See RESTITUTION.

IGNORANCE of undue negotiation of bill, payment in, i. 445.

- Of want of seaworthiness of ship, i. 597, 663.

IL CONSOLATO DEL MARE, commentators on, i. 547-8.

ILLEGAL contracts and obligations, i. 317-8.

- Where incentive to crime, no foundation of claim, *ib.*
- Indecent, mischievous, consideration, i. 318-9.
- Gaming, *ib.*
- Wagers, i. 319.
- Liquor Acts, i. 320.
- Contracts against public policy, *ib.*
- Against policy of laws of trade, i. 325.
- Usury, i. 327-8.
- Effect of illegality against third parties, i. 330-1.
- Debt partly illegal, i. 331-2.
- Money or obligation given for concurrence to bankrupt's discharge, ii. 371-2.
- See CONTRACTS and OBLIGATIONS—SMUGGLING—USURY.

IMMORAL contracts, or *contra bonos mores*, i. 317-8.

IMPLEMENT—

- Adjudication in, i. 782-3.
- Of the action, *ib.*
- Completion of, i. 783-4.
- Criterion of preference, *ib.*
- Not subject to *pari passu* preference, *ib.*
- Competing adjudications in implement, *ib.*
- Over property simply heritable, i. 794.
- Ranking of, among simple adjudgers, i. 636-7.
- How to secure against, i. 653-4.
- Competition of two adjudications in implement, i. 648-9.

IMPLEMENTS of husbandry—

- Whether liable to landlord's hypothec, ii. 28-9.
- Working implements excepted from conveyance in *cessio*, ii. 482-3.

IMPLIED discharge of cautioners, i. 376-7.

- Guarantee by mercantile factor, claims on, i. 395-6.
- Acceptance of bill, i. 423-4.
- Obligation by factor remitting money, i. 395.
- Among co-obligants, i. 361.
- Agreement, lien by, ii. 101-2.
- Conditions in contract of sale as to fitness and soundness, i. 463-4.
- Exceptions, i. 464.
- Sale of goods on arrival from abroad, *ib.*
- By sample, *ib.*
- By taste or other criterion, i. 465-6.
- Mandate and institorial power in mercantile affairs, i. 508-9.
- See MANDATE—SALE—CAUTIONARY.

IMPLIED WARRANTIES in insurance, i. 663-4.

IMPLIED ACCESSION to trust-deed, ii. 393-4.

IMPLIED CONDITIONS in, ii. 394.

- In private composition, ii. 398-9.

See TRUST-DEED—COMPOSITION.

IMPLIED PROTECTION from imprisonment, ii. 462.

IMPLIED—*continued.*

IMPLIED POWER of partners to bind company, ii. 503.

IMPLIED OBLIGATION to pay interest, i. 690-1.

IMPRISONMENT for debt—

General spirit of the law of, ii. 428-9.

Distinction between Scottish and English laws, *ib.*

In England, imprisonment a satisfaction for debt, ii. 429-30.

Spirit of Scottish law of imprisonment, *ib.*

History of imprisonment for civil debt, ii. 430-1.

Not permitted at one time in either country, *ib.*

Statute merchant in England, *ib.*

Act of warding in Scotland, *ib.*

History of ordinary imprisonment in England, *ib.*

History of ordinary imprisonment for debt in Scotland, ii. 432.

History of caption, ii. 433.

Imprisonment under Small Debt Acts, ii. 434.

Contrast of the laws of England and Scotland, *ib.*

WARRANT FOR IMPRISONMENT and its execution, ii. 435-6.

Imprisonment on acts of warding, *ib.*

Small debt, *ib.*

On caption, *ib.*

Warrant of caption, *ib.*

Horning, days of charge, *ib.* note.

Denunciation, *ib.* note.

Caption, *ib.*

Of apprehending the debtor, *ib.*

Magistrates, messengers, etc., to assist, *ib.*

Liability of magistrates for neglect, *ib.*

Of messengers and their cautioners, *ib.*

Execution of search where debtor cannot be found, ii. 436-7.

Apprehension where debtor found, *ib.*

Solemnities requisite by messenger, *ib.*

Incarceration, messenger not bound to imprison instantly, *ib.*

Debtor may insist on being carried to next sufficient prison, *ib.*

Messenger must produce caption to clerk of prison or jailor, and leave it, or a charge upon it, with jailor, *ib.*

Of recording the prisoner in jail books, *ib.*

Duty of magistrates in keeping prisoners, ii. 437-8.

Their responsibility for prisoners, *ib.*

Sufficiency of prison and vigilance of jailors, *ib.*

Onus probandi on magistrates, *ib.*

Search after escape, ii. 439.

CUSTODY OF PRISONERS and their maintenance, ii. 439-40.

Close imprisonment, *ib.*

Squalor carceris, derivation of the term, *ib.*

Close confinement in England, *ib.*

Doctrine of Scottish law, *ib.*

Limitations of the rule in Scotland, ii. 440.

RELIEF GIVEN TO SICK PRISONERS, ii. 440-1.

Bill of health, *ib.*

Act of Sederunt permitting prisoners for debt to be liberated in case of sickness, *ib.* note.

Construction of the Act of Sederunt, ii. 441-2.

The indisposition must endanger life, *ib.*

Certificate by surgeon must be on oath, *ib.*

Restraint on debtor freed on bill of health, *ib.*

Provision for safe custody, *ib.*

Responsibility of magistrates in liberating on bill of health, *ib.*

Of open jails, ii. 443-4.

Law gives no relaxation except in case of bad health, *ib.*

No bar to *cessio*, ii. 473-4.

MAINTENANCE OF PRISONERS, ii. 443-4.

Creditor must maintain debtor where he is unable, *ib.*

Jail fees for fire, bedding, light, etc., ii. 444-5.

Whether debtor can be detained for jail fees after debt paid, *ib.*

IMPRISONMENT—*continued.*MAINTENANCE OF PRISONERS—*continued.*

Whether different where debtor liberated for want of aliment, ii. 444-5.

Act of Grace, ii. 445.

Act 1696, c. 32, *ib.* note.

Persons entitled to Act of Grace, ii. 445.

Prisoners for debt at suit of individual creditors, ii. 445-6.

Distinction, *ib.*

Prisoners *ad factum præstandum*, ii. 446-7.

Must debtor be in prison? *ib.*

Rate of aliment, *ib.*

Sum by new statute to be deposited for aliment, ii. 447-8.

Debtor must be unable to maintain himself, *ib.*

Intimation to creditor of application, *ib.*

Conveyance *omnium bonorum*, *ib.*

Effect of liberation on the Act, ii. 448.

CONSTRAINT ARISING FROM, will vitiate an obligation, i. 315-6.

OF DEBTORS IN MEDITATIONE FUGÆ, ii. 448-9.

History of *meditatione fugæ* warrants, ii. 449-50.

Privilege of Admiralty, *ib.*

Proceedings in *meditatione fugæ*, ii. 450-1.

Who may grant warrant, *ib.*

Summary without notice, *ib.*

Debt, *ib.*

Judge bound to inquire, *ib.*

Proofs necessary to authorize debtor's apprehension, ii. 451-2.

Duty in granting first warrant, *ib.*

In second warrant, *ib.*

Evidence, ii. 452-3.

Debtor must be examined, ii. 453-4.

Ground of inference, *ib.*

Going to another part of Scotland, *ib.*

Retiring to sanctuary, *ib.*

Fraudulent removal not a requisite, *ib.*

Soldiers and sailors, ii. 454-5.

Foreigners, *ib.*

How examination to be taken, ii. 455-6.

Effect of the warrant, ii. 456.

Execution on Sunday, in sanctuary, *ib.*

Personal protection, *ib.*

Imprisonment different from that for debt, *ib.*

Claims of damage arising on these warrants, ii. 457-8.

FOR DEBT CONTRACTED WITHIN SANCTUARY, ii. 463-4.

Debtor must be confined within Abbey jail, ii. 464-5.

Entitled to benefit of Act of Grace and bill of health, *ib.*

Imprisonment for a month necessary to pursue *cessio*, ii. 472-3.

Whether in Abbey jail sufficient, ii. 464, 474-5.

Must be for debt, *ib.*

Evidence of it, ii. 477.

See *CESSIO*.

PROTECTIONS AGAINST, by privilege, sanctuary, or judicial authority, ii. 458-9.

See *MEDITATIO FUGÆ*—PROTECTIONS—SANCTUARY.

A REQUISITE OF BANKRUPTCY, ii. 158-9.

Requisites of it, ii. 160-1.

Evidence of it, ii. 161.

Entry in jail books, *ib.*

Execution by messenger, *ib.*

Circumstantial evidence and oral testimony, *ib.*

Date of imprisonment, ii. 165.

Equivalents of, *ib.*

Evidence of equivalents, ii. 161-2

Forcibly defending, *ib.*

Absconding, *ib.*

Taking sanctuary, ii. 163.

Exemption from, ii. 156.

IMPRISONMENT—continued.

- A REQUISITE OF BANKRUPTCY—continued.**
 - Peers, members of Parliament, pupils, idiots, married women, ii. 156.
 - Imprisonment of bankrupt refusing to answer at examinations, ii. 325-6.
 - Ceases on disclosure, *ib.*
 - Remedy, prosecution for fraudulent bankruptcy, *ib.*
 - Bankrupt cannot be imprisoned at examinations for perjury, must be prosecuted criminally, *ib.*
- IMPROVEMENTS** under a lease, who liable for, i. 70-1.
 - Under an entail, i. 70-1.
 - Where no entail, *ib.*
 - Value of, i. 793-4.
 - Completion and effect of the claim for, against the next heir, *ib.*
 - Claim for, by tenant's creditors on bankruptcy, i. 78-9.
- INCAPACITY**, restitution against deeds on the ground of, i. 126-7.
 - Pupils and minors, *ib.*
 - Insane or fatuous persons, i. 131.
 - Interdicted persons, i. 134.
 - See **RESTITUTION—CONSENT.**
 - Of partners, effect in dissolving company, ii. 524-5.
 - In discharging mandate, i. 525-6.
 - Protection from imprisonment by incapacity, i. 614-5.
- INCARCERATION** of debtor, ii. 436-7.
 - Duty of messenger as to, *ib.*
 - Debtor may insist on being carried to next sufficient prison, *ib.*
 - See **IMPRISONMENT—BANKRUPTCY.**
- INCENTIVE** to crime, agreements or obligations operating as, illegal, i. 317-8.
- INCORPOREAL** rights considered as a fund for payment of debt, i. 100-1.
 - Subjects, distinguished as heritable or moveable, ii. 2-3.
 - Completion of securities over, ii. 15-6.
- INDECENT** consideration in contract, i. 318-9.
- INDEFINITE** precept of sasine, i. 723-4.
 - Heritable security, i. 724.
 - In terms of absolute conveyance, i. 725.
 - Disposition in security, *ib.*
 - Objection to adjudication that debt indefinite, i. 776-7.
 - No security for indefinite sums, ii. 218-9.
 - See **ACT 1696.**
- INDEFINITE PAYMENT**, ii. 427-8.
 - Rules in application of payment, *ib.*
 - Exceptions, *ib.*
- INDEMNIFICATION.**
 - See **DAMAGES.**
- INDEMNITY.**
 - See **MUTUAL ACCOMMODATIONS—DAMAGE—LOSS—CONTRIBUTION.**
- INDIRECT** alienations challengeable on 1696, c. 5, ii. 197-8.
 - See **ACT 1696—PREFERENCES.**
- INFANTS**, ii. 458.
 - See **INCAPACITY.**
- INFESTMENT** of annualrent, i. 712-3.
 - BASE AND PUBLIC**, i. 722-3.
 - Sasine on public holding null till confirmed, i. 723-4.
 - Mid-impediment, *ib.*
 - Alternative holding, *ib.*
 - Effect of obligation to infest, *ib.*
- SIMPLE**, order of ranking of, ii. 402-3.
 - See **SASINE—LIFERENT INFESTMENT.**
- ON AN ENTAIL**, i. 47-8.
 - Omissions in, *ib.*
- INHIBITION—**
 - Nature and effect of the diligence, ii. 133-4.
 - Inhibition described, *ib.*
 - Form of, *ib.* note.

INHIBITION—continued.

- Execution of, ii. 134-5.
- Recording, *ib.*
- Affects only heritage, *ib.*
- What it operates against, ii. 135-6.
- In what cases it may be used in security, ii. 136-7.
- Inhibition on dependence for future debts, *ib.*
- On future debts, *ib.*
- On future or contingent debts, *ib.*
- On depending action, ii. 137-8.
- What is a depending action, *ib.*
- On debts due, ii. 138-9.
- Operation of, *ib.*
- What secured by inhibition, ii. 140-1.
- Must be renewed against heir, ii. 141-2.
- Effect of inhibition, ii. 142.
- OBJECTIONS** against inhibition, and their effects, ii. 142-3.
 - Nullities of ground of inhibition, *ib.*
 - Partial nullities, *ib.*
 - Litigiosity in inhibition, ii. 145-6.
- RANKING OF**, ii. 406-7.
 - Effect of inhibitions, *ib.*
 - With heritable creditors, adjudgers, etc., *ib.*
 - Vinco vincentem*, ii. 407-8.
 - Whether heritable creditor excluded has indemnification against adjudgers, not affected by the inhibition, ii. 401-2.
 - From which of the adjudgers, etc., inhibitor is to be paid, ii. 412-3.
 - Canons of ranking, ii. 413-4.
 - Whether inhibition a real burden to entitle to preference on price of lands under sequestration, ii. 346.
 - Registration of petition of sequestration as an inhibition, ii. 297.
 - Effect of inhibition in relation to trustee's title, ii. 346.
 - Effect of discharge by composition contract against inhibition, ii. 358.
 - Effect of inhibitions, where a trust-deed, ii. 391-2.
 - How to secure against preference by inhibition, ii. 493-4.
- INITIALS—**
 - Subscription of mercantile obligations by, i. 342.
 - Of bills, i. 415-6.
- INLAND BILLS**, time for notice of dishonour of, i. 442-3.
 - See **BILL OF EXCHANGE.**
- INNKEEPER—**
 - Responsibility of, on edict *Nautæ Caupones*, etc., i. 498.
 - Limitation of responsibility, i. 501-2.
 - Obligation to receive travellers, *ib.*
 - Lien of innkeepers, ii. 98-9.
- INSANITY** of person having interest to object to decree of sale, effect of, to challenge sale, ii. 260-1.
 - Of bankrupt applying for discharge, ii. 372.
 - Effect of, in recalling procurator, i. 525-6.
 - In dissolving partnership, ii. 525-6.
- INSOLVENCY—**
 - Effect of, on the diligence of individual creditors, i. 7-8.
 - Insolvency and bankruptcy distinguished, ii. 152-3.
 - Indications and proof of insolvency, *ib.*
 - Occasion of inquiry into insolvency, ii. 153.
 - In relation to gratuitous deeds, *ib.*
 - In relation to deeds to creditors in satisfaction on security, *ib.*
 - In relation to the proceedings of creditors, *ib.*
 - In relation to diligence in security, stopping *in transitu*, etc., ii. 154.
 - Conclusive proof, comparison of debts with funds, *ib.*
 - Insolvency must be computed as at time of act challenged, ii. 154-5.
 - Visible estate *ex eventu* inadequate, ii. 180-1.
 - Rights *in spe* not to be computed, *ib.*
 - Life interest of heir of entail, etc., *ib.*

INSOLVENCY—*continued*.

Computation of life interests, ii. 180-1.
 Insolvency as an ingredient in bankruptcy, ii. 158-9.
 How tried, *ib*.

Computation of, in a challenge, ii. 159-60.

EXTRAJUDICIAL SETTLEMENTS between insolvent debtors and their creditors, ii. 381-2.

See TRUST-DEED—ARRANGEMENTS.

Insolvency alone no ground for challenging trust-deed, ii. 387-8.

Settlement of, by private composition, ii. 398-9.

Practical consultations by debtors arranging with creditors on insolvency, ii. 488-9.

By creditors as to arranging with debtors on, ii. 491-2.

See ARRANGEMENTS.

Commentary on the laws equalizing diligence on, ii. 72.

Effect of, on partnership, ii. 524-5.

Effect of, on contract of sale, i. 263, 470.

Necessary to authorize stopping *in transitu*, i. 242-3.

Concealment of insolvency. See FRAUD—STOPPING IN TRANSITU—SALE—REJECTION.

IN RELATION TO DEEDS CHALLENGED UNDER ACT 1621, c. 18, ii. 179-80.

Insolvency at time of challenge, presumed at date of deed, *ib*.

Deed supported by proof of solvency at making, *ib*.

Visible estate sufficient, though *ex eventu* insolvent, ii. 153, 180.

No rights merely *in spe* can be taken into account in reckoning solvency, *ib*.

Mode of valuing life interests, ii. 180-1.

After long delay, grantee not bound to prove solvency of grantor, ii. 231-2.

In reduction at common law, *ib*.

Under second branch of Act 1621, ii. 185-6.

NECESSARY IN A RANKING AND SALE by creditors, ii. 233-4.

Not necessary where by apparent heir, ii. 234.

Proof of, ii. 239.

Insolvency no excuse for want of due negotiation of bill, i. 444-5.

Claims for damages, whether to be enlarged in respect of it, i. 698-9.

Necessary to pursuer of *cessio*, i. 633.

Proof of it, i. 634.

Where doubtful, *ib*.

Heir's disposition within a year, i. 738-9.

INSOLVENT—

Advance of money to, not challengeable, ii. 231-2.

Deeds by. See ACTS 1621, 1696.

Insolvent debtors, laws for relief of, in England, ii. 395.

Of extrajudicial settlements between, and creditors, ii. 381-2.

Estates, distribution of, where no sequestration, ii. 232-3.

See SALE—TRUST-DEED—PREFERENCES—ARRANGEMENTS.

INSTITUTIONAL POWER, i. 506-7.

To clerks or shopmen, i. 510-1.

To a wife managing shop, *ib*.

To bank agents and officers of bank, *ib*.

Traveller or rider, i. 515.

How recalled, i. 522-3.

See FACTOR—COMMISSION.

INSTITUTE in entail, how affected by prohibitions, i. 44-5.

INSTRUMENTS OF HUSBANDRY, whether liable to hypothec, ii. 28-9.

INSTRUMENT OF PROTEST on bills, i. 437-8.

Of intimation of assignation, ii. 20-1.

INSTRUMENT OF SASINE, i. 715, 716.

INSURANCE—

Contracts of insurance, i. 643-4.

Nature of the contract, settled by written instrument duly stamped, *ib*.

INSURANCE—*continued*.

Claims on bankruptcy of insured, i. 645-6.

Premium, *ib*.

History and use of the receipt in the policy, *ib*.

How transaction managed by broker for the parties, *ib*.

Effect of delivery of receipt to the broker, *ib*.

In England, i. 646-7.

Claim when made by broker cannot be met by the receipt on policy, i. 647-8.

The policy the proper evidence of broker's claim for premiums, i. 648-9.

Amount of claim, *ib*.

Suffers diminution by return premiums, *ib*.

When return premiums due, *ib*.

Claim by underwriters may be met by claim for loss, *ib*.

This no answer to broker's claim, *ib*.

Premiums cannot be retained while risk undetermined, *ib*.

Claim may be made for repayment of losses settled in ignorance of circumstances which would have barred recovery under policy, *ib*.

Where such claim is barred, *ib*.

CLAIMS ON BANKRUPTCY OF UNDERWRITERS, i. 648-9.

Claims against underwriters, *ib*.

Proofs in support of claim, *ib*.

Requisites of policy, i. 649-50.

Effect of the slip or memorandum of terms, *ib*.

Policies must be stamped, *ib*.

Parole evidence of policy, when lost, not admissible if unstamped, *ib*.

How far it may be altered after being underwritten, *ib*.

Contents of the policy, i. 651-2.

Name of the insured required by statute, *ib*.

Alternatives, *ib*.

Blank policies null, *ib*.

Regulations as to names of those interested, *ib*.

Name of ship and master, *ib*.

Subject of the insurance a *sine qua non*, i. 652-3.

Place and time of commencement and termination of risk, *ib*.

What is a 'port' in relation to the termination of the voyage, i. 671.

Perils of the voyage, i. 652.

Subscription by the several insurers, *ib*.

Where signed by procurators, *ib*.

Does not require witnesses, *ib*.

No parole evidence will alter policy, i. 653-4.

LOSSES, HOW PROVED, *ib*.

Proof of the interest, *ib*.

Wager policies ineffectual, *ib*.

Insurance of profit—of future freight, *ib*.

Total and partial loss, *ib*.

Total loss must be accompanied with abandonment, *ib*.

Circumstances in which abandonment competent, i. 654-5.

Description of a total loss, *ib*.

Abandonment on imperfect information, *ib*.

Where ship captured and retaken, and abandonment after information of former, but before notice of latter, *ib*.

Effect of abandonment where ship insured with one set of underwriters, and freight with another, i. 656.

Time of abandonment, i. 657.

Notice of abandonment, *ib*.

Partial loss, what included under it, *ib*.

Proof of loss, i. 659-60.

Log-book, *ib*.

Master and crew, *ib*.

Surveys, sentences of condemnation abroad, *ib*.

Valuations and adjustment of losses, *ib*.

Total loss happening under a valued policy, *ib*.

Under an open policy, i. 660-1.

Adjustment of partial loss, *ib*.

INSURANCE—*continued*.LOSSES, HOW PROVED—*continued*.

- On the ship, i. 660-1.
- On cargo, *ib*.
- Where part of a package damaged, i. 661-2.
- Where a valued policy and partial loss, i. 662-3.
- Defences against claim of insured, *ib*.
- Breach of warranty, *ib*.
- Several warranties in the contract, *ib*.
- Express, *ib*.
- Difference between warranty and representation, or inducement to contract, *ib*.
- Non-fulfilment of warranty fatal, *ib*.
- Representation fatal or not, as it is important to risk, *ib*.
- Implied warranties, i. 663-4.
- Warranty of seaworthiness, *ib*.
- Misrepresentation and concealment, i. 665-6.
- Of day of sailing, *ib*.
- Of ship being a running ship, i. 667.
- Of destination, etc., *ib*.
- Of fate actual or suspected of ship, *ib*.
- Deviation from course of voyage, i. 668-9.
- What shall be held deviation, *ib*.
- What will excuse it, *ib*.
- Ignorance of deviation by insured no defence, *ib*.
- Destroys responsibility, although ship has returned to her course without apparent injury, *ib*.
- Deviation unavoidable, i. 669-70.
- Onus probandi* on insurers, *ib*.
- Alteration of voyage differs from deviation, *ib*.
- Voids policy, *ib*.
- What alteration considered an abandonment of voyage, *ib*.
- The benefit of the contract may be transferred, i. 675-6.
- Claim by creditors, *ib*.
- CONTRACTS OF, AGAINST FIRE, i. 671-2.
- Nature of the contract, *ib*.
- The interest, *ib*.
- Risks and losses insured against, i. 672-3.
- Fire, *ib*.
- Exception, *ib*.
- Fire by civil commotion, *ib*.
- Loss must be within policy, *ib*.
- Premium must have been paid, *ib*.
- Credit with agent, *ib*.
- Proposals a part of contract, *ib*.
- Damage by removal, i. 673-4.
- Loss of rent, *ib*.
- Warranty, *ib*.
- Representation, *ib*.
- Of settling and adjusting losses, *ib*.
- Notice of fire, etc., i. 674-5.
- Subject may be insured in different offices, i. 675.
- Whether the policy transferable, *ib*.
- Creditors on bankruptcy entitled to the benefit, *ib*.
- CONTRACTS OF, ON LIFE, *ib*.
- Nature and purpose of, *ib*.
- Interest, assignation of policy, i. 675-6.
- On bankruptcy, i. 676-7.
- Warranty, *ib*.
- The risk, *ib*.
- Adjustment of loss, *ib*.
- POLICIES OF LIFE INSURANCE, as a fund for payment of creditors, i. 102-3.
- Cases in which the value of a life policy may accrue to creditors, *ib*.
- By whom such policies may be opened, *ib*.
- CLAIM AGAINST AGENT for neglect to insure, i. 544-5.
- Cases where order to insure must be obeyed, *ib*.
- Concealment of information, *ib*.
- See FACTOR.

INSURANCE—*continued*.

- INSURANCE OF SOLVENCY, i. 622-3.
- Compensation between parties to insurance contract, ii. 125-6.
- See COMPENSATION.
- Monopoly of insurance in England, ii. 546-7.
- Insurance of mortgaged ship, ii. 11-2.
- INSURANCE BROKER, *lien of*, ii. 115-6.
- Claims by, on bankruptcy of insured, i. 645-6.
- See BROKER.
- INTERDICT against invasion of patent or copyright, i. 119-20.
- INTERDICTION—
- Restitution against deeds by interdicted persons, i. 134-5.
- Interdiction affects only alienations of heritage, *ib*.
- It is available to creditors, *ib*.
- Judicial interdiction, *ib*.
- Summons, *ib*.
- Citation, publication, registration, i. 135-6.
- Effect of interdiction, *ib*.
- Voluntary interdiction, *ib*.
- INTEREST OF MONEY—
- Simple and accumulated claims for, i. 690.
- Of interest *nomine damni*, i. 691.
- Difference between claim for damages on breach of pecuniary obligation, and such claim on breach of ordinary contract, *ib*.
- Cases where interest is due in name of damages, *ib*.
- Claims for interest on convention, express or implied, i. 692-3.
- Rate of it, *ib*.
- Must not be taken by anticipation, *ib*.
- Commencement of it, i. 693-4.
- Termination, i. 694-5.
- Limitation against cautioners, *ib*.
- Stops at date of sequestration, *ib*.
- Not as against the bankrupt, *ib*.
- Accumulation of principal and interest, i. 695-6.
- No accumulation *ipso jure*, *ib*.
- Arrears, *ib*.
- Accumulation in judicial sale, *ib*.
- Duty to invest interests, *ib*.
- Cautioner paying a debt with interest, i. 696-7.
- Accumulation by voluntary corroboration, *ib*.
- By judicial proceedings, *ib*.
- Denunciation, *ib*.
- Adjudication, i. 697-8.
- Decree of judicial sale, *ib*.
- Diligence against moveables does not produce accumulation, *ib*.
- By adjudication and poiding the ground on *debita fundi*, i. 753-4.
- Arrears of, whether heritable or moveable, ii. 7.
- Adjudication of, i. 794.
- In what cases extinguished by compensation, ii. 123-4.
- MARITIME, i. 579-80.
- See BOTTOMRY.
- COLLATERAL OBLIGATION for payment of, effect of, i. 364-5.
- INTEREST, ADVERSE—
- Whether creditor with, can vote, ii. 288, 304.
- Or be trustee, ii. 302.
- IN SEA INSURANCE, i. 651-2.
- In fire insurance, i. 671.
- Life, i. 675.
- INTERESTS, state of, in ranking and sale, ii. 266.
- INTERIM FACTOR, ii. 299-301.
- See SEQUESTRATION.
- INTERIM WARRANTS, expense of, to be paid by those having the benefit, ii. 402-3.
- INTERMEDIATE management of bankrupt estate previous to election of trustee, ii. 299-301.
- Object, preservation of estate, *ib*.
- See SEQUESTRATION.

- INTERMEDIATE PORTS, power of calling at, i. 608-9, 668-9.
 See CHARTER-PARTY—INSURANCE.
- INTERNATIONAL law—
 Mutual relation of Scottish and foreign laws in bankruptcy, ii. 375, 568.
 Remedies in nature of bankruptcy against persons out of Scotland, *ib.*
 Persons abroad, how subject to our courts, *ib.*
 May be bankrupt, though cannot be sequestrated, ii. 569.
 This sort of bankruptcy no effect beyond Scotland, *ib.*
- MOVEABLE ESTATE—
 Effect of bankruptcy in debtor's domicile, and of the proceedings and conveyance by bankrupt to his creditors, ii. 376, 569.
 Determined on general principles, *ib.*
 Personal estate regulated by law of domicile, *ib.*
 Effect given in England to foreign proceedings, ii. 569-70.
 In Ireland, ii. 570.
 In Scotland, *ib.*
 Settled that moveable estate in succession follows law of domicile, *ib.*
 Same in bankruptcy, *ib.*
 Arrestment in Scotland posterior to an English commission of bankruptcy and assignment void, ii. 571-2.
 Diligence posterior to commission, though before assignment, void, *ib.*
 Diligence before teste of commission, but after act of bankruptcy, *ib.*
 Company having domicile in different countries, *ib.*
 Proceedings in either domicile comprehend whole personal estate, ii. 572-3.
 Title to pursue by assignees, *ib.*
 Accession to foreign trust-deed, *ib.*
 Effect of the deed in Scotland, *ib.*
 Effect of different decision in foreign country from what would be adopted here, *ib.*
 Whether there is restitution of payments received abroad, *ib.*
 English rule, ii. 573-4.
 Scottish, *ib.*
- REAL ESTATES ABROAD, ii. 378, 574.
 How affected by bankruptcy beyond debtor's domicile, *ib.*
 Territorial law regulates real estate, *ib.*
 English commission no effect against real estate in Scotland, *ib.*
 Effect of a conveyance, *ib.*
- RECIPROCAL EFFECT of bankrupt's certificate or discharge, ii. 379, 575.
 General principle, that debt discharged by law of one country will be discharged by another, *ib.*
 Difficulty from *lex loci contractus*, *ib.*
 Creditor following discharged debtor to foreign country, *ib.*
 Creditor's residence in another country, ii. 576-7.
 Effect of locality of contract, *ib.*
 Where debt payable in a particular country, place of payment seems to rule the discharge, *ib.*
 Where the proceedings in bankruptcy include the whole estate, ii. 577-8.
 Peculiarities in effect of discharge, *ib.*
 Effect of a mere commission of bankruptcy as a personal protection, *ib.*
 Effect of English certificate limited, ii. 578-9.
 Discharge in Scotland universal, *ib.*
 Effect of *cessio bonorum* in Scotland, *ib.*
 See FOREIGN—ABROAD.
- INTERROGATORIES—
 Bankrupt may be examined without an exhibition of, ii. 325-6.
 Other persons to be examined only upon all proper interrogatories, *ib.*
- VOL. II.
- INTERROGATORIES—*continued.*
 Of the questions that may be put to bankrupt, and answers he is bound to give, ii. 326-7.
 Answers of others, ii. 328-9.
- INTERRUPTION of prescription by proving debt in ranking and sale, ii. 266-7.
 See PRESCRIPTION.
- INTERVENING securities between adjudgers, effect of, on ranking, ii. 403-4.
 See MID-IMPEDIMENT.
- INTIMATION of adjudication, i. 759-60.
 Bad effects of law in accumulating expense, i. 760-1.
 How far intimation may be stopped, *ib.*
 Of petition of sequestration, ii. 286-7.
 Of petition for bankrupt's discharge, ii. 349.
 Of meeting and of petition for approval of composition, ii. 351.
 Of judicial sale, ii. 258.
 Of assignations, the criterion of preference, ii. 16.
 Notarial intimation, *ib.*
 Instrument must be regular and formal, *ib.*
 To whom intimation to be made, *ib.*
 Notarial intimation not precisely requisite, *ib.*
 Equivalents of intimation, ii. 17.
 Assignations not requiring intimation, ii. 17-8.
 Of dishonour of bills, i. 438-9.
 To creditor by prisoner applying for Act of Grace, ii. 447-8.
 Of dissolution of partnerships, i. 684, 685-6.
 Kind of, necessary to complete assignation to a lease or a sublease, i. 64-5.
 See ASSIGNATION—BILL—NEGOTIATION.
- INTOXICATION, effect of, in vitiating contracts, i. 316-7.
- INTRINSIC quality of oath, i. 350-1.
- INTRODUCTION, letters of, how may infer a guarantee, i. 388-9.
- INTROMISSION—
 Vitious, passive title of, i. 705-6.
 Of executors, ii. 81-2.
 Effect of intromissions, payments, etc., on securities, ii. 424-5.
 On personal claims, *ib.*
 On adjudication, ii. 425.
 On heritable bond, ii. 426.
 In claiming in bankruptcy against co-obligants, *ib.*
 See PAYMENTS.
- INVECTA ET ILLATA—
 Whether superior has hypothec over, for feu-duties in urban tenements, ii. 26-7.
 Landlord's hypothec over, in *prædia urbana*, ii. 29-30.
 Shops, warehouses, cellars, ii. 30-1.
- INVENTIONS secured by patent, i. 103-4.
 See PATENT.
- INVENTORY of title-deeds in judicial sale, ii. 254-5.
 To be given up by executors, ii. 78.
 Omissions in, ii. 81.
 By heir entering *cum beneficio*, i. 706-7.
- INVOICES of goods, assignment of, in security, ii. 14-15.
- IRREDEEMABLE RIGHT—
 Declarator of expiry of legal in adjudications, i. 743-4.
 Charter of adjudication and sasine with forty years' possession, i. 744-5.
- IRRITANCY of a lease on bankruptcy of tenant, i. 76-7.
- IRRITANT and resolute clauses in entails, i. 44-5.
- JACTUS MERCIUM, Rhodian law of, i. 630-1.
 Indemnification of loss by, *ib.*
 Regular and irregular *jactus*, i. 631.
Jactura or jettison, i. 632.
 See AVERAGE.

JAIL—

Prisoner may insist on being carried to next jail, ii. 436-7.

Recording in jail books, *ib.*

Liability of magistrates for sufficiency of, ii. 437-8.

Open jails, responsibility of magistrates for allowing prisoners privilege of, ii. 443-4.

FEES, ii. 444-5.

Debtor cannot be detained for them after paying original debt, *ib.*

Whether different where liberation for want of aliment, *ib.*

Jailor may bring action for fees, *ib.*

OF ABBEY, imprisonment in, ii. 463-4.

Not sufficient to entitle to benefit of *cessio*, ii. 464-5.

JAILOR to record prisoners in jail books, ii. 436-7.

How far authorized to liberate, ii. 437-8.

May prosecute for jail fees, ii. 444-5.

Cannot detain prisoners for, *ib.*

Nor keep them from aliment, *ib.*

Of Abbey jail, responsibility for prisoners in, ii. 463-4.

JUDGE and WARRANT, i. 784-5.

JETTISON or *jactura*, loss by, i. 632-3.

See **AVERAGE**.

JOINT ADVENTURE, or joint trade, ii. 539-40.

A limited partnership, *ib.*

Erroneous distinction in Erskine between partnership and joint trade, *ib.*

Creditors of concern preferable on joint-stock, *ib.*

Creditors claim against the individuals only for balance, deducting what received from joint-stock, *ib.*

Limits of contract fixed by actual agreement, unless joint concern avowed, and credit raised on combined responsibility, *ib.*

If agreement formed, and joint interest constituted, parties jointly responsible, *ib.*

If goods purchased previous to contract, no joint responsibility, ii. 541-2.

Where purchased separately, and afterwards put in stock, *ib.*

Precise limits of joint concern conclusive, ii. 542-3.

Sub-contracts, *ib.*

Joint trade by companies, *ib.*

Analogy or discrimination between joint trade and partnership proper, *ib.*

Stock of the concern, *ib.*

Preference of creditors of joint adventure, *ib.*

Lien of partners, *ib.*

Each partner *præpositus*, ii. 543-4.

JOINT OWNERS—

Common proprietors, not partners, ii. 544-5.

Cannot bind each other but for necessary repairs, *ib.*

See **OWNERS**.

JOINT PURCHASE—

Distinguished from joint trade, ii. 543-4.

How a joint purchaser might be liable for whole purchase, *ib.*

JOINT-STOCK COMPANIES, ii. 516-7.**JOINT AND SEVERAL OBLIGATIONS**, i. 361-2.

Where co-obligants bound 'jointly and severally,' *ib.*

Where they are bound 'each severally,' as 'co-principal and full debtor,' *ib.*

Terms 'jointly' or 'conjunctly,' *ib.*

Where parties are bound simply, *ib.*

Where the bond bears the money to be for use of one of the parties, *ib.*

Where each is bound 'for his own share,' *ib.*

Implied obligation, *ib.*

Effect among the co-obligants of joint or several obligations, i. 362-3.

JOINTURE, Wife's, i. 682-3.

See **MARRIAGE CONTRACTS**.

JUDGE, salary of, whether attachable, i. 123-4.

ADMIRAL, his jurisdiction, i. 546-7, notes.

Concurrence of, to arrestment of goods on board ship, ii. 63-4.

ORDINARY, his jurisdiction in sequestration, ii. 283-4.

See **SHERIFF—MAGISTRATE—MEDITATIO FUGÆ**.

JUDGMENT awarding sequestration, and its effects, ii. 285, 293.

Judgment recalling, ii. 294-5.

Of trustee on the debts preparatory to dividend, ii. 362-3.

Discharging trustee, ii. 373-4.

See **SEQUESTRATION**.

JUDICATUM SOLVI, bond of caution, i. 400-1.

In a suspension or advocacy, i. 401-2.

Cautioner not entitled to benefit of septennial prescription, *ib.*

JUDICIAL sale and ranking, ii. 232-3.

Accumulation of principal and interest in, i. 695.

Decree, i. 697.

See **SALE**.

Judicial sale under sequestration, i. 309-10.

SECURITIES ON HERITAGE, i. 789-90.

On property simply heritable, i. 789-90.

Inhibition, ii. 433.

On moveables, ii. 40, 55, 62, 76.

CAUTION, i. 396-7.

JUDICIO SISTI Caution, inquiry concerning the extent of, i. 396-7.

Bail in civil law, *ib.*

In England, in Scotland, i. 397-8.

Import of the obligation *de judicio sisti*, *ib.*

Import of the bond *de judicio sisti*, i. 398-9.

May the debtor take sanctuary? *ib.*

Form of the bond in practice, and effect of it, i. 399, 400.

Presentation of debtor's person in court, *ib.*

Extinction of cautioner's obligation, *ib.*

JURA INCORPORALIA, i. 302-3.

How affected by qualifications in right to, *ib.*

Effect of destination in, as to heritable or moveable, ii. 6.

See **QUALIFIED RIGHT**.

JURISDICTION of Judge-Admiral, i. 546-7, notes.

Difference between Scottish and English Courts of Admiralty, *ib.*

Of Bailie of Abbey, ii. 463-4, note.

Of Water Bailie of the Clyde, ii. 63-4.

Of Court of Exchequer as to writs of extent, ii. 40-1.

In diligence against foreigners, a previous arrestment *ad fundandam jurisdictionem* necessary, ii. 158-9.

Of Court of Session in mercantile bankruptcy, ii. 283.

Judge Ordinary, *ib.*

JURY COURT, the Court for determining questions of damage, i. 698-9.

JUS ACCRESCENDI, i. 737-8.

JUS CREDITI, under a trust, i. 33-4, ii. 4.

Wife and children must have *jus crediti* to compete with creditors, i. 681-2, 684.

See **MARRIAGE CONTRACT**.

JUS DELIBERANDI, i. 748-9.

JUS IN RE and **JUS AD REM**, distinction between, i. 297-8.

Regulates every claim of preference against general creditors, *ib.*

Exception, *ib.*

JUS MARITI, i. 59, 678.

Effect of it as to rents, *ib.*

Of wife's estate, i. 59.

Competency of adjudging the husband's interest, *ib.*

Where the *jus mariti* is excluded, *ib.*

How it may be excluded to secure provisions to wife and children in case of insolvency, i. 683-4.

JUS QUÆSITUM, to creditors of those having interest in a trust, i. 30-1.

JUS RELICTÆ vests *ipso jure*, i. 137.
When due, i. 678-9.

KENNING to the terce, i. 58.

KEY, delivery of, i. 186-7.

Distinction between this and symbolical delivery, *ib.*

When the key delivered to air goods, i. 192-3.

KING'S WAREHOUSE, delivery into, for behoof of buyer, i. 183-4.

Transference of goods in king's warehouse, i. 203.

Dock warrants, i. 206.

Delivery note, i. 208.

Who is custodian of goods in king's warehouse? i. 209-10.

To whom notice of transfer to be made, i. 210-1.

See DELIVERY—WAREHOUSE.

KING'S DEBTOR not entitled to sanctuary, ii. 462-3.

See CROWN—EXTENT.

KING'S SHIP, whether entitled to salvage, i. 640-1.

KIRK or MARKET, going to, by the grantor of a deed, bars a challenge on deathbed, i. 84-5.

See DEATHBED.

LABES REALIS, deathbed, i. 299-300, note.

LABOUR, hiring of, i. 484.

Materials furnished by employer, *ib.*

Whether loss of subject extinguishes claim of workman, i. 485-6.

Claims on employer's bankruptcy, i. 486-7.

Where work completed, partly completed, or not commenced, *ib.*

On workman's bankruptcy, *ib.*

His creditors may complete contract if advantageous, *ib.*

Where employer suffers damage by non-fulfilment, *ib.*

Periculum, i. 487-8.

Diligence prestable by workmen, *ib.*

Skill of professional men and artists, i. 488-9.

LADING, bill of, i. 212-3, note.

See BILL OF LADING.

LAND—

Of estates in land and connected with land, i. 18.

Diligence against land in Scotland, i. 5-6.

In England, i. 6-7, note.

Of property in land as responsible for debt, i. 19-20.

Dominium directum and *dominium utile*, *ib.*

Vassal's estate, or *dominium utile*, i. 20-1.

Estate of the superior, i. 21-2.

See DOMINIUM UTILE—SUPERIOR—SASINE—CONDITIONS—SECURITIES.

LANDING of cargo, obligation on shipmaster as to, i. 604-5.

LANDLORD, hypothec of, ii. 26-7.

Definition of, in England, ii. 27-8.

Nature of the right in Scotland, *ib.*

Subjects of hypothec, *ib.*

Whether applied to a contract of wood-cutting, *ib.*

1. Where no sublease in agricultural farms, *ib.*

Fruits, corn, cattle, liable to hypothec, ii. 28-9.

Whether furniture and instruments of husbandry liable, *ib.*

In grass farms, *ib.*

Cattle only liable, *ib.*

No hypothec over cattle of others, but only on grass mail, *ib.*

Grass farms where cut daily for sale, effect of hypothec, *ib.*

In *prædia urbana*, ii. 29-30.

Hypothec is over *invecta et illata*, *ib.*

Hired furniture, ii. 30-1.

Furniture lent, *ib.* note.

Shops, warehouses, cellars, etc., *ib.*

Goods for sale in shop subject to hypothec, *ib.*

LANDLORD—continued.

Goods of third parties in warehouse not liable, ii. 30-1.

Rules as to goods of others in manufacturer's hands, and goods for sale in shop, *ib.*

Effects of traveller in an inn, *ib.*

Goods deposited or in pledge in tenant's house, *ib.*

2. Where there is a sublease, *ib.*

Agricultural farm, *ib.*

Landlord's right cannot be hurt without his consent to sublease, ii. 31-2.

Whether subtenant of part liable to hypothec for whole, *ib.*

Where landlord assents to sublease, effect of it, *ib.*

In urban subjects, power to sublet implied, *ib.*

Tenant's right to hypothec against subtenant, *ib.*

Hypothec includes a right of retention, *ib.*

Nature and extent of hypothec, ii. 32.

Mode of rendering it effectual, *ib.*

Sequestration, warrant to sell, ii. 32-3.

Warrant to pay, ii. 33-4.

Criterion of preference, *ib.*

Landlord's right in competition, *ib.*

With the Crown, with creditors under sequestration, *ib.*

With farm-servants, ii. 34-5.

Crown's right as against landlord, ii. 52-3.

Where a pawning of tenant's furniture, ii. 60-1.

Ranking of landlord's hypothec, ii. 406-7.

LAND-TAX, i. 739-40.

Not a *debitum fundi*, *ib.*

Sale of surplus lands, i. 792-3.

Competition of Crown's diligence for, with diligence of subject, ii. 51-2.

LATENT partners of a company, evidence of, ii. 510-1.

Must be notified at dissolution, ii. 533.

How to proceed against, ii. 561-2.

LAW—

General view of the principles of bankrupt law, i. 7-8.

Examination of the bankrupt law of England and Scotland, i. 9.

English law, i. 11.

Scottish law, i. 13.

Maritime law, i. 545-6.

General review of the practical uses of the bankrupt laws, ii. 154.

See MARITIME—ENGLISH LAW—FOREIGN.

LAW AGENT, hypothec of, ii. 34.

Lien or retention of, ii. 106.

Responsibility of, for skill, i. 488-9.

May charge interest on accounts after year and day, i. 693-4.

Ranking of, i. 562-3.

See WRITER.

LAWFUL DAY, execution of warrants must be on, ii. 460-1.

Meditatio fugæ and criminal warrants an exception, *ib.*, ii. 456-7.

See HOLIDAYS.

LAY-DAYS, i. 621-2.

See DEMURRAGE.

LEASE, i. 63.

Of leasehold property as responsible for debt, *ib.*

REQUISITES of a lease effectual against purchaser's creditors or heirs of entail, i. 63.

Requisites to entitle a lease to the benefit of the Act 1449, c. 17, *ib.*

COMPLETION of the tenant's right, i. 63-4.

Possession of the lands, *ib.*

A tenant not in possession is a mere personal creditor, *ib.*

Assignment or sublease by tenant, how completed, *ib.*

Assignment of sublease, i. 64-5.

Whether tenant in possession, who receives a prorogation before expiry of his lease, a real or personal creditor, i. 65-6.

Registration of leases, *ib.*

LEASE—*continued*.

ENDURANCE OF, i. 65-6.

How far long leases are effectual, where no prohibition against alienation, *ib*.

Effect of prohibition to alienate in deed of entail, *ib*.

What leases held to amount to an alienation, i. 66-7.

Effect of a prohibition to dispoise, i. 67-8.

Lease beyond term limited by the entail, *ib*.

Leases under the Improvement Act, *ib*.

RENT, i. 68-9.

How rent may be affected by stipulation, *ib*.

Effect of lease to subsist till debt be paid, *ib*.

Although tenant may retain rents against landlord, he cannot by special contract retain against singular successors, i. 69.

Lease as a security for a loan, *ib*.

How this security completed, *ib*.

GRASSUMS, i. 69-70.

Power to let leases for, *ib*.

Effect as to purchasers, *ib*.

As to substitutes of entail, *ib*.

Where there is no prohibition against diminution of rental, or to alienate, i. 70.

Where there is such prohibition, *ib*.

MELIORATIONS and improvements, *ib*.

Where there is an entail, *ib*.

Where there is no entail, *ib*.

Rights of tenant arising from local custom, i. 70-1.

TENANT'S ESTATE as available to creditors or assignees, i. 71-2.

Limitation by *delectus personæ*, *ib*.

In England, lease in general case assignable, *ib*.

In Scotland, bias other way, *ib*.

Heirs succeed without any special mention of them, i. 72-3.

In agricultural leases *delectus personæ* held to be stronger, *ib*.

In urban leases, assignees admitted unless excluded, *ib*.

Same doctrine as to subtenants, *ib*.

In long leases, right of assigning and subsetting implied, i. 73-4.

What is a long lease? *ib*.

Exclusion of adjudgers, *ib*.

Exclusion of assignees and subtenants, *ib*.

Who entitled to challenge on this clause, *ib*.

Whether landlord's heir, *ib*.

Exclusion unless landlord consents, i. 74-5.

Creditors may insist on tenants granting an assignation or sublease, i. 75-6.

Can they do so where lease excludes assignees with an irritancy? *ib*.

Where lease adjudged or assigned to creditors, are they proper tenants without any new contract of lease? *ib*.

Power of possessing by a manager on bankruptcy where there is an exclusion of assignees, i. 76.

Where tenant does not himself possess, i. 76-7.

Tenant cannot be compelled to concur with creditors in appointing a manager, *ib*.

Irritancy of lease on tenant's bankruptcy bars creditors, *ib*.

In this case creditors may claim meliorations, i. 78-9.

Lease to a company excluding assignees and subtenants null on company's bankruptcy, *ib*.

Effect of this exclusion on tenant's death, *ib*.

Power to name an heir, *ib*.

ASSIGNATION OF, as a security, how completed, i. 789-90.

Where under sublease, *ib*.

Whether intimation to landlord is in the ordinary case sufficient, i. 792-3.

VESTS IN HEIR *ipso jure*, and may be adjudged without a charge, i. 794-5.

LANDLORD'S HYPOTHEC, ii. 26-7.

Tenant's right of hypothec against subtenant, where sublease with landlord's consent, ii. 30-1.

See LANDLORD.

LEASE—*continued*.

TENANT'S RIGHT TO REMOVE MACHINERY, i. 787-8.

Tenant with right to retain rents, whether may plead compensation against an assignee, ii. 132-3.

Assignment of lease or a sublease by tenant challengeable on 1621, though lease excludes assignees and subtenants, ii. 178-9.

Creditors taking lease on tenant's bankruptcy, ii. 342-4.

Where lease abandoned, *ib*.

Debtor holding lease, though excluding assignees and subtenants, bound to assign in *cessio*, ii. 484-5.

TO A COMPANY, effect as to endurance of partnership, ii. 523-4.

How far leases challengeable on deathbed, i. 88-9.

LEGACIES, special, vest by survivorship, without confirmation, i. 137-8.

LEGAL of adjudications, i. 743-4.

Declarator of expiry makes right absolute, *ib*.

Decree of expiry in absence, *ib*.

Mere expiry not sufficient to foreclose, *ib*.

Effect of possession for forty years with charter and sasine, i. 744-5.

In adjudication in security, i. 752-3.

LEGAL PROVISIONS of wife and children cannot compete with creditors, i. 678-9.

LEGAL OR ILLEGAL, obligations considered as, i. 317-8.

LEGITIM, i. 678, 680.

Vests without confirmation, i. 137-8.

See CHILD.

LESION and minority, restitution on, i. 129-30.

Proof of lesion and minority, i. 130.

Extent of restitution, i. 131.

Facility, circumvention, and lesion, i. 136-7.

See RESTITUTION.

Effect of lesion and fraud in vitiating obligations, i. 316-7.

LESSEE, or hirer of moveables, claim by, on bankruptcy of lessor, i. 481-2.

LESSOR, or letter to hire under contract of location, claim by, on lessee's bankruptcy, i. 482-3.

See LOCATION.

LETTERS of arrestment and execution, ii. 62-3, note.

Of supplement, ii. 63-4, note.

Of horning and caption, ii. 159-60.

Of inhibition, ii. 133, note.

LETTERS—

Settling of bargains by, i. 342-3.

Offer must be accepted, i. 343-4.

What delay allowed, *ib*.

Acceptance binds the bargain, *ib*.

Letters of guarantee, i. 387-8.

Of credit, *ib*.

Letters of administration, the executor's title, in England, ii. 76-7.

Letter of introduction or recommendation, i. 388-9.

See GUARANTEE.

LETTERS, private, of correspondence, whether a right of property in, to warrant publication, i. 111-2.

LEVARI FACIAS, writ of, i. 6-7, note.

LEX RHODIA DE JACTU, i. 547, 602.

See AVERAGE.

LIABILITY of executors for debts of deceased, ii. 79-80.

Liability to sequestration, ii. 284-5.

Of trustee for agents, ii. 322-3.

For negligence in following directions as to carriage of goods, i. 473-4.

For neglect, or diligence prestable, in contracts of hiring, i. 482-3.

Professional men and artists for skill, i. 488.

Owners of stage-coaches, i. 491.

Public carriers for goods, i. 492.

On *Nautæ Caupones*, etc., i. 494 et seq.

LIABILITY—*continued.*

Responsibility of magistrates, messengers, etc., for prisoner, ii. 436-7, 441.

See RESPONSIBILITY.

LIBEL of adjudications, alternative, i. 742-3.

Of articulate adjudication, i. 774-5.

Objections to the libel of adjudication, i. 779-80.

LIBERATION—

Whether personal protection operates as a liberation, ii. 208-9.

Effect of discharge to bankrupt, ii. 372-3.

Liberation of prisoner for debt by paying sum for which booked, ii. 437.

On bill of health, ii. 441.

On Act of Grace, ii. 445-6.

Effect of liberation on the Act, ii. 448-9.

Of prisoner in *meditatio fugæ* on bail, ii. 457-8.

By *cessio*, ii. 469.

LIBERTY—

Restraints on natural liberty by special contract, i. 321-2.

LICENCES to the subjects of belligerent states to trade with each other, i. 323-4.

Requisites to make them effectual, *ib.*

Restriction, i. 324-5.

See WAR.

LICENSED ship, i. 601-2.

LIEGE POUSTIE, i. 81-2.

See DEATHBED.

LIEN, or retention, doctrine of, ii. 87-8.

Two kinds of lien, special and general, *ib.*

Of lien in general, *ib.*

Possession necessary, *ib.*

Must be actual, *ib.*

Must be legitimate, ii. 88.

Must precede bankruptcy, *ib.*

And on express or implied agreement, ii. 88-9.

Effect of limited purpose, *ib.*

Lien expires with possession, *ib.*

Whether it revives with possession, ii. 90-1.

Effect of lien, *ib.*

Waiver and discharge of lien, ii. 91-2.

SPECIAL OR PARTICULAR LIENS, ii. 92-3.

On ship for repairs and outfit, *ib.*

Exception from lien by local usage, ii. 93-4.

Particular custom of the Thames, *ib.*

Whether lien for repairs without possession, *ib.*

No lien for furnishings to ship, *ib.*

Indirect lien attempted by personal engagement of ship-master, *ib.*

LIEN FOR CARRIAGE OF GOODS, ii. 94-5.

For freight where ship hired for a voyage or on time, *ib.*

What secured by it, *ib.*

Cases in which freight is due, *ib.*

No lien for dead freight or demurrage, ii. 95-6.

Things subject to lien, *ib.*

Lien for freight extends over every part of goods for the whole, *ib.*

Delivery divests of lien, ii. 96-7.

When is the possession terminated? *ib.*

Lien for wharfage dues, *ib.*

Lien for land carriage, ii. 97-8.

Shipmaster's lien, *ib.*

He has no lien on ship, *ib.*

Lien for seamen's wages, ii. 98-9.

For salvage, *ib.*

For average loss, *ib.*

Definition of average, *ib.*

Lien of innkeeper, *ib.*

Livery stabler, ii. 99-100.

For grass mail, *ib.*

To workmen, printer, *ib.*

LIEN—*continued.*

OF GENERAL LIENS, ii. 100-1.

Benefit and design of, *ib.*

English law, *ib.*

Principles of the doctrine of general lien, *ib.*

Balancing accounts on bankruptcy, ii. 101-2.

Foundations of general lien, either express or implied agreement, *ib.*

Express agreement, *ib.*

Implied agreement, *ib.*

Lien grounded on usage of trade or special custom, *ib.*, ii. 102-3.

Usage of trade in England, *ib.*

Calico printers, *ib.*

Dyers, *ib.*

Wharfingers, *ib.*

Packers, ii. 103-4.

In Scotland no general usage, *ib.*

Lien grounded on special agreement, or the course of dealing between the parties, ii. 104-5.

Bleacher, *ib.*

Attempts to raise general lien by advertisement, ii. 105-6.

Distinctions between optional and necessary employment of workmen claiming lien, *ib.*

Constructive lien at common law, ii. 106-7.

Law agent's lien, *ib.*

See WRITER.

Factor's lien, ii. 109-10.

Banker's lien, ii. 112.

Broker's lien, ii. 115-6.

Lien of trustees for advances, ii. 117-8.

Lien to cautioners, *ib.*

Extent of it, *ib.*

Distinction of English and Scottish law important, *ib.*

AVAILABLE AGAINST THE CROWN, ii. 53-4.

Of partners of a company, ii. 500-1.

Indirectly raising a lien challengeable on 1696, ii. 199.

Ranking of creditors holding lien on moveable fund, ii. 406-7.

Person holding lien no right of stopping *in transitu*, i. 244-5.

Vendor holding lien may exercise it, and also claim damages where vendee unable to fulfil contract, i. 250-1.

Distinction between lien and stoppage *in transitu*, *ib.*

Lien, or real securities, preferable on price of land sold under a sequestration, ii. 344-8.

What are real securities entitled to preference? *ib.*

Effect of inhibition, *ib.*

Whether creditor with lien bound to contribute to expense of sequestration, ii. 347-8.

Creditor must value and deduct security previous to ranking, ii. 306-7.

Factor's power to impledge his lien, i. 517-8

LIFE ANNUITIES, i. 353-4.

Claims on, *ib.*

LIFE, insurance on, i. 675-6.

Uses, *ib.*

Interest, *ib.*

By creditor of debtor's life, *ib.*

Assignment of the policy, i. 675.

Assignment by bankruptcy, i. 676-7.

Warranty under the contract, *ib.*

Risk, *ib.*

Adjustment of loss, *ib.*

How the value may accrue to creditors, i. 102-3.

LIFE INTERESTS—

How valued in question of solvency on 1621, c. 18, ii. 180.

Conveyance of heir of entail's life interest challengeable under the Act, ii. 178.

LIFERENT ANNUITIES—

Nature of, i. 352-3.

Distinctions where for a certain or uncertain duration, i. 353-4.

Rules for ranking, i. 354, 355.

See **TERCE—COURTESY—ANNUITIES.****LIFERENT and fee, i. 52-3.**Meaning of the term *liferent*, *ib.**Liferent* and fee subsisting together, mutual restraints on each other, *ib.**Liferent* a burden on fee, *ib.*Conventional *liferents*, *ib.*By reservation, *ib.*By grant to another, *ib.**Liferent* exclusively, *ib.*

Fiduciary fee, i. 53-4.

Liferent in marriage and family settlements, *ib.*Locality, *ib.*Conjunct fee and *liferent*, *ib.*

To husband and wife, i. 54-5.

Fee and *liferent* between parent and child, *ib.*Legal *liferents*, i. 55-6.*Terce*, *ib.**Courtesy*, i. 58-9.See **TERCE—COURTESY.**Extent and exercise of *liferenter's* right, i. 60-1.How to be attached, *ib.**Liferenters* entitled to every use which does not consume the subject, *ib.*No right to coals or minerals, *ib.*

Where they are let on lease, i. 61-2.

Where they are used only for the estate, *ib.*May cut down timber which spontaneously grows again, *ib.*Where wood laid out in allotments, may continue the cutting, *ib.*Estate of *fiar* available to his creditors only under burden of *liferent*, *ib.**Fiar* can claim no use which invades *liferenter's* possession, *ib.*Conveyance of *liferent* interest of heir of entail may be challenged under 1621, ii. 178-9.See **CONJUNCT RIGHTS.****VALUATION OF LAND** in ranking and sale subject to, ii. 251-2.**ASSIGNATION OF**, as a security, completion of, i. 792-3.**LIFERENTER**, power of, i. 60-1.See **LIFERENT.****LIMITATION**, Septennial, of cautionary obligations, i. 402-3.See **CAUTIONARY OBLIGATIONS.**

Of guarantees and letters of credit, i. 390-1.

As to person, i. 391.

As to time, i. 392.

Of responsibility under edict *Nautæ Caupones*, etc., i. 501-2.Effect of notice in newspapers, and placards in offices, *ib.**Onus probandi* on carrier to show that notice given, i. 503-4.

Must be a special agreement to limit, or evidence of notice, and assent to that notice, i. 504-5.

Evidence, *ib.*

Statutes limiting responsibility of shipowners, i. 608, 610.

Of seamen's claim for wages, i. 561-2.

LIMITATIONS by means of conditions in feudal grants, i. 25, 26.

By declaration of special uses, or by reservation of a faculty, i. 29.

By deed of entail, i. 43.

Liferent and fee, and conjunct rights, i. 52, 61.**LIMITED** right, i. 25-6.See **QUALIFIED.****LIMITED PARTNERSHIP**, ii. 517-8, 539.**LIQUIDATE DAMAGES**, i. 699-700.

Liquid debt, adjudication on, i. 775-6.

LIQUOR ACTS, i. 320-1.**LIS PENDENS**, ii. 143-4.See **LITIGIOSITY.****LITERARY PROPERTY** or copyright, i. 110-1.**PROPERTY IN UNPUBLISHED WORKS**, i. 111-2.Private letters, *ib.*Whether the receiver is entitled to publish them for gain, *ib.*Distinction between the law of Scotland and England on this point, *ib.*

Exceptions to the author's right of restraining publication, i. 112-3.

Where disclosure required for the purposes of public justice, *ib.*Right to publish by authority of party, *ib.*Effect of publication by acting or reciting, *ib.*The piece so recited or acted is still under the restraining power of the author, *ib.*

Gift, or sale of manuscripts, i. 113-4.

The author's right of printing and publishing still entire, *ib.*Translation of an unpublished book, *ib.* note.Book printed, or in printer's hands, *ib.*The printer has a lien, but no right of publication, *ib.*Distinction between English and Scottish practice as to the principle on which author's restraining power is given effect to, *ib.*

Bookseller's lien on the work for advances, ii. 100-1.

PROPERTY IN PUBLISHED WORKS, i. 114-5.Author's right at common law, *ib.*Author's right under the statute 8 Anne, c. 19, *ib.*

Under the 54 Geo. III. c. 156, i. 115-6.

Objects of this Act, *ib.*Copies of the work to be furnished to certain libraries, *ib.*Period of the author's exclusive right of printing and publishing, *ib.*

Penalties on parties infringing the privilege, i. 116-7.

Entry in Stationers Hall, *ib.*Limitation of penal actions, *ib.*Rules as to the identification of the work when invaded, *ib.*Quotations, *ib.*Abridgments, *ib.*Substance of a book in other words, *ib.*Almanacs, directories, roadbooks, etc., *ib.*

What is held as books under the Act, i. 118-9.

Part of a work, *ib.*Notes on a book, *ib.*Property in a title to a work, *ib.*Book published abroad, *ib.*Extent of author's right, or his assignees, under the Act, *ib.*Transfer of the copyright, *ib.*How attached by diligence, *ib.*

Title to pursue, i. 119-20.

PROPERTY IN ENGRAVINGS, busts, models, casts, etc., i. 119-20.Property in the inventors of patterns for printing linens, cottons, etc., *ib.*Property in musical compositions, *ib.***EFFECT** of the exclusive right of copyright, i. 119-20.Remedies for protection, *ib.*Interdicted, *ib.*

Action of damages, i. 120-1.

LITIGIOSITY as a ground of exclusive preference, ii. 143-4.Definition of it, *ib.*In real actions, *ib.*

Commencement of it, ii. 145.

Mora, *ib.*Expires on decree, *ib.*

LITIGIOSITY—*continued.*

- Litigiosity in diligence, *ib.*
- The principle of common law adopted and extended in second branch of 1621, c. 18, *ib.*
- When it begins, *ib.*
- Inhibition, *ib.*
- Adjudication, *ib.*
- Commencement, expiration, ii. 145-6.
- In ranking and sale, ii. 146-7.
- Misapplication of the doctrine in ranking and sale, *ib.*
- IN DILIGENCE BEGUN, under a challenge on second branch of Act 1621, c. 18, ii. 185-6.
- Extension of litigiosity, the principle of Act, *ib.*
- Title to challenge deed in prejudice of the diligence, *ib.*
- Diligence must be begun, *ib.*
- Must be such as would have attached subject alienated, *ib.*
- Adjudication, inhibition to affect land, ii. 186-7.
- What necessary to attach moveables alienated, *ib.*
- Arrestment and poiding, *ib.*
- Diligence must be regular, *ib.*
- Mora*, ii. 187-8.
- See ACT 1621.
- IN RANKING AND SALE, ii. 243.
- Effect of, on voluntary deeds, *ib.*
- On diligence, ii. 243-4.
- Decree of sale and adjudication for all creditors, as at first calling, ii. 243-4.
- IN MULTIPLEPOINDING, ii. 278-9.
- LIVERY STABLES, lien to keepers of, ii. 99-100.
- LOADING goods on board ship, claims in relation to, i. 595.
- Responsibility of owners and master as to, i. 596.
- Taking them on board, *ib.*
- Where ship distant from warehouse, *ib.*
- Stowage, *ib.*
- LOAN, contract of, effect of possession under, i. 274-5.
- Loan to shipmaster, i. 575-6.
- See BOTTOMRY.
- LOANS from Government on depositions of goods, ii. 19-20.
- LOCALITY, liferent to wife by, instead of legal provisions, i. 53-4, 681.
- LOCATIO CUSTODIÆ, responsibility as to, i. 487-8.
- LOCATION or hire, i. 274-5.
- EFFECTS OF POSSESSION UNDER, in question of reputed ownership, *ib.*
- Under the contract *locatio rei*, or *locatio conductio rei*, i. 274-5.
- Property unaltered, *ib.*
- LOCATIO OPERIS FACIENDI, i. 275-6.
- Difficulties by complication of this contract with that of sale, *ib.*
- Locator furnishes materials, conductor the labour, *ib.*
- Property of materials remains with locator, *ib.*
- Conductor furnishing materials as well as work, properly sale rather than location, *ib.*
- Distinctions, *ib.*
- LOCATIO OPERIS MERCIUM VEHANDARUM, property does not pass to carrier, i. 275-6.
- Cargo of fungibles given to shipmaster or carrier, with order to deliver to particular persons, i. 276-7.
- Money given to a carrier on his obligation to pay according to order, *ib.*
- Money in a sealed box or bag, *ib.*
- CONTRACTS OF, CLAIMS UNDER, i. 480-1.
- Distinction between location and sale, *ib.*
- Risk of loss remains with owner, i. 481-2.
- Hiring of moveables, *ib.*
- Claims by lessee on lessor's bankruptcy, *ib.*
- Where subject not delivered, lessor's creditors may compel lessee to take possession and pay hire, *ib.*
- He may demand possession or damages, *ib.*

LOCATION—*continued.*CONTRACTS OF, CLAIMS UNDER—*continued.*

- Where subject has perished accidentally, no claim for damages, but free from hire, i. 481-2.
- Refusal to deliver on ground of insolvency will entitle lessee to damages, *ib.*
- Where subject has been delivered, *ib.*
- Lessee entitled to abatement of hire proportioned to any partial destruction of subject, *ib.*
- Risk always with owner, *ib.*
- Lessee no claim for damages on destruction of subject, if accidental, i. 482-3.
- But he has such claim, if failure from refusal or insolvency, *ib.*
- On accidental destruction, lessee has claim for necessary expense laid out, *ib.*
- Claim by lessor on lessee's bankruptcy, *ib.*
- Lessor may claim hire for whole term agreed on, deducting value of the possession given up to him, *ib.*
- Of responsibility for neglect, or diligence prestable, *ib.*
- Lessee taking excessive use of subject hired, i. 483-4.
- Evidence of negligence, *ib.*
- Hiring of labour, or *locatio operis*, i. 484-5.
- Implied that materials to be furnished by employer, *ib.*
- Where more has been done than was stipulated, *ib.*
- Faulty or insufficient work, i. 485-6.
- Where it is united with employer's property, *ib.*
- Where work rendered useless, *ib.*
- Who suffer loss, where subject perishes, *ib.*
- Whether loss of subject, after workman bestowed part of his labour, extinguishes his claim, *ib.*
- Claims on employer's bankruptcy, i. 486-7.
- Where work completed claims as personal creditor, and secured by lien, if work not delivered, *ib.*
- Where work partly complete, *ib.*
- Work not commenced, *ib.*
- Claims on bankruptcy of workman, *ib.*
- His creditors may go on, or employer may claim damages, *ib.*
- Periculum*, i. 487-8.
- Diligence prestable, *ib.*
- Locatio custodiæ*, or safe custody, *ib.*
- Cattle in field, goods in warehouse, etc., *ib.*
- Skill of professional men and artists, i. 488-9.
- Responsibilities for want of skill, *ib.*
- Difficult operations, i. 489-90.
- Hiring of carriage by land, i. 490-1.
- Claim by carrier, *ib.*
- Claims by passengers and owners of goods, i. 491-2.
- Rashness, negligence, overloading, *ib.*
- Presumption against owners, i. 492-3.
- Responsibility for negligence in carriage of goods, *ib.*
- Principals liable for servants, i. 493-4.
- What sufficient to charge carrier with goods, *ib.*
- The delivery requisite, *ib.*
- See NAUTE CAUPONES, etc.
- LOCUS POENITENTIÆ, doctrine of, i. 344-5.
- Circumstances in which it is pleadable in obligations and contracts, i. 345-6.
- It may be barred by *rei interventus* and homologation, *ib.*
- LOG-BOOK of ship, effect of, in supporting claim for loss, i. 658-9.
- LOOSING of arrestment in security, ii. 66-7.
- Bond of caution, *ib.*
- Effect of losing, *ib.*
- Where goods unremoved, *ib.*
- Where the losing takes effect, ii. 67-8.
- Common debtor must be called in forthcoming against the cautioner, *ib.*
- Effect of losing as to the *pari passu* preference, ii. 69-70.

LOSS—

- Claims for, in contracts of sale, where goods have perished, i. 471-2.
- By seller, *ib.*
- Rules as to risk, till contract completed, i. 473-4.
- Liability for neglect in following directions as to carriage, *ib.*
- Claim by seller for loss on account of non-delivery, i. 477-8.
- IN CONTRACTS OF HIRING—
 - On whom, i. 481-2.
 - Responsibility for neglect, or diligence prestable, i. 482-3.
 - Effect of loss of subjects in contract of hiring in extinguishing workman's claim, i. 485-6.
 - Periculum* in hiring of labour, i. 487, 488-9.
- RISK OF, UNDER EDICT NAUTÆ CAUPONES, on whom, i. 498.
- Proof of loss, i. 500.
- Responsibility of shipowners and masters for, i. 605-6.
- On goods by unskilful navigation, how estimated, i. 608-9.
- Limitation of responsibility by statute, *ib.*
- BY COLLISION OF SHIPS, on whom it falls, i. 625-6.
- UNDER CONTRACT OF BOTTOMRY, i. 581-2.
- UNDER CONTRACT OF INSURANCE, i. 653-4.
- Claim for total loss must be accompanied with abandonment, *ib.*
- Description of loss entitling to abandon, i. 654-5.
- Partial loss, i. 657-8.
- Proof of loss, i. 658.
- Valuation and adjustment of losses, i. 659-60.
- Claim on bankruptcy of insured for repayment of losses settled in ignorance, i. 648-9.
- Of settling and adjusting loss in a fire-insurance contract, i. 673-4.
- In life insurance, i. 676-7.
- See INSURANCE—AVERAGE.
- AT SEA, CONTRIBUTION FOR, by general average, i. 629-30.
- See AVERAGE.
- LUGGAGE of passengers in ships or coaches, lien on, ii. 95, 97.
- Proof of value of, in a claim under the edict *Nautæ*, etc., i. 500-1.
- LUNATIC may be made bankrupt, ii. 156, 163-4.
- Restitution against deeds by, i. 131-2.
- Protected from imprisonment, ii. 459-60.
- See RESTITUTION.
- LUCID INTERVALS, deeds by insane persons during, i. 133-4.

MACHINERY brought to premises of buyer, but not yet erected, how far delivery complete, i. 193-4.

AND FIXTURES, whether heritable or moveable, i. 786-7.

See HERITABLE and MOVEABLE, ii. 2-3—ACCESSION.

MAGISTRATE—

- Liability for not assisting in apprehension of debtor, ii. 435-6.
- Recording prisoner in jail books, ii. 436-7.
- Duty in keeping prisoner, ii. 437-8.
- Responsibility for prisoners, *ib.*
- Sufficiency of prison, and vigilance of jailors, *ib.*
- Onus probandi* on magistrate, *ib.*
- Not liable for escape where prison opened by superior force, ii. 438-9.
- Search after escape, *ib.*
- Squalor carceris*, ii. 439-40.
- Obligation on magistrates as to close confinement of prisoners, *ib.*
- Duty and responsibility in liberating on bill of health, ii. 441-2.
- Open jails, responsibility for allowing prisoners privilege of, ii. 443.

MAGISTRATE—*continued.*

- Jail fees, ii. 444-5.
- Duty and responsibility in liberating on Act of Grace, ii. 445-6.
- Duty in judging as to *meditatio fugæ* warrants, ii. 450-1.
- Of the evidence to be required or admitted, ii. 452-3.
- Cannot delegate his office, ii. 453-4.
- Damages for granting irregular warrant, ii. 457-8.
- Bailie of Abbey, ii. 463.
- See MEDITATIO FUGÆ.
- MAIL-COACH proprietors liable on edict *Nautæ*, etc., i. 496.
- Responsibility for negligence of drivers, i. 491.
- See NAUTÆ CAUPONES, etc.
- GRASS MAIL—
 - Lien for, ii. 99.
 - Hypothec for, ii. 28.
- MAINTENANCE of prisoners for debt, ii. 443-4.
- Maintain themselves, if able, *ib.*
- Criminals maintained by public, *ib.*
- Jail fees for fire, candle, bedding, etc., fall on prisoner, ii. 444-5.
- Cannot be retained from aliment, *ib.*
- Act of Grace, ii. 445-6.
- Who entitled to benefit, *ib.*
- Rate of aliment, ii. 446-7.
- See ACT OF GRACE.
- MAJORITY of creditors. See SEQUESTRATION.
- MALE APPRETIATA, ii. 81-2.
- See CONFIRMATION.
- MANAGEMENT—
 - Intermediate, of bankrupt estate previous to election of trustee, ii. 299-300.
 - Management, sale, and recovery of estate and effects under the trustee, ii. 342-4, 330.
 - Review of resolutions by creditors objecting within thirty days, *ib.*
 - Where the bankrupt objects, ii. 331-2.
 - Where creditors forced to a course of management, ii. 344.
 - Fulfilling of prospective contracts of bankrupt, *ib.*
 - Whether creditors bound to advance money, *ib.*
 - Compounding and submitting claims, ii. 321-2.
 - Claim abandoned by creditors may be pursued by individual creditor or by bankrupt, *ib.*, ii. 356-8.
 - Disposal of heritable estate, ii. 344-6.
 - Voluntary public sale, *ib.*
 - Private sale, *ib.*
 - Title of purchaser, *ib.*
 - Disposal of moveable estate, ii. 344.
 - Outstanding debts, *ib.*
 - Money, *ib.*
- MANDATE, or commission, mercantile, i. 505-6.
- Constitution of, i. 508-9.
- Implied mandate and *actio institoria*, *ib.*
- Where goods consigned at a distance, *ib.*
- To accredited servants, i. 509-10.
- To clerks, etc., acting under procurator, *ib.*
- Præpositura*, *ib.*
- Institorial power, i. 510-1.
- Clerk or shopman, *ib.*
- Wife, bank agents, *ib.*
- Traveller or rider, i. 515-6.
- Commission or hire, *ib.*
- Diligence prestable, *ib.*
- Authority and power of factor, i. 516-7.
- Determination, i. 522-3.
- General mandates or *præpositura*, expiration of, *ib.*
- Effect of revocation against ordinary mercantile factor, i. 525-6.
- Limited mandate expires on performance, i. 526-7.
- See COMMISSIONS.

MANDATE—*continued*.

OR FACTORY—

- Contract of, effect of possession under, i. 278-9.
- In Roman law, mandate a gratuitous contract, *ib*.
- Where goods of principal in hands of factor are distinguishable from factor's property, *ib*.
- Where factor purchases goods for principal, and with his money, and fails, i. 279-80.
- Where factor has purchased in his own name, but goods identified as the principal's, *ib*.
- Where factor fails with remittances in his hands, *ib*.
- Requisites to entitle principal to recover, i. 280-1.
- The remittance must be made as to a factor, *ib*.
- The remittance must be specific, i. 281-2.
- Where there is only one transaction between the parties, *ib*.
- Where there is a running account between them, *ib*.
- Whether a remittance to be held as on general account or specially appropriated, *ib*.
- The money or bills must be capable of identification from factor's property, i. 283-4.
- Money or bills in repositories of bank agent, *ib*.
- Where factor has sold goods, and failed before price paid, principal is creditor, i. 284-5.
- Where bills for price still in factor's hands, *ib*.
- Where price paid in money has been kept distinct, *ib*.
- Where factor has discounted the bills, or paid away the money, i. 284-5.
- Where factor with *del credere* commission sinks the principal's name, *ib*.
- Notice by principal to buyer on factor's failure, *ib*.
- Compensation to those transacting with factor in his own name, *ib*.
- Where factor, entrusted with money to buy stock, etc., misapplies it, i. 285-6.

See PROCURATION.

FROM DEBTOR TO APPLY FOR SEQUESTRATION, ii. 285-6.

- Death of debtor after granting it, ii. 286.
- To agent or attorney to vote, ii. 285, 304.
- To concur in bankrupt's discharge, must be special, ii. 352, 355.

By bankrupts to sequestration of a company, ii. 562-3.

MANSE and church, repairs of, i. 739-40.

MANSION-HOUSE of entailed estate cannot be pulled down to sell materials, i. 51-2.

Whether a widow has a terce of the mansion-house, i. 56-7.

MANUFACTURER—

- Goods in hand of, not delivered, unless employed by vendee, i. 193-4.
- Sale of goods already in hands of manufacturers, i. 196-7.

MARINERS, i. 557.

See SEAMEN.

MARITI, JUS, i. 59, 673, 683.

See MARRIAGE.

MARITIME INTEREST, i. 579.

See BOTTOMRY.

LAWS, i. 545-6.

- Authorities in maritime law in Scotland, *ib*.
- Balfour, Stair, Bankton, Erskine, *ib*.
- Continental treatises, *ib*.
- Rhodian laws, i. 547-8.
- Il Consolato del Mare, *ib*.
- Laws of Oleron and Wisbuy, i. 548-9.
- Ordonnances of the Hanseatic Towns, *ib*.
- Le Guidon de la Mer, *ib*.
- Ordonnance de la Marine, *ib*.
- Code de Commerce, i. 549-50.
- Decisions of foreign courts, *ib*.
- Of English courts, *ib*.
- Lord Stowell, *ib*.
- Foreign authors, i. 550-1.
- English, *ib*.

VOL. II.

MARITIME INTEREST—*continued*.

CONTRACTS relative to equipment of vessel, i. 551.

Shipshusband, i. 552.

Shipmaster, i. 554.

Hiring of seamen, i. 557-8.

Contracts for repairs and furnishings, i. 567-8.

Bottomry and *respondentia*, i. 577-8.

Charter-party of affreightment, i. 586.

Contract of insurance, i. 643.

See SHIP—CHARTER-PARTY—INSURANCE.

HYPOTHECS, i. 573-4, ii. 38.

MARKET, sale at, i. 299, 306.

OR KIRK, going to, by the granter of a deed, bars a challenge on deathbed, i. 84-5.

See DEATHBED.

MARKING goods, effect of, as to transference, i. 192-3, 216-7.

MARRIAGE CONTRACTS and bonds of provision—

Claims by wives and children under, i. 676-7.

Legal rights of wife and children, i. 678-9.

Legal provisions, *ib*.Cannot claim for, in competition with creditors, *ib*.

Claims by wife and children where no special contract, i. 679.

Dissolution of marriage within year and day, *ib*.

After a year, or birth of a living child, i. 679-80.

Wife's interest, *ib*.Husband insolvent, *ib*.Where she has a land estate, *ib*.Death of husband, or divorce for adultery, *ib*.Where he is solvent or insolvent, *ib*.Divorce of wife, *ib*.

Children cannot claim as creditors for legitim, i. 680-1.

They may claim as mother's heirs where she died during husband's solvency, *ib*.Distinction between claim for aliment to legitimate and natural children, *ib*.Aliment to natural child a proper debt, *ib*.Conventional provisions, *ib*.

Provisions to wife, i. 681-2.

By antenuptial contract, *ib*.Will entitle to compete with creditors where a *jus crediti*, *ib*.Where secured by infetment, *ib*.Locality and jointure, *ib*.

Investment of money and land to husband and wife in conjunct fee and liferent, i. 682-3.

Where husband's title not complete, marriage articles will entitle wife to rank, *ib*.Although wife not preferable, she may rank for her eventual liferent, *ib*.Wife with bond of provision may rank as a contingent creditor, *ib*.Where husband insolvent at time of contract, *ib*.

Whether competent to make provisions in the event of husband's insolvency, i. 683-4.

Securing against insolvency by appropriation of special estates or funds to wife, exclusive of *jus mariti*, *ib*.Settlement by wife's father, exclusive of *jus mariti*, *ib*.By antenuptial contract, *jus mariti* may be excluded as to wife's particular estate, *ib*.Whether by postnuptial deed, *ib*.

Provision to wife before marriage so as to entitle her to rank for aliment on husband's insolvency, i. 684-5.

Whether an obligation may be constituted by antenuptial contract to pay annually premium of life insurance for securing provision to wife and children, *ib*.Provision to children by antenuptial contract, *ib*.

How to enable them to compete with creditors, i. 685-6.

Provisions under postnuptial contract, i. 686-7.

Provision to wife, husband solvent at granting, i. 687-8.

After contracting debt, *ib*.Postnuptial, in implement of antenuptial contract, *ib*.

MARRIAGE CONTRACTS—*continued.*

- Claims for, under contracts or decrees of separation, i. 688-9.
- See PROVISIONS.
- LIFERENT PROVISIONS in marriage contracts, i. 53-4.
 - Locality to wife, *ib.*
 - Conjunct fee and liferent, *ib.*
 - Between husband and wife, *ib.*
 - Between parent and child, *ib.*
- PROVISIONS IN, HOW AFFECTED BY 1621, c. 18, ii. 176-7.
 - Antenuptial, *ib.*
 - Postnuptial provisions, ii. 177-8.
 - Contracts imposing restraints on marriage, i. 320.
 - Marriage brokerage contracts, i. 321.
 - Marriage as a legal assignation requires no intimation, ii. 17-8.
 - Liability of wife to personal diligence, ii. 156.
- MASTER and servant, no compensation between them, ii. 131-2.
 - See SERVANTS.
- OF SHIP, i. 554-5.
 - See SHIPMASTER.
- MATE and seamen, hiring of, i. 557-8.
 - See SEAMEN.
- MATERIALS laid down for building—
 - How transferred, i. 193-4.
 - Whether heritable or moveable, ii. 2.
 - See SPECIFICATION.
- MEASUREMENT, effect of, as a part of the description of lands in a sale, ii. 263-4.
- MEASURES between insolvent debtors and their creditors to secure a fair distribution, ii. 488, 491.
 - See ARRANGEMENTS—SEQUESTRATION.
- MEASURING out of grain, etc., by seller, not held in Scotland to be effectual delivery, i. 192-3.
 - Where goods in hands of third party, i. 194-5.
- MEDICAL attendance, expense of, a privileged debt, ii. 147-8.
- MEDITATIO FUGÆ warrants, ii. 448-9.
 - History of *meditatio fugæ* warrants, ii. 449.
 - Border warrants, *ib.*
 - Privilege of Admiralty, *ib.*
 - First use of *meditatio fugæ* warrants, *ib.*
 - Who may issue the warrant, ii. 450-1.
 - Summary and without notice, *ib.*
 - Debt may be illiquid, *ib.*
 - Judge bound to inquire into circumstances, ii. 451-2.
 - Duty of the judge, *ib.*
 - Oath of creditor, *ib.*
 - Must state the grounds of suspected flight, *ib.*
 - Must be ratified by a mandatory where taken in another country, *ib.*
 - Must not be a mere oath of credulity, *ib.*
 - Proofs and proceedings after apprehension of the debtor, *ib.*
 - Duty of magistrates, *ib.*
 - Evidence to be required or admitted, ii. 452-3.
 - Collateral evidence, *ib.*
 - Judge must examine the debtor himself, ii. 453-4.
 - Going to another part of Scotland, *ib.*
 - Retiring to sanctuary, *ib.*
 - Removal not fraudulent, *ib.*
 - Soldiers and sailors, ii. 454-5.
 - Foreigners, *ib.*
 - How examination to be taken, ii. 455-6.
 - Effect of the warrant, ii. 456.
 - May be executed on Sunday, *ib.*
 - Effect of personal protection, *ib.*
 - Sanctuary no protection, but debtor not to be brought out, *ib.*
 - Imprisonment different from imprisonment for debt, *ib.*
 - Bail, ii. 457-8.

MEDITATIO FUGÆ—*continued.*

- Damages for abuse, ii. 457-8.
- For refusal to grant warrant, *ib.*
- MEETINGS of creditors under a sequestration, and mode of proceedings, ii. 330-2.
 - See SEQUESTRATION.
- MELIORATIONS and IMPROVEMENTS under a lease, who liable for, i. 70-1.
 - Under entail, *ib.*
 - Where no entail, *ib.*
 - Claim for, by tenant's creditors on bankruptcy, i. 78-9.
- MEMBER of PARLIAMENT may be rendered bankrupt, ii. 156-7.
 - By charge of horning, followed by poinding, adjudication, or arrestment unloosed for fourteen days, ii. 164.
 - Protected from imprisonment, ii. 458.
- MEMORIAL and ABSTRACT in ranking and sale, ii. 252.
 - See SALE and RANKING.
- MERCANTILE obligations and contracts excepted from the solemnities of deeds required by law, i. 341-2.
 - Writings comprehended under this privilege, i. 342-3.
 - May be proved by parole evidence unless a written contract agreed on, *ib.*
 - Bargains settled by correspondence, i. 342.
 - Offers must be accepted, i. 343-4.
 - What delay allowed, *ib.*
 - Acceptance binds the bargains, *ib.*
 - Order for goods, i. 344-5.
 - Execution of it, the acceptance, *ib.*
 - Obligation of minor *in re mercatoria* binding without consent of curators, *ib.*
 - Of creditors by verbal agreement or open account, i. 347-8.
 - Proofs of the debt *prima facie*, books, etc., *ib.*
 - Further evidence to prove delivery, clerks, porters, letters, etc., *ib.*
 - Prescription of merchant's accounts, i. 348-9.
 - Close of an account, *ib.*
 - How claim established after prescription, i. 349-50.
 - Proof by writing or oath of party, *ib.*
 - See OFFER—PRESCRIPTION.
- CLAIMS on mercantile obligations and contracts, on bills of exchange, i. 402.
 - Contract of sale, i. 457.
 - Contracts of hiring, i. 480-1.
 - Contracts of mercantile agency, i. 505.
 - Claims in bankruptcy under, i. 526.
 - See OBLIGATIONS—CONTRACTS—DELIVERY.
- SEQUESTRATION, ii. 281.
 - See SEQUESTRATION.
- MERCHANT'S ACCOUNTS—
 - Proof of, i. 347-8.
 - Prescription of, i. 348-9.
 - How claim established after prescription, i. 349.
- MESSENGERS—
 - Duty of, as to apprehension of debtor, to constitute bankruptcy, ii. 160-1.
 - Discretionary powers, ii. 161-2.
 - Liability of the messenger and his cautioners for delay in execution of caption, ii. 435-6.
 - Duty to return search where debtor not found, ii. 436-7.
 - Solemnities of apprehension, *ib.*
 - Not bound instantly to imprison, but liable if debtor escapes during indulgence, *ib.*
 - Debtor may force him to carry him to next sufficient prison, *ib.*
 - Caption to be produced to clerk of prison or jailor, *ib.*
- CAUTIONERS FOR, i. 381-2.
 - How claim against them constituted, i. 382-3.
 - Responsibility of messengers for skill, i. 489-90.
- MID-IMPEDIMENT to confirmation of sasine, i. 723-4.

MILITARY OFFICERS—

How far their pay attachable, i. 121, 122.
Going to their regiments, not liable to *meditatio fugæ* warrants, ii. 454-5.

Must in *cessio* convey part of half-pay, ii. 483-4.

MILL, machinery of, whether covered by heritable securities, i. 786-7.

See **ACCESSION**.

MINES and MINERALS—

Whether heir of entail may work, i. 51-2.

Whether his creditors may, *ib.*

Liferenter has no right to them without special grant, i. 60-1.

Completion of a right to, i. 792-3.

MINISTER'S stipend, how far liable to attachment, i. 123-4.

Or to be assigned in *cessio*, ii. 483-4.

WIDOWS' FUND, annuities from, not attachable or assignable, i. 125-6.

Yearly rates preferable debt, ii. 150-1.

MINOR—

Restitution against the deeds of, i. 127-8.

Deeds in minority, i. 129-30.

Minor without curators, *ib.*

Minor with curators, *ib.*

Curators concurring, *ib.*

Restitution on lesion against deeds in minority, *ib.*

Reduction, i. 130-1.

Proof of minority and lesion, *ib.*

Extent of restitution, i. 131-2.

See **RESTITUTION**.

Ratification by minor of exceptionable deeds, effect of, in barring restitution, i. 138-9.

His obligations in *re mercatoria* not challengeable on minority and lesion, i. 344-5.

Objection to special charge that tutors and curators not charged, i. 778-9.

How far minor protected from imprisonment, ii. 458-9.

Whether may be partner of company, ii. 513-4.

Judicial cognition and sale by, ii. 239-40.

MINORITY of person interested to challenge decree of sale, effect of, ii. 259.

AND **LESION**, restitution on, i. 129-30.

See **RESTITUTION**.

MINUTE-BOOK—

Intimation of adjudication in, i. 759-60.

Dispensation with, i. 762-3.

Of Register of Sasines, entry of sasines in, i. 717-8.

Minute-book to be kept by common agent in ranking and sale, ii. 249-50.

Minute-book of creditors in a sequestration, ii. 318.

MISREPRESENTATION—

Effect of, on transference, i. 262-3.

Concealment and misrepresentation in insurance, i. 665-6.

Misrepresentation of day of sailing, *ib.*

That part of risk already insured, *ib.*

Concealment of state of ship, i. 667.

That it is a running ship, *ib.*

Of destination, of fate, actual or suspected, i. 667-8.

Of information after order to insure, *ib.*

See **FRAUD—INSURANCE**.

MISSIVE LETTER, i. 342-3.

See **BARGAINS**.

MITIGATION of penalties, i. 700-1.

MONEY of bankrupt estate to be lodged in bank, ii. 318-9.

Provision for, in trust-deed, ii. 396-7.

See **TRUSTEE—SEQUESTRATION**.

IN **HANDS** OF **BANK AGENT** at his bankruptcy, i. 283.

Deposit of, i. 277.

Cannot be retained on plea of compensation, ii. 122.

Sent by carrier, i. 276.

MONOPOLIES—

Laws against, i. 103, 104.

Period of monopoly in a patent, i. 109.

MONTES PIETATIS for pledging goods on the Continent, ii. 19.

MORA—

Effect of, in challenging on 1621, ii. 181-2.

In diligence under second branch of 1621, ii. 187-8.

Effect of, as to litigiousity, ii. 143.

In acceptance of offer, i. 343-4.

In intimating rejection of order, i. 344-5.

In intimating shipment of goods, i. 475-6.

In not intimating non-arrival of goods, *ib.*

In landlord's sequestration, ii. 33-4.

See **BILLS**.

MORTGAGE of ships, how completed, i. 158-9.

Mortgage in security, *ib.*

Assignment to a trustee for payment of debt, i. 159-60.

Mortgagee in security not liable for repairs, i. 570-1.

Vendition in security, ii. 10.

Should be aided by insurance, ii. 11.

See **SHIP**.

MOURNINGS included under funeral expenses, ii. 147-8.

How far privileged debt, *ib.*

Widow's claim for, i. 679, 680.

MOVEABLE estate, **DILIGENCE AGAINST**, in Scotland and England, i. 6-7.

Ordinary diligence during debtor's life, ii. 55-6.

Poining the ground, *ib.*

Personal poining, ii. 57-8.

Arrestment and forthcoming, ii. 62.

Commentary on laws equalizing diligence during debtor's life, ii. 72-3.

Proceedings to take benefit of statutes, ii. 74-5.

Effect of sequestration in equalizing, ii. 75-6.

Effect of *pari passu* preference where an arrestment has been loosed, ii. 76-7.

Bonus of ten per cent. abolished, *ib.*

Diligence after debtor's death, and laws establishing equality among the creditors, *ib.*

Vesting moveable estate after death, *ib.*

In Scotland, *ib.*

In England, *ib.*

Confirmation as executor, ii. 77-8.

Proceedings by creditors of deceased against creditors confirmed, or where no confirmation, ii. 79.

How personal estate liable after death in England, *ib.* note.

In Scotland, ii. 79-80.

Diligence commenced before debtor's death, *ib.*

Executor confirmed, ii. 80.

Diligence to be used by creditors, *ib.*

No executor confirmed, ii. 81.

Confirmation as executor-creditor, *ib.*

Debt requiring constitution, ii. 81-2.

Equalizing of diligence after death, ii. 82-3.

Commentary on the Act of Sederunt 28th February 1662, *ib.*

Pari passu preference within six months, *ib.*

Privileged debts, ii. 83-4.

Competition with arrestments during debtor's life, *ib.*

If debtor made bankrupt, *ib.*

If not bankrupt, ii. 84-5.

Where no diligence during debtor's life, *ib.*

Diligence by creditors of executor, and of the preference to creditors of deceased, ii. 85-6.

Proceedings by creditors of executor, *ib.*

Competition with creditors of deceased, *ib.*

REAL SECURITIES over moveable estate, ii. 10-1.

Voluntary, *ib.*

Corporeal moveables cannot be transferred without delivery, *ib.*

MOVEABLE—*continued.*REAL SECURITIES—*continued.*

- Mortgage of ships, ii. 10-1.
- Consignment of goods, ii. 11-2.
- Transference of debts, ii. 15.
- Pledge, ii. 19.
- Hypothecs, ii. 24-5.
- Judicial securities, writ of extent, ii. 40.
- Securities from possession, ii. 87-8.
- Lien or retention, *ib.*
- Contracts of hiring, or location of moveables, i. 454-5.
- See DILIGENCE.

- REPUTED OWNERSHIP in moveables, as raising a responsibility for the debts of the possessor, i. 268-9.
- See REPUTED OWNERSHIP.

QUALIFIED RIGHT in moveables, i. 304-5.

- Possession the badge of property in moveables, *ib.*
- How right to, affected by defect in seller's title, *ib.*
- Moveables purchased *bona fide*, i. 306-7.
- Pledgee selling goods, effect as to purchaser, *ib.*
- Sale at market, *ib.*
- Creditors of person holding moveables in trust, liable to restitution to true owner, *ib.*
- Stolen goods, *ib.*

MOVEABLE AND HERITABLE, distinction between, ii. 1.

See HERITABLE and MOVEABLE.

SECURITY OVER moveable estate for future debts, not challengeable on 1696, ii. 225-6.

RANKING OF CREDITORS holding securities over moveable fund, ii. 406.

- On goods in general, *ib.*
- On debts in general, *ib.*
- On ship, *ib.*
- On freight, *ib.*
- On cargo, ii. 406-7.
- On subjects of an action, *ib.*
- On corn stalks, *ib.*
- On rents, *ib.*
- On profits, *ib.*

PROCESSES FOR DISTRIBUTING the moveable or personal estate where debtor not a trader, i. 315-6.

- How equality obtained, *ib.*
- Multiplepointing, i. 316-7.
- Forthcoming, i. 320-1.
- Process against poinder for distribution of pointed goods, *ib.*

RIGHT OF HEIR TO CLAIM a share of the moveable succession with or without collation, i. 95-6.

- Rights of succession in moveables, i. 136-7.
- Executry vests *ipso jure*, *ib.*
- Vesting of special assignments and legacies, i. 137-8.
- Legitim, *ib.*
- Jus relictæ*, *ib.*
- Of property in moveables corporeal, i. 145-6.

VESTING OF MOVEABLE PROPERTY in trustee under sequestration, ii. 334.

- Where abroad, ii. 341.
- Disposal of, ii. 344-5.
- No restraint on creditors, *ib.*
- Outstanding debts, etc., *ib.*

MULTIPLEPOINTING, action of, ii. 276-7.

- Parties to be called, ii. 277-8.
- Effect of decree to person who pays, *ib.*
- Effect to receivers, *ib.*
- Any creditor may appear, *ib.*
- Pursuer's interest in the proceedings, ii. 278-9.
- Parties stopped in diligence against holder of the fund, *ib.*
- The fund litigious, *ib.*
- Whether diligence to attach fund may proceed, *ib.*
- Parties may apply for common agent, ii. 279-80.
- Factor, *ib.*

MULTIPLEPOINTING—*continued.*

- Common agent, ii. 279-80.
- Determination of the process, ii. 280-1.

MUSICAL COMPOSITIONS, property in, i. 119-20.

MUTUAL accommodations or cross bills, i. 574-5.

- Doctrine and rules as to, *ib.*
- Good considerations for each other, *ib.*
- Effects of several ways of disposing of cross paper, i. 576, 577.

CONTRACTS, i. 454-5.

See CONTRACTS.

ENTAILS, i. 46-7.

MUTUUM, contract of, i. 274-5.

NARRATIVE of deed challenged under 1621, effect of, ii. 178-9.

- Whether granter entitled to his oath in support of it, *ib.*
- Of deed challenged as without onerous consideration, ii. 184-5.

NATIVES of Scotland domiciled abroad may be made bankrupt, ii. 158-9.

- But cannot be sequestrated, *ib.*
- Arrestment *ad fundandam jurisdictionem* necessary to warrant a horning against them, *ib.*

NATURAL CHILD. See BASTARD—ALIMENT.

NAUTÆ CAUPONES, etc., edict, i. 494-5.

- Principle of it, *ib.*
- Responsibility on, i. 495-6.
- Persons liable, *ib.*
- Carriers, i. 496-7.
- All land-carriers comprehended, *ib.*
- Carriers by water, *ib.*
- Mail-coaches and stage-coaches, *ib.*
- Hackney-coachmen an exception to rule, i. 497-8.
- General Post Office not on footing of edict, *ib.*
- But responsibility for negligence still subsists, *ib.*
- Innkeepers and stablers, i. 498-9.
- Extent of responsibility of carriers, innkeepers, etc., *ib.*
- Robbery, theft, no defence against responsibility, *ib.*
- Fire, *ib.*
- Proof of loss, i. 500-1.
- How far responsibility may be limited, i. 501-2.
- Notices in newspapers, and placards in offices, *ib.*
- Obligation on innkeepers, stage-coachmen, and public carriers, *ib.*
- Where there is a special contract, *ib.*
- Bad consequences of law as to limitation of responsibility by notices and advertisements, i. 502-3.
- Onus probandi* on public carrier, to show that limitation was insisted on, or consideration for extraordinary risk refused, i. 503-4.
- Must show special agreement, *ib.*
- Evidence of specific bargain, i. 504-5.
- Responsibility of shipowners and masters, i. 605.
- Act of God, i. 499.
- Perils of sea, i. 606.
- Detention by foreign powers, i. 607.
- Risk of boats, i. 608-9.
- Departure from proper course, *ib.*
- Where usual and necessary to call at intermediate ports, *ib.*
- Where contract excludes deviation, *ib.*
- Loss by failure to perform, how estimated, *ib.*
- Limitation of responsibility by statute, *ib.*
- Owners not responsible for loss by fire, i. 609-10.
- Nor beyond value of ship, *ib.*
- Nor for loss of gold, silver, diamonds, jewels, etc., unless nature, quality, and value entered in bill of lading, *ib.*
- Whether for pilots, i. 610-1.
- Commentary on the Limitation Acts, *ib.*
- Whether shipmaster liable for loss by fire, *ib.*

NAUTÆ CAUPONES—*continued*.

Goods destroyed by spilling of corrosive liquors, i. 610-1.
Remedy entire against master and mariners for embezzlement, i. 611-2.

Where bill of lading bears contents unknown, it does not preclude proof of embezzlement, but *onus probandi* on merchant, *ib*.

Difficulty in questions of embezzlement where commodity in quantity, *ib*.

NAVIGATION ACTS, history and policy of, i. 146-7.

See SHIPS.

NAVY BILLS, i. 100-1.

NECESSARY deeds excepted from second branch of Act 1621, ii. 187-8.

NEGATIVE prescription of bonds, i. 352-3.

How interrupted, *ib*.

NEGLIGENCE—

Effect in discharging cautioner, i. 377-8.

Under contract of sale, in following directions as to carriage, i. 473.

Diligence prestable in hiring, i. 482.

In hiring of labour, i. 485.

Skill of workmen, i. 487.

Locatio custodiæ, *ib*.

Skill of professional men and artists, i. 488-9.

Claims for, by passengers in stage-coaches, i. 491.

Against carrier for negligence, i. 492.

By principal against factor for neglect to insure, etc., i. 544-5.

Claim against shipowners for master's neglect, i. 557-8.

Of wharfingers in unloading ship, i. 605-6.

Collision of ships by, i. 625-6.

NEGOTIATION of bills, requisites of, i. 432-3.

Presentment for acceptance, *ib*.

For payment, i. 433-4.

Days of grace, usance, i. 434.

Time of presenting, *ib*.

Hour, i. 435.

Place, i. 436.

Absence of drawee or acceptor, i. 437.

Protest, *ib*.

Requisites, *ib*.

Can protest be dispensed with? i. 438.

For non-acceptance, *ib*.

For non-payment, *ib*.

Notice of dishonour, *ib*.

Form of notice, *ib*.

Proof of notice, i. 441.

Time for notice, *ib*.

In foreign bills, *ib*.

In notes and inland bills, i. 442.

By whom to be given, i. 443.

To whom to be given, i. 444.

Equivalents of protest and notice, i. 444-5.

Bankruptcy or insolvency of acceptor not equivalent, *ib*.

Of drawer no excuse for not intimating to him, *ib*.

Waiving or discharge of rules of negotiation, i. 445-6.

Partial payment or promise to pay, *ib*.

Payment in ignorance of undue negotiation, *ib*.

Notice by one paying on protest for honour, i. 447-8.

Exception to rule where no effects in drawee's hands, *ib*.

Bill in security no exception, i. 448-9.

Negotiation of accommodation bills, rules of, i. 450-1.

Where no effects in drawee's hands, drawer cannot plead want of notice, *ib*.

Where drawer had good grounds for drawing, entitled to notice, i. 451-2.

Where for accommodation of drawer notice not necessary, i. 452-3.

Each one bound, except him accommodated, entitled to notice, i. 453-4.

NEGOTIATION—*continued*.

Effect of giving indulgence to drawer where bill for his accommodation, i. 454-5.

See DEDUCTION.

NEGOTIORUM GESTIO, contract of, i. 287-8.

Property coming into hands of a *negotiorum gestor* is held to be vested in principal, *ib*.

NEUTRALS—

Rights of neutrals trading with the subjects of two belligerent states, i. 323-4.

How they are restricted, i. 324-5.

See WAR.

NEW creditors claiming under supplementary sequestration, ii. 334-5.

New trustee, transmission of property to, ii. 317-8.

New acquisitions, how attached by trustee, ii. 334-5.

See SUPPLEMENTARY SEQUESTRATION.

NOMINE DAMNI, claims for interest, i. 691-2.

NON-ACCEDING creditor challenging trust-deed, ii. 382, 386-7.

NON-ACCEPTANCE of bill, protest for, i. 438-9.

For non-payment, *ib*.

NON COMPOS MENTIS, persons protected from imprisonment, ii. 459-60.

See IDIOT.

NON-ENTRY, casualty of, i. 22-3.

Non-entry duties, *ib*.

Declarator of non-entry, *ib*.

Who must be called, *ib*.

Note—conclusions of the summons, *ib*.

Decree, *ib*.

Duties, how made effectual, i. 723-4.

See SUPERIOR.

NOTARIAL intimation, ii. 16-7.

SUBSCRIPTION of deeds, i. 340-1.

Clergyman may act as notary in testamentary deeds, i. 341-2.

NOTARY, in intimating an assignation, cannot act both as procurator and notary, ii. 16-7.

In giving sasine, i. 716.

Cautioners for, i. 383.

Responsibility of, for skill, i. 489-90.

NOTE—

Delivery note, i. 194.

See DELIVERY.

Bought and sold note, i. 458-9.

NOTES, promissory, i. 412-3.

See BILLS.

ON LITERARY WORK, property in, i. 118-9.

NOTICE of dishonour of bills, i. 438-9.

Form of notice, *ib*.

Proof of notice, i. 441-2.

Time, *ib*.

In foreign bills, *ib*.

In notes and inland bills, i. 442-3.

By whom to be given, i. 444.

To whom to be given, *ib*.

Equivalents of notice, i. 445.

Insolvency or bankruptcy of acceptor not equivalent, *ib*.

Of drawer no excuse for not intimating to him, *ib*.

Waiving or discharging rules of negotiation, i. 445-6.

Partial payment, or promise to pay, *ib*.

Payment in ignorance of want of notice, *ib*.

Notice by one paying on protest for honour, i. 447-8.

Exception to the rule where no effects of drawer in drawee's hands, *ib*.

Accommodation bills, rules as to notice, i. 450-1.

Not lost by omission of protest and notice, if no effects in drawee's hands, i. 451-2.

Where bill for accommodation of drawer, no notice requisite, i. 452-3.

NOTICE—*continued.*

Each person engaged, except him accommodated, entitled to notice, i. 453-4.

See **BILLS**.

OF REFUSAL TO EXECUTE ORDER, i. 344-5.

Of shipment of goods, i. 475-6.

Notices in newspapers, and placards in carriers' offices, etc., effect of, in limiting their responsibility on edict *Nautæ Caupones*, etc., i. 501-2.

OF DISSOLUTION OF PARTNERSHIP, ii. 529-30.

Whether notice of dissolution by death necessary, *ib.*

By bankruptcy, *ib.*

By renunciation, *ib.*

Notice to customers and correspondents, ii. 530.

To the public, ii. 531.

Notice of intention to abandon for total loss in insurance, i. 657-8.

Notice of assignation, ii. 16.

Of sale of poinded goods, ii. 58.

Of judicial sale, ii. 253.

Printed notices, effect of, in limiting responsibility by public carriers, i. 501-2.

Lien by, ii. 105.

See **INTIMATION**.

NOTOUR Bankruptcy, ii. 155-6.

See **BANKRUPTCY**.

NOVA DEBITA, securities for, not challengeable on 1621, ii. 188.

Excepted from the rule of the statute 1621, *ib.*

And 1696, c. 5, ii. 205.

Distinctions as to *nova debita*, *ib.*

Transfer not completed till within sixty days, ii. 206.

Security on moveables completed after advance, ii. 207.

Where completion requires debtor to interfere, ii. 208-9.

Security supposed to be complete at first, *ib.*

Security completed after advance of money, ii. 209-10.

Security to a cautioner on his engaging for a prior debt, ii. 210-1.

NULLITY under 1621, c. 18, whether may be pleaded by way of exception, ii. 181.

Effect of nullity, ii. 182.

Against strangers, *ib.*

Purchaser *bona fide*, *ib.*

Participator in fraud, ii. 183-4.

Effect against creditors, *ib.*

Opens fund recovered to whole creditors, *ib.*

NUMBER and Value, reckoning creditors in, ii. 331, 352.

OATH of creditor in sequestration, ii. 291, 304.

See **SEQUESTRATION**.

OF BANKRUPT, reference to, effect of, ii. 329-30.

Of bankrupt in *cessio*, ii. 482-3.

OF DEBTOR, proof by, after triennial prescription, i. 350-1.

Intrinsic and extrinsic qualities of oath, *ib.*

After debtor's bankruptcy, i. 351-2.

See **EVIDENCE**.

Reference to bankrupt's oath, ii. 329-30.

See **EVIDENCE IN BANKRUPTCY**.

OF CREDITOR applying for *meditatio fugæ* warrant, ii. 451-2.

OBJECTIONS to real voluntary securities, i. 734-5.

To the debt, *ib.*

Pactum illicitum, *ib.*

Prescription, *ib.*

To the security, *ib.*

Want of stamp, i. 735-6.

Exhausting of precept of *sasine*, *ib.*

Special precept, i. 736-7.

Precept of *clare constat*, i. 737-8.

Doctrine of accretion, *ib.*

Objections in relation to insolvency, i. 738-9.

OBJECTIONS—*continued.*

Heir's disposition within a year, i. 738-9.

Indefinite debt, *ib.*

Effect of objections, i. 739-40.

To ADJUDICATIONS, i. 773-4.

Distinguished as in a ranking, or against debtor, *ib.*

See **ADJUDICATION**.

To HERITABLE SECURITIES on 1621, c. 18, ii. 171-2.

To alienations without onerous consideration, ii. 184-5.

On second branch of Act 1621, *ib.*

On the Act 1696, c. 5, ii. 191-2.

To debts in ranking and sale, ii. 266-7.

To sequestration and grounds of recall, ii. 294-5.

By TRUSTEE, TO CLAIMS in sequestration, ii. 362.

Appeal from trustee's judgment, ii. 362-3.

To VOTES AT MEETINGS OF CREDITORS, ii. 314-5.

Scrutiny of votes, *ib.*

How to be judicially disposed of, *ib.*

Proof of debt, *ib.*

Distinction betwixt proof requisite to vote and to draw dividend, ii. 315.

Parole proof inadmissible, *ib.*

Proof admissible, *ib.*

Creditor to vote during discussion, ii. 315.

Trial of objections in court, *ib.*

See **VOTES**.

PERSONAL, to trustee, ii. 302-3, 313.

A personal objection must be stated at meeting, *ib.*

Conjunct and confident person, ii. 302-14.

See **VOTES**.

To TRUSTEE'S JUDGMENT on debts must be lodged within fifteen days, ii. 362-3.

To RESOLUTIONS OF CREDITORS, ii. 331-2.

To SCHEME OF DIVISION and setting apart dividends in sequestration, ii. 362-3.

Not bound to set apart unless objection lodged within fifteen days, *ib.*

To BANKRUPT'S DISCHARGE, ii. 371-2.

Onus probandi on objectors, *ib.*

No objection that debtor abroad, ii. 372, 369.

To concurrence of creditors, *ib.*

Bargains by bankrupt's friends, though without his knowledge, fatal, ii. 369-70.

Consideration given to creditor void, ii. 370.

Discharge obtained by money to be equally divided not objectionable, ii. 371.

Objections to the discharge, ii. 371-2.

Enumeration of them, *ib.*

To APPROVAL OF COMPOSITION, discretionary power of Court, ii. 356.

To the caution, ii. 352-3.

Objections to arrestments, ii. 69-70.

To poinding, ii. 60-1.

To bills, i. 413-4.

To writ of extent, ii. 50-1.

Appearing and claiming, *ib.*

Motions to set aside extent, *ib.*

Relief in equity, *ib.*

To trust-deed under 1621 and 1696, ii. 388-9.

To inhibitions, ii. 142.

OBLIGATION to infest, effect of, i. 723-4.

OBLIGATIONS and contracts, general principles of, i. 312.

Conventional obligations and contracts, i. 313-4.

Consent requisite in conventional obligations, *ib.*

How consent invalidated, *ib.*

Error, *ib.*

Error in substantials, *ib.*

Error either with or without fraud, *ib.*

Error in the person, i. 314-5.

As to the price, *ib.*

As to quality of subject, *ib.*

Constraint, *ib.*

OBLIGATIONS—*continued*.

- Degree of force, and force requisite to invalidate consent, i. 314-5.
- Weakness of age, sex, or condition, *ib*.
- Imprisonments, i. 315-6.
- Threats, *ib*.
- Fraud, i. 316-7.
- Deception, *ib*.
- Lesion, *ib*.
- Intoxication, *ib*.
- CONSIDERED AS LEGAL OR ILLEGAL, i. 317-8.
- Obligations and contracts, immoral or *contra bonos mores*, *ib*.
- Incentive to crime, *ib*.
- Indecent or mischievous consideration, i. 318-9.
- Gaming, *ib*.
- Wagers, i. 319.
- Liquor Acts, i. 320-1.
- Contracts against public policy, *ib*.
- Restraints on marriage, *ib*.
- On natural liberty, i. 321.
- War policy, i. 322.
- Smuggling, i. 325.
- Usurious, i. 327-8.
- Effect of illegality of debt against third parties, i. 330-1.
- ONEROUS OR GRATUITOUS, PURE, FUTURE, OR CONTINGENT, i. 331-2.
- Of the various ways in which obligations and contracts are constituted, i. 334-5.
- Of unilateral obligations, i. 351.
- Bonds, i. 352.
- Construction of joint and several obligations, i. 361-2.
- Implied obligation, *ib*.
- Effect among co-obligants of joint or several obligations, i. 362-3.
- Cautionary obligations, *ib*.
- See JOINT AND SEVERAL OBLIGATIONS—CAUTIONARY.
- Doctrine of *locus penitentiae, rei interventus*, and homologation, as applicable to obligations and contracts, i. 344-5.
- OFFER of composition cannot be made till after examination, ii. 348-9.
- Nature and description of the offer, ii. 349.
- By whom may be made, *ib*.
- Of the caution, ii. 352-3.
- See COMPOSITION.
- IN MERCANTILE BARGAINS must be accepted, i. 343-4.
- What delay allowed, *ib*.
- Acceptance binds the bargain, *ib*.
- Nature of acceptance, *ib*.
- It must meet the offer, i. 344-5.
- Provisional acceptance, *ib*.
- Implied condition that all shall be bound, or none, *ib*.
- Revocation of offer before acceptance, *ib*.
- How revocation may be barred, *ib*.
- Distinction between an order and an offer, i. 344-5.
- OFFERERS at judicial sale, ii. 254-5.
- Obligation under clause of devolution where highest offerer fails, *ib*.
- Responsibility of highest offerer failing, for the difference between his offer and the second, ii. 255-6.
- Of subsequent offerers, *ib*.
- OFFICERS, military—
- Whether may be compelled to sell their commissions by creditors, i. 122-3.
- Pay of, whether attachable, i. 123.
- Arrears of pay, *ib*.
- Whether liable to *meditatio fugæ* warrant, ii. 454.
- Obtaining *cessio* must convey part of pay, ii. 483.
- Public officers, salary of, whether arrestable, i. 123-4.
- OFFICES, how far attachable for debt, i. 121-2.
- Heritable offices, *ib*.
- Patrimonial offices descendible to heirs and assignees, *ib*.

OFFICES—*continued*.

- Offices in which there is a personal trust, 121-2.
- Offices connected with the administration of justice, *ib*.
- Offices in king's palace, *ib*.
- Commissions in king's forces, *ib*.
- Whether a military officer may be compelled by creditors to sell his commission, i. 122-3.
- Voluntary sale of commission, *ib*.
- Deputations of offices, *ib*.
- Salary of an office, *ib*.
- How far attachable, *ib*.
- Rule in England, i. 123-4.
- In Scotland, *ib*.
- Pay or half-pay of an officer, *ib*.
- Minister's stipend, professor's salary, salary of judges and other public officers, i. 123-4.
- Arrears, or pay, or salary, *ib*.
- What agreements are considered as *pacta illicita* in regard to offices, *ib*.
- Where office abolished on a salary to the officer, i. 125-6.
- SECURITY FOR DISCHARGE OF, not challengeable on 1696, c. 5, ii. 219-20.
- CAUTIONER for the performance of duties of, i. 380.
- General rules of responsibility, i. 383.
- OLERON and WISBUY, laws of, i. 548-9.
- Authority of, in maritime law, *ib*.
- OMISSA VEL MALE APPRETIATA—
- See EXECUTOR, ii. 81-2.
- OMISSION to record petition of sequestration, effect of, ii. 296-7.
- To state personal objection to trustee at meeting, ii. 303.
- In decree of adjudication, i. 781-2.
- To record abbreviate, effect of, *ib*.
- Where sasine taken and recorded, omission of no consequence in question with creditors posterior to sasine, *ib*.
- In inventory given up by executor, ii. 81-2.
- Of conditions in infeftment on entail, i. 47-8.
- OMNIUM BONORUM, conveyance to individual creditor where other debts render granter insolvent, ii. 153-4.
- To individual creditors challengeable at common law, ii. 226-7.
- Conveyance by debtor obtaining Act of Grace, ii. 447-8.
- By pursuer of *cessio*, ii. 482.
- What may be excepted from it, *ib*.
- Military officers must convey part of pay, ii. 483-4.
- Clergyman part of stipend, *ib*.
- See CESSIO.
- ONEROUS Consideration, for granting deed under 1621, ii. 175-6.
- Evidence of it, ii. 178-9.
- Of alienations without consideration, reducible at common law, ii. 225-6.
- DEBTS, claims for, i. 331-2.
- DEEDS, challengeable on deathbed, if spontaneous, i. 69-70.
- ONUS PROBANDI of conjunct and confident, ii. 175-6.
- Of onerous consideration, ii. 178-9.
- On creditors objecting to *cessio*, ii. 476-7.
- Of notice to limit responsibility of public carriers, i. 503-4.
- Of goods in bill of lading, i. 611.
- Of seaworthiness, i. 663.
- Of deviation in insurance contract, i. 669-70.
- Of circumstances as to escape of prisoner, ii. 437-8.
- Of fraudulent bankruptcy, ii. 403.
- In a reduction on insanity, i. 132.
- In a challenge of deed for want of solemnities, i. 341-2.
- OPEN Account, proof of debt by, i. 347-8.
- May be conveyed by assignation, ii. 19.
- See ACCOUNT—DEBTS.
- POLICY OF INSURANCE, i. 660-1.
- JAILS, responsibility of magistrates for allowing prisoners privilege of, ii. 443-4.

- ORDER for goods requires no acceptance, i. 344-5.
 Execution binds the bargain, *ib.*
 Refusal to execute should be instantly communicated, *ib.*
 OF DELIVERY, effect of, in passing the property, i. 194-5.
 See DELIVERY.
 ORDONNANCE of Hanseatic Towns on maritime law, i. 548-9.
 DE LA MARINE, history of, i. 548-9.
 Commentators on, *ib.*
 OUTSTANDING Debts, sale of, ii. 344.
 OVERLOADING coaches, i. 491-2.
 Ships, i. 664-5.
 OWNERS of mail and stage coaches, responsibility for carelessness of drivers, i. 491-2.
 Under edict *Nautæ Caupones*, etc., i. 496-7.
 Mail-coaches, *ib.*
 Hackney-coachmen, i. 497-8.
 How far responsibility limited by notices and placards, i. 501-2.
 See NAUTÆ, etc.
 OWNERS of ships—
 CONTRACTS OF, relative to equipment of vessel, i. 55-6.
 As to employment of ship, *ib.*
 Remedy where they disagree as to this, *ib.*
 Their contract with shipshusband, i. 552.
 With master, i. 554.
 Responsibility for master, i. 555-6.
 Liable only to extent of value of ship, *ib.*
 Claims on bankruptcy of owners by master, i. 557-8.
 On bankruptcy of master by owners, *ib.*
 Claim by seamen against owners, i. 561-2.
 Contracts with owners for repairs, and who liable as such, i. 567-8.
 Where several owners, and order given by the apparent manager or shipshusband, *ib.*
 Where owners liable only *pro rata*, *ib.*
 Where *singuli in solidum*, i. 568-9.
 Persons liable as owners, *ib.*
 Registered owners in possession, and titles clear, *ib.*
 Mere ownership, effect of, where repairs, etc., made on the credit of others, *ib.*
 Repairs made previous to purchase, *ib.*
 Furnishing on order of master, *ib.*
 Where on hire or on lease, i. 561.
 Where ship mortgaged, i. 570.
 See REPAIRS.
 Obligations of owners under contracts of charter-party, i. 588-9.
 Under edict *Nautæ Caupones*, etc., i. 605-6.
 See NAUTÆ, etc.
 Exceptions from rule of responsibility, i. 608-9.
 Not liable beyond value of ship and freight for embezzlement or damage, etc., occasioned by master, i. 609-10.
 How value of ship to be estimated, i. 611-2.
 Where ship and freight insufficient, a proportional distribution, *ib.*
 Order of ranking of shipowner on cargo, ii. 406-7.
 See SHIP—SHIPMASTER—CHARTY-PARTY.
 PART OWNERSHIP IN VESSELS, ii. 544-5.
 Distinction between partnership and part ownership, *ib.*
 Part owners *pro indiviso* proprietors, not partners, *ib.*
 TITLE AND RIGHT of the several owners, ii. 544-5.
 Must be registered, *ib.*
 Owners, a separate right, descendible to heirs, and assignable, *ib.*
 No lien on ship, *ib.*
 EMPLOYMENT OF VESSEL, i. 551-2.
 Whether majority of owners rules the employment, *ib.*
 Where minority dissent, *ib.*
 Their remedy against loss, *ib.*
 Protesting or arresting ship, *ib.*
 OWNERS—*continued.*
 EMPLOYMENT OF VESSEL—*continued.*
 Where no protest or arrest, are they held as assenting? i. 552-3.
 Remedy of minority where majority destroys ship, *ib.*
 Responsibility to third parties, ii. 544.
 Right of creditors to attach partner's share, ii. 544-5.
 See SHIP.
 OWNERSHIP—
 Reputed, as raising a responsibility for the debts of the possessor, i. 268-9.
 Of reputed ownership, i. 269.
 Collusive possession, *ib.*
 English law, i. 270.
 Scottish, *ib.*
 Collusion of owner, necessary, *ib.*
 Conveyance *retenta possessione*, i. 272-3.
 Distinction between possession newly given and possession reserved, *ib.*
 Where a security intended, *ib.*
 Where the conveyance conditional, i. 273-4.
 Suspensive conditions in sale, *ib.*
 Furniture, etc., *ib.*
 Where notice given, i. 274-5.
 Effect of radical objections, conditions, and personal exceptions, in questions of ownership, i. 297-8.
 See FRAUD—REPUTED OWNERSHIP—POSSESSION.
 Acts of ownership, effect of, in passing property, i. 242, 219.
 Goods thrown overboard in a storm, property still in owners if recovered, i. 637-8.
 OF VESSELS, proof of, at obtaining registry, i. 151.
 Part ownership, i. 153, ii. 540.
 See OWNER.
 PACKER'S Lien, ii. 103-4.
 PACTA ILLICITA—
 Contracts considered as, i. 317-8.
 An objection to debt, i. 734-5.
 Burdening salary of public officer, i. 123-4.
 PACTUM LEGIS COMMISSORIÆ, i. 259-60.
 Difference between it and power to sell, *ib.*, ii. 269-70.
 PAGES of instrument of sasine, i. 716-7.
 PAPERS of ships, i. 602-3.
 LAW AGENT'S LIEN OVER, ii. 106-7.
 PARAPHERNALIA of wife excepted from *communio bonorum*, i. 678-9.
 PARATA EXECUTIO, competition between debts having *parata executio*, and future and contingent debts, i. 333-4.
 PARENT and CHILD, construction of rights in fee and life-rent as between, i. 54-5.
 See LIFE-RENT AND FEE—PROVISIONS.
 PARI PASSU PREFERENCE of adjudications, i. 754-5.
 First effectual the criterion, i. 758-9.
 Where the debtor is dead, i. 763.
 Over subjects simply heritable, i. 794-5.
 Adjudication in implement not subject to, i. 782-3.
 Commentary on the laws for establishing equality among creditors doing diligence against moveables during debtor's life, ii. 72-3.
 History of the laws, *ib.*
 Proceedings in order to take benefit by the statutes, ii. 74-5.
 Effect of sequestration in establishing *pari passu* preference, ii. 75-6.
 Effect of loosing arrestment, ii. 76-7.
 See EQUALITY.
 OF CROWN with other adjudgers, i. 781-2.
 OF CREDITORS doing diligence after debtor's death, ii. 76-7.
 Creditors of defunct, ii. 79.

PARI PASSU PREFERENCE—*continued.*OF CREDITORS—*continued.*

Commentary on Act of Sederunt 28th February 1662, ii. 82-3.

Pari passu preference within six months, *ib.*

Privileged debts a preference, ii. 83-4.

Contrast of *pari passu* preference of adjudgers with this, *ib.*

Competition with diligence during debtor's life, *ib.*

If debtor bankrupt, *ib.*

If not made bankrupt, ii. 84-5.

If no diligence during life, *ib.*

Competition of creditors of executors and of defunct, ii. 85-6.

How to secure *pari passu* preference where trust-deed challenged, ii. 389-90.

How to arrange the affairs of an insolvent to secure equality, ii. 488, 491.

OF THE PROCESSES for equal distribution of moveable estate where debtor not a trader, ii. 275-6.

Multiplepointing, ii. 276-7.

Forthcoming, ii. 280.

Action for distribution of pointed goods, *ib.*

See EQUALITY—ARRANGEMENTS.

PARLIAMENT, member of—

May be made bankrupt, ii. 156-7.

Diligence requisite, ii. 163.

Exemption of, from imprisonment for debt, ii. 460-1.

PAROLE proof of contracts, i. 335-6.

Of partnership, i. 668-9.

See PROOF—CONTRACTS.

PART OWNERS. See PARTNERSHIP.

PARTIAL LOSS, i. 653, 657.

Adjustment of, i. 660.

See INSURANCE.

PAYMENTS—

Effect of, on securities, ii. 424.

After sequestration, ii. 305-6.

PARTICULAR and general average—

Distinction between, i. 581, 689.

Particular average, i. 657-8.

Adjustment of partial loss, i. 660-1.

LIENS, ii. 92-3.

PARTNERS of company—

Lien of, ii. 501-2.

Powers of, ii. 503-4.

Dormant partner, ii. 510.

Any partner may swear to verity of debt, ii. 304-5.

See PARTNERSHIP.

PARTNERSHIP, ii. 499.

General principles of the contract, ii. 500-1.

Stock of the company, a trust estate, *ib.*

Implies a lien to partners for advances or debts, *ib.*

And to creditors of company for its debts, ii. 501-2.

Partners have only reversion after satisfying company creditors, *ib.*

Contract operates as a transference, confers a *jus ad rem* to partners, *ib.*

This implied conveyance requires completion by tradition or otherwise, *ib.*

Various cases, *ib.*

Property acquired in name of company, though with individual partner's money, ii. 502-3.

Acquisitions in line of company's trade by a partner, *ib.*

Partner binding himself to pay money or fungibles into stock, *ib.*

On whom loss falls before money or fungibles so put in, *ib.*

Where he has engaged to put in a certain subject which perishes, on whom is the loss? *ib.*

POWERS OF PARTNERS, ii. 503-4.

How exercised, *ib.*

VOL. II.

PARTNERSHIP—*continued.*POWERS OF PARTNERS—*continued.*

Provision against any of the partners, except one or more, signing company firm, ii. 503-4.

Effect of this provision against third parties, *ib.*

Purchases made apparently for use of company, *ib.*

Negotiable instruments, *ib.*

Endorsations, ii. 504.

Ordinary contracts, ii. 505.

Guarantee, ii. 506.

Where transaction plainly an individual concern, *ib.*

Where previous consent or subsequent approbation of other partners shown, *ib.*

Where joint security at full disposal of partner, *ib.*

Where transaction out of company's line, but apparently done by them and entered in their books, *ib.*

Fraudulent acts of partner acting in their line of trade, *ib.*

Partner represents company in bankruptcy, by proving debt, voting, and discharging, *ib.*

RESPONSIBILITY OF PARTNERS, ii. 506-7.

To third parties, *ib.*

Liable *singuli in solidum*, *ib.*

Obligations to each other, ii. 507.

Company indebted to a partner, *ib.*

COMPANY A SEPARATE PERSON in law, ii. 507-8.

Partnership primary debtors, *ib.*

Action not competent in first instance against a partner, *ib.*

In bankruptcy, estate of partner only charged with balance after what paid from company estate, *ib.*

Share of partner attached by arrestment in company's hands, *ib.*

Action or diligence in name of company, or against it by its firm, *ib.*

Personal execution against partners, *ib.*

Sequestration proceeds against firm, *ib.*

Debts between companies in which same person a partner, *ib.*

DELECTUS PERSONÆ, ii. 508-9

Implied in contract, *ib.*

Effect of it, *ib.*

Bars admission of new partners, *ib.*

Stipulation for admission of heirs or assignees, *ib.*

Can company object to partner proposed? *ib.*

Not same *delectus personæ* in public as in private companies, *ib.*

OF PARTNERSHIP PROPER, ii. 509-10.

Constitution of private partnership, *ib.*

1. Written contract, *ib.*

Useful where special stipulations, *ib.*

Less formal contract, exchange of letters, ii. 510-1.

Articles drawn out, but not signed, *ib.*

How established, *ib.*

2. Parole or circumstantial proof, where no written contract, *ib.*

Subscribing by firm—using firm in purchasing—participation of profits, *ib.*

Dormant partner, *ib.*

Proportion of profit of no consequence, *ib.*

Payment for labour in proportion to profit not sufficient, *ib.*

There must be a specific interest in profits, *ib.*

What will infer responsibility, ii. 511-2.

What not, *ib.*

Use of one's name, *ib.*

Proposed record of partnership, ii. 513.

Of the persons capable of becoming partners, ii. 513-4.

Minor, *ib.*

Whether father or tutors may engage minor in a partnership, *ib.*

One company becoming member of another, *ib.*

PARTNERSHIP—*continued.*OF PARTNERSHIP PROPER—*continued.*

- Consequences of this as to creditors, ii. 514-5.
- Whether an individual can set up a firm to entitle those dealing with firm to preference on its stock, *ib.*
- Whether same persons can form several companies, *ib.*
- Distinctions, *ib.*
- Two companies under separate firms, but same in object and interest, *ib.*
- Funds and debts massed together on bankruptcy, *ib.*
- Companies differing in name, trade, and capital, ii. 516.
- Stock of each company reserved for its own creditors, *ib.*
- Companies having establishments abroad, *ib.*
- Where partnership real and trade distinct, partner abroad not in home company, *ib.*
- Where no distinction but difference of firms, *ib.*
- Partners different, but trade the same, *ib.*

JOINT-STOCK COMPANIES, ii. 516-7.

- Difference between company under a firm, and joint stock association under descriptive name, *ib.*
- Distinction recognised in Scotland, ii. 517-8.
- History and occasion of Bubble Act, ii. 519-20.
- Joint-stock company no *persona standi*, *ib.*
- Authority or mandate to officers, *ib.*
- Recent Act as to joint-stock banking companies in Scotland, *ib.*
- Conditions annexed to privilege, ii. 520-1.
- Personal responsibility of holders of joint-stock shares, *ib.*
- Effect of sale of share, *ib.*

PUBLIC COMPANIES, ii. 545-6.

- Object of public companies, *ib.*
- Chartered companies, *ib.*
- Benefits of a charter, *ib.*
- Company acts by its constitutional organs, directors, officers, etc., *ib.*
- Continues undissolved by death of shareholders, *ib.*
- Shares transferable, *ib.*
- Monopoly of public banking in England, ii. 546.
- Limitation of members of private banking companies in England, *ib.*
- Monopoly of insurance in England abolished, *ib.*
- Public company by Act of Parliament, ii. 546-7.

OF THE DISSOLUTION OF PARTNERSHIP, ii. 520-1.

DISSOLUTION IN RELATION TO THE PARTIES—

- By act of the parties, ii. 521-2.
- By expiration of term of duration, *ib.*
- May be renewed by tacit consent, *ib.*
- Such renewal implies a dissolution at pleasure, *ib.*
- Renunciation where no term fixed, *ib.*
- Power of partner to renounce and dissolve, *ib.*
- Whether such renunciation terminates concern, *ib.*
- Power of dissolution must be fairly exercised, ii. 522-3.
- Reasonable notice required, *ib.*
- The dissolution must not be fraudulent, *ib.*
- Dissolving for private advantage, *ib.*
- Effect of dissolution, ii. 523-4.
- Right of partner in purchasing goodwill, shop, etc., *ib.*
- Dissolution where term fixed, *ib.*
- Must be on cause shown, *ib.*
- Bona fide* dissolution by a majority on rational grounds, *ib.*
- Whether term of duration may be fixed otherwise than by contract, *ib.*
- Business in premises under a lease, *ib.*
- Where lease excludes assignees and subtenants, *ib.*
- Appointment by court of neutral person to wind up, ii. 524-5.
- Dissolution by death, *ib.*
- One or more partners dying, dissolves, *ib.*
- Where by contract heir takes place of ancestor, *ib.*

PARTNERSHIP—*continued.*DISSOLUTION IN RELATION TO THE PARTIES—*continued.*

- Where partnership declared to subsist notwithstanding, ii. 524-5.
 - Right of heir and his responsibility where dissolution takes place, *ib.*
 - Dissolution by change of party's condition, *ib.*
 - Effect of marriage of female, *ib.*
 - Incapacity by disease, *ib.*
 - Of insolvency, bankruptcy under 1696, and by sequestration, and execution of a trust-deed, *ib.*
 - Effect of incapacity by insanity or other disease, ii. 525-6.
 - Dangers imminent, *ib.*
 - Dissolution by changes on the partnership, *ib.*
 - Partial alterations, adoption of new or dropping old partners, ii. 526.
 - Securities to individual not available to partnership formed by him, *ib.*
 - Whether obligations to a firm extend to the house, under all changes of partners, *ib.*
 - Broker's transactions, *ib.*
 - Interest of representatives, ii. 526-7.
 - Three persons in partnership, when only two, whether purchaser may void sale, *ib.*
 - Of the winding up and the necessary prolongation of the partnership, ii. 527-8.
 - Subsistence for winding up, *ib.*
 - Power of the partners in winding up, *ib.*
 - Liability for goods ordered previous to dissolution, *ib.*
 - For freight and charges on goods so ordered, *ib.*
 - Of the person who is to wind up, *ib.*
 - Where this settled by contract, where not so settled, *ib.*
- OF THE DISSOLUTION IN RELATION TO THIRD PARTIES, ii. 528-9.
- Dissolution infers no discharge of subsisting responsibilities, *ib.*
 - Balance at death, *ib.*
 - Where retiring partner has paid his share, *ib.*
 - Whether one dealing with company, after partner's death, discharges representatives of deceased, *ib.*
 - Effect of the transactions in such dealing, in discharging or rendering liable the representatives, *ib.*
 - Whether dissolution by death requires notice, ii. 529-30.
 - Dissolution by bankruptcy, *ib.*
 - Dissolution by renunciation, *ib.*
 - Notification, *ib.*
 - What is sufficient notice, *ib.*
 - 1. Notice to customers and correspondents, ii. 530-1.
 - Circular letter by post, *ib.*
 - Onus probandi* of notice not having been received, *ib.*
 - Change of firm, alteration on checks, notes, invoices, etc., *ib.*
 - Notice by Gazette not sufficient unless traced to the party, ii. 531-2.
 - 2. Notice to the public at large, *ib.*
 - Whether Gazette notice sufficient, *ib.*
 - Advertisements in provincial papers, *ib.*
 - Effect of continuing the firm after retirement of partner, ii. 532-3.
 - Whether dissolution of secret partnership must be notified, ii. 533.
 - Distinction between the evidence of an agreement to dissolve, and notice of that dissolution, *ib.*
 - A written notice signed required at Gazette office, *ib.*
 - Partner has right to insert notice of his own retirement, signed by himself, *ib.*
 - Powers of partners after dissolution, ii. 533-4.
 - Receipt by signature of firm, ii. 534.
 - Where debts notified to be paid to a particular person, *ib.*
 - No drafts, endorsement, or acceptance by firm, valid, *ib.*

PARTNERSHIP—*continued.*OF THE DISSOLUTION, ETC.—*continued.*

Acceptance of bill by firm, dated before dissolution, ii. 534.
 Retiring with a share of profits or annuity, ii. 534-5.
 Participation of profits continues responsibility, *ib.*
 Partner selling his interest for an annuity, *ib.*
 Where, besides interest, he receives annuity in lieu of profits, *ib.*

Where annuity in proportion to the profits, *ib.*
 Final settlement of affairs of company on dissolution, ii. 535.

Property common for division, after paying debts, *ib.*

Sale best criterion of value, *ib.*

Fund or stock, *ib.*

Taking account between the partners, *ib.*

Survivors wind up, unless fault or fraud, in which case a receiver named, *ib.*

RIGHTS OF PARTNERS by the general contract or by particular stipulation, ii. 535-6.

CONTRIBUTION OF STOCK and regulation of profits, ii. 536.

Contributions of stock may be by money, goods, subjects, skill, influence, etc., *ib.*

Division of, on dissolution, according to contract, *ib.*

Profits regulated by contract, ii. 536-7.

Agreement to share profits with exemptions from loss, *ib.*

Not effectual against third parties, *ib.*

Where gross inequality by fraud, *ib.*

Share of each a debt against company arrestable in company's hands, *ib.*

Partner failing to advance his stock, *ib.*

Advancing more than his share, *ib.*

His remedy against company and individuals, *ib.*

Partner bringing the others to account, *ib.*

STIPULATIONS AS TO DISSOLUTION and relative arrangements, ii. 536-7.

At what time profits to be held divisible, *ib.*

In dissolution by death, incapacity, or failure, stipulation in contract as to this, *ib.*

Settling with retiring partners or representatives, ii. 537-8.

Where no stipulation, *ib.*

Time of dissolution the time of dividing, *ib.*

In what case representatives or creditors of deceased, or retiring partner, will share subsequent profit and loss, *ib.*

Transactions in ignorance of the act of dissolution, *ib.*

Stipulation that share to be regulated by preceding balance, *ib.*

Effect of company's insolvency before the death on this stipulation in fixing heir's right, *ib.*

Stipulation of extinction of partner's right on bankruptcy or death, and regulation of the right of creditors or heirs by preceding balance, *ib.*

Intention of parties to be studied in construing such clauses, ii. 538-9.

Where the company have neglected to make a regular balance, *ib.*

Stipulation for settlement of retiring or deceased partner's interest by a valuation, *ib.*

Reference, *ib.*

JOINT ADVENTURE, ii. 539-40.

Distinction between proper partnership and joint trade, *ib.*

Not necessary that there be a firm to make a partnership, *ib.*

Joint trade, *ib.*

A limited partnership, *ib.*

Its creditors preferable on common property, *ib.*

Partners liable *singuli in solidum* for active partner, *ib.*

Creditors claiming on bankruptcy, *ib.*

Where the joint concern not avowed or relied on at contracting, *ib.*

Responsibility where agreement formed, and joint interest constituted, *ib.*

PARTNERSHIP—*continued.*JOINT ADVENTURE—*continued.*

Where concern entered into after possession of the goods, ii. 541-2.

Effect of limits of the concern in restricting responsibility, ii. 542.

Joint trade between companies, *ib.*

Stock of joint concern common property, ii. 542-3.

Preference to the creditors of joint adventure, and lien on, to the partners, *ib.*

Acting partners are *præpositi*, ii. 543.

Express or tacit authority of, to bind the whole, *ib.*

Purchasing goods and borrowing money, *ib.*

JOINT PURCHASE, ii. 543-4.

Not a partnership, *ib.*

How one may be liable for whole in a joint purchase, *ib.*

Agreement to share profit and loss, *ib.*

Purchaser using his name and credit, *ib.*

SUB-CONTRACT, ii. 543-4.

Made by a partner for sharing his profits with a stranger, *ib.*

Effect of the contract as to principal partnership and its creditors, *ib.*

PART OWNERSHIP IN VESSELS, ii. 544.

Distinction between partnership and part ownership, *ib.*

Part owners *pro indiviso* proprietors, not partners, *ib.*

Title and right of the several owners, ii. 544-5.

Owner has a separate right descendible to heirs, and assignable, *ib.*

Of necessities ordered by part owners, ii. 544-5.

One may bind whole for necessities, *ib.*

Things not necessary, *ib.*

Insurance, *ib.*

Responsibility to third parties, *ib.*

Right of creditors to attach partner's share, ii. 545-6.

See SHIP.

OF CLAIMS ARISING ON BANKRUPTCY, either of individual partners or company itself, ii. 546.

1. BANKRUPTCY OF A PARTNER, the company solvent, ii. 546-7.

1. Claim by bankrupt estate of partner, where he is a creditor of company, *ib.*

Deduction from claim of company debts, *ib.*

Winding up and striking balance, to see whether sufficiency for debts, ii. 547-8.

Where no stipulation for settling according to previous balance, *ib.*

Debtor's share of stock and profits alone attachable, *ib.*

How his share to be ascertained, *ib.*

Right of the partner fixed as at moment of dissolution, *ib.*

Where partner is indebted to company, *ib.*

Claim by the company, *ib.*

Compensation between the company and private debts, *ib.*

Where company has claim against the partner, but he has claim against another partner solvent, whether there is compensation, *ib.*

Bankrupt partner with claim against company, and partner of company having claim against bankrupt, ii. 548.

2. BANKRUPTCY OF THE COMPANY, a partner solvent, ii. 548-9.

Relief amongst the partners, *ib.*

Relief of solvent partner paying all the debts, *ib.*

Liability of partner admitted into company for a sum to be paid by instalment, for the unpaid instalments at company's bankruptcy, *ib.*

3. BANKRUPTCY OF THE COMPANY AND PARTNERS, ii. 548-9.

Claims between the estates of the company and of the partners, ii. 549-50.

Claims of company creditors on company funds, *ib.*

Difference of English and Scottish laws, *ib.*

Claims on the company estate, ii. 550-1.

PARTNERSHIP—*continued*.

3. BANKRUPTCY OF THE COMPANY AND PARTNERS—*continued*.
Company creditors for whole debt undiminished, ii. 550-1.
Where creditors claim against the company as members of a joint adventure, *ib*.
Separation of joint adventure funds, *ib*.
Claims on the separate estate of the partners, *ib*.
Creditors of company claim balance unpaid from company, *ib*.
How is the ranking to be conducted? ii. 551-2.
Effect of Crown's extent against company, *ib*.
Whether the Crown, as creditor of partner, has preference over company creditors, *ib*.
Where Crown creditor of all the partners in their individual capacity, ii. 552-3.
 4. OF COMPENSATION BETWEEN COMPANY AND PRIVATE DEBTS, ii. 553-4.
In general, no compensation between debts of company and partners, *ib*.
Exception, *ib*.
Can a debtor set off a debt by a partner against company's claim? *ib*.
Can a demand against company be met by debt due to a partner? *ib*.
Effect of bankruptcy on pleas of compensation, *ib*.
Setting off debt due to a partner against claim by company creditor after company dissolved, ii. 555-6.
Where company two firms, ii. 556-7.
Compensation of debt due by one firm against debt due to other, *ib*.
 5. ELECTION WHERE SEVERAL FIRMS HAVE BEEN USED ambiguously, ii. 558-9.
Partnerships under same firm, but different in trade and interests, *ib*.
Right of election to those dealing with firm, where not clearly distinguishable which of the concerns meant, *ib*.
Where trader deceived by ambiguous use of firm, *ib*.
Negotiable securities signed by the firm and in the circle, *ib*.
What sufficient to constitute an election, ii. 559.
Case in which presumption will be against trader, *ib*.
- PROCEEDINGS FOR DISTRIBUTION OF THE FUNDS OF THE COMPANY AND PARTNERS AMONG THE CREDITORS, ii. 559-60.
1. PROCEEDINGS TO RENDER COMPANY BANKRUPT, *ib*.
May be bankrupt under 1696, c. 5, ii. 560-1.
Proceedings against estate by adjudication, inhibition, arrestment, poiding, *ib*.
How these diligences to be directed effectually, *ib*.
Proceedings by creditors against partners, and assigning their claims against company on full payment, *ib*.
Trust-deed for settling bankruptcy of company, *ib*.
How arranged, *ib*.
How executed and completed, *ib*.
Judicial proceedings or sequestration, ii. 561-2.
Against company and individuals, where both insolvent, *ib*.
Competent though one partner able to pay whole debts, *ib*.
Where directed against company alone, *ib*.
Proceeding against the individuals by diligence or sequestration, *ib*.
Where latent partners, *ib*.
How far may proceed against suspected partner, *ib*.
Declarator of partnership, ii. 562.
 2. SEQUESTRATION ON THE BANKRUPTCY OF COMPANIES, ii. 562-3.
Petition, *ib*.
Citation, ii. 564-5.
Proof of debts, *ib*.
Interim factor, *ib*.
Trustee, *ib*.
Vesting estate in trustee, ii. 565-6.
Persons of partners, ii. 565.

PARTNERSHIP—*continued*.

2. SEQUESTRATION, ETC.—*continued*.
Discharge, ii. 565.
Composition, ii. 566-7.
See SEQUESTRATION—TRUST-DEED.
- PART OWNERS of ship, ii. 544-5.
See OWNERS—SHIP.
- PASSENGERS in ships, how far entitled to salvage, i. 639-40.
Lien on luggage of, for freight, ii. 95-6.
No lien on the individual, or clothes on his person, *ib*.
Lien on luggage of passengers in stage-coaches, ii. 97-8.
Claims by, against owners, for carelessness or unskilfulness of drivers, i. 491-2.
See NAUTÆ CAUPONES.
- PASSIVE TITLES, general doctrine and rules of, i. 702-3.
Passive representation, i. 703.
Heir entering by service, *ib*.
Heir of provision, *ib*.
Heir in moveables, *ib*.
Præceptio hæreditatis, i. 704-5.
Gestio pro hærede, *ib*.
Private acquisition of the estate, i. 705-6.
Vitious intromission, *ib*.
Limited representation, *ib*.
By judicial proceedings, i. 706-7.
By stating peremptory defences, *ib*.
Charge to enter, and heir neither entering nor renouncing, *ib*.
Heir entering *cum beneficio inventarii*, *ib*.
Limited responsibility from three years' possession by apparent heir in conferring on creditors a right against the next heir entering, i. 707-8.
See APPARENT HEIR—BENEFICIO INVENTARII.
- RANKING AND SALE BY APPARENT HEIR does not infer a passive title, ii. 241-2.
Whether heir having incurred a passive title will bar him from pursuing a ranking and sale, *ib*.
- PATENTS, of inventions secured by, i. 103-4.
Granted by the king, *ib*.
Principle of the king's power to grant patents, i. 104-5.
How obtained, *ib*.
They may extend over the whole king's dominions, or to England, Scotland, or Ireland alone, *ib*.
Distinct patents must pass for each, *ib*.
Use of the patent, *ib*.
Proper subject of patent, *ib*.
It must be a new invention, or importation of one not before known or used, i. 106-7.
It must be useful, i. 107-8.
Nature of the specification, or disclosure of the invention, *ib*.
The patent and specification must accord, i. 108-9.
Unfair disclosure fatal to patent, *ib*.
Period of monopoly, i. 109-10.
How the benefit is communicated, *ib*.
Assignment in whole or part, i. 110-1.
Licences to use patent, *ib*.
Restraints on the patentee, *ib*.
Transference or attachment of the right by creditors on patentee's bankruptcy, *ib*.
Nature of the right, *ib*.
Right of an inventor without a patent, who has already disclosed his invention, to prevent others from vending the subject as his, *ib*.
Effect of the exclusive privilege of patent, i. 119-20.
Remedies against infringement, *ib*.
Interdict, *ib*.
Action of damages, i. 120-1.
- PAY—
In England, neither pay nor half-pay of an officer in the army or navy attachable, i. 123-4.
Whether they are attachable in Scotland, i. 123-5.

PAY—*continued*.

- Arrears, i. 123-5.
- How far must be given up in *cessio*, ii. 483-4.
- See *CESSIO*.

PAYEE in bill, claim by, i. 428-9.

PAYMENT in cash, not liable to challenge under second branch of Act 1621, ii. 195.

- Nor under 1696, ii. 200.
- Cash includes circulating notes, ii. 201-2.
- In ordinary course of business, ii. 202-3.
- Collusive payments, ii. 204-5.
- By anticipation challengeable at common law, ii. 228.
- By and to bankrupt after sequestration, ii. 232.
- Partial payment forms deduction, ii. 315-6.
- By bill lost by undue negotiation forms a deduction, *ib.*
- Challengeable payment does not, *ib.*
- See *PROOF OF DEBTS*.

EFFECT OF PAYMENTS and intrusions on claims of creditors holding securities, ii. 424-5.

- Payment while debt is personal, *ib.*
- From one of co-obligants, *ib.*
- Effect of real security, ii. 425-6.
- Payment of part diminishes debt, but not security, *ib.*
- Effect and operation of diligence limited to amount of debt at time of competition, *ib.*
- Whether same rule holds in heritable bond and adjudication, *ib.*
- Effect of payment on heritable bond, ii. 426-7.
- Effect of bankruptcy by statute, in regulating how to claim against co-obligants where partial payment, *ib.*
- Whether bankruptcy, unaided by statute, qualifies creditor's right to claim for full sum, *ib.*
- Regulations by statute, *ib.*
- Special provision, *ib.*
- Indefinite payment, ii. 427-8.

OF BILL, presentment for, i. 433.

- Time, i. 434.
- Place, i. 436.
- Protest for non-payment, i. 437.
- Endorsation after term of, i. 426, 427.

BONA FIDE to or by king's debtor, how far affected by writ of extent, ii. 43-4.

OF PRICE, effect of, in transference of goods by constructive delivery, i. 188-9, 222, 295.

- Of price of lands sold under judicial sale, ii. 257-8.
- See *PRICE—DELIVERY*.

PEERS—

- May be made bankrupt, ii. 156-7.
- How to be rendered bankrupt, ii. 163-4.
- Exempted from imprisonment for debt, ii. 458-9.
- Also widows of peers, *ib.*

PENAL BOND, adjudication on, i. 776-7.

PENALTIES, general principle of the doctrine of, i. 698-9.

- Penalties in contracts and obligations *ad factum præstandum*, i. 699-700.
- Liquidate damages, *ib.*
- Where exorbitant, *ib.*
- Penalty of increased rent to secure against possible invasion, *ib.*
- Penalties in money obligations, *ib.*
- Power of mitigating penalties, i. 700-1.
- What expense and damages comprehended, i. 701-2.
- Effect of adjudication on bond, *ib.*
- Penalty in heritable bond covers only actual expenses, *ib.*
- Cannot rank for whole penalty, i. 702.
- Creditor in adjudication on bond, i. 701.
- Prosecution for, under Usury Acts, i. 327, 328.
- See *USURY*.

PENSIONS not attachable for debt, i. 125-6.

PERICULUM, as a criterion of transference of goods, i. 179.

- In hiring of labour, i. 487.

PERICULUM—*continued*.

- In contract of sale, i. 471-2.
- See *RISK—LOSS*.

PERILS of the sea, freeing shipowners from liability for loss, i. 606-7.

- What are considered perils of the sea, i. 607, 652.

PERSON of debtor. See *IMPRISONMENT—DISCHARGE—PROTECTION*.

PERSONA STANDI IN JUDICIO of company, ii. 507-8.

- Joint-stock company no *persona*, ii. 519-20.

PERSONAL CREDITORS, i. 312-3.

- Classing of, previous to ranking under a sequestration, ii. 361-2.
- Pure debts, *ib.*
- Future debts, *ib.*
- Contingent debts, *ib.*
- Ranking, ii. 364-5.

PERSONAL DILIGENCE, i. 1-6, ii. 435.

PERSONAL EXCEPTIONS and Fraud, effect of, against purchasers and creditors, i. 297-8.

- Distinction between *jus in re* and *jus ad rem*, *ib.*

EFFECT OF RADICAL DEFECT in debtor's title, i. 298-9.

- Available against purchasers and creditors, i. 299-300.
- Bills of exchange and bills of lading, acquired for value, an exception, *ib.*

RIGHTS STANDING QUALIFIED in the person of the debtor, i. 300-1.

- Qualified or limited rights, *ib.*
- In land rights, *ib.*
- In personal rights to land, i. 301, 732.
- Jura incorporalia*, i. 302-3.
- How *bona fide* assignee affected, *ib.*
- Moveables, i. 304-5.
- Purchased *bona fide*, *ib.*
- Purchase at market, *ib.*
- Sale of goods pledged by pledgee, i. 306-7.
- Personal engagements of bankrupt, *ib.*
- Stellionate, i. 307-8.

EXCEPTION OF FRAUD, as it affects creditors, i. 309-10.

- Distinction between purchasers and creditors, *ib.*

PERSONAL FACULTY, can creditors under Act 1621 challenge conveyance of? ii. 177-8.

- Personal estate, how liable after death in England, ii. 76-7.
- In Scotland, *ib.*
- See *MOVEABLE*.
- Personal objection to trustee, ii. 302-3.
- Omission to state, annuls the whole election, *ib.*
- Personal or moveable estate, distribution of, where debtor not a trader, ii. 275-6.

See *MOVEABLE*.

Personal protection to bankrupt, ii. 298-9.

See *PRIVILEGED PERSONS*.

Personal exception to claim of preference, ii. 132-3.

Against challenger of trust-deed, ii. 393, 395.

Personal bonds, with assignation to heritable subject in security, are heritable, ii. 4, 6.

Personal privilege, protection from imprisonment by, ii. 458-9.

Minors, *ib.*Idiots, *ib.*

Members of Parliament, ii. 459-60.

Married women, *ib.*Personal responsibility for negligence. See *NEGLIGENCE—RESPONSIBILITY*.

PETITION for sequestration, requisites of, ii. 285-6.

Amount of petitioning creditor's debt, ii. 286.

Nature of debt to warrant petition, ii. 288-9.

Evidence of primary requisites of petition, ii. 290-2.

Registration as an inhibition, ii. 297.

Effect of omitting to record, *ib.*

Petition for recall of sequestration, ii. 294.

PETITION—*continued*.

- Petition for confirmation of trustee, ii. 315.
- For discharge of bankrupt, ii. 356, 367.
- For approval of composition, ii. 356.
- By landlord for sequestration, ii. 32.
- See SEQUESTRATION.

PETITIONING Creditor, in sequestration, nature and amount of his debt, ii. 286.

- Oath by, ii. 289.
- His duty to record petition, ii. 297-8.
- Effect of omission to record, *ib.*

PETTY AVERAGE, i. 614-5.

PILOT—

- Obligation to have pilot on board, under contracts of affreightment, i. 598-9.
- English pilots, i. 599-600.
- Scottish, *ib.*
- Who a sufficient pilot, *ib.*
- How appointed, *ib.*
- In what cases necessary, *ib.*
- His authority, i. 601.
- How far owners responsible where pilot on board, i. 601-2.
- Where master controls him, *ib.*
- Claim of pilot for salvage, i. 639-40.

PIRATES, capture by, a peril of the sea, i. 601-2.

PLACE of examinations of bankrupt, ii. 325-6.

- Of presenting bill for payment, i. 433-4.
- Of judicial sale, ii. 253.
- Of meeting to elect trustee, ii. 312.

PROTECTION BY PRIVILEGE OF, from imprisonment for debt, ii. 460, 461.

PLAN of the lands in judicial sale, ii. 254-5.

PLEDGE, nature of, ii. 19.

- Introductory remarks, ii. 19-20.
- Bonding or impledging for duties, *ib.*
- Government loans, *ib.*
- Montes Pietatis* on the Continent for loans on deposit, *ib.*
- Pledge of commodities, ii. 20-1.
- Proof of the terms of pledge, *ib.*
- Possession necessary, *ib.*
- Exceptions in course of necessary operations on, *ib.*
- How to make pledge effectual, *ib.*
- Sale of pledge, *ib.*
- Pledge of debts, ii. 22-3.
- Not good against third parties or creditors, *ib.*
- Of bills, *ib.*
- Test to know whether bill discounted or impledged, *ib.*
- Pledge of bill without endorsement, *ib.*
- Of long-dated bills for bills of short date, i. 291-2.

PLEDGE OF TITLE-DEEDS, ii. 23-4.

- English doctrine of equitable lien thus raised, *ib.*
- Inconsistent with Scottish rule, *ib.*
- Pledge of document of debt without assignation, effect of, *ib.*
- Factor's power to pledge, i. 517-8.
- Power to impledge his own lien, *ib.*
- To impledge for advances, *ib.*
- Authority of civil and foreign law on this point, i. 519-20.
- Commercial expediency, how far it alters common law, *ib.*
- Difference between English and Scottish law as to factor's power to pledge, i. 520-1.

EFFECT OF POSSESSION under the contract of pledge, i. 277.

- The pledger true proprietor, i. 278.
- Advances on security of pledge, *ib.*
- Where person holding pledge has engaged his credit merely, and fails, *ib.*
- Statutes 4 Geo. IV. c. 83 and 6 Geo. IV. c. 94, as to the rights of those making advances, etc., to persons having the apparent ownership of goods, or with factors, etc., i. 520.
- Ranking of creditors with, ii. 406-7.

PLURIS PETITIO, effect of, in adjudication, i. 780-1.

See ADJUDICATION.

POINDED GOODS, of the action against poinders for distribution of, ii. 280-1.

POINDERS, competition with arrestors, assignees, etc., ii. 61, 69, 406.

POINDING of the ground, the mode of making duties to superior effectual, i. 723-4.

- Conclusions of the summons, *ib.* note.
- A direct warrant for adjudication, i. 753-4.
- No constitution necessary against heir to warrant it, *ib.*
- Commences with an action competent before the sheriff, ii. 55.

Summons, ii. 56.

Nothing can be included but what belongs to owner of ground or his tenant, *ib.*On decree letters of poinding issued without a charge, *ib.*Force of the letters subsists during pursuer's life, *ib.*

Criterion of preference, ii. 57.

PERSONAL, ii. 57-8.

Days of charge must expire, *ib.*

Poinding reformed by late statutes, ii. 57-8.

How execution of poinding carried into effect, ii. 58-9.

Appraisement—offering back goods—leaving goods with schedule and note of appraised value, and reporting execution to sheriff, *ib.*Where debtor continues in possession, *ib.*Time of sale, *ib.*Minute of sale, *ib.*

Payment of proceeds or delivery of goods, ii. 59-60.

Where debtor not true owner, real owner may oppose, *ib.*To what moveables the diligence applies, *ib.*Ships and goods on board, *ib.*Debts excepted, *ib.*Goods in debtor's own possession, *ib.*With third party, *ib.*Where under a lien or pledge, *ib.*

Opposition to poinding, ii. 60.

Preference of, in competition, ii. 61.

With arrestments, ii. 69-70.

Pari passu preference, and equalizing diligence, ii. 72-3.

Distribution of poinded goods, ii. 280.

Litigiosity by poinding, ii. 186.

A method of rendering bankrupt persons exempt from personal diligence, ii. 164-5.

Date of such bankruptcy, ii. 165-6.

POLICY of insurance, use of receipt in, i. 645-6.

Requisites of, i. 649-50.

Must be stamped, *ib.*Alteration, *ib.*

Excepted from solemnities of deeds, i. 652-3.

Warranties under policy, i. 662-3.

Valued policy, i. 659.

Open policy, i. 660.

Wager policy, i. 653.

Fire policy, i. 671.

Life policy, i. 675.

See INSURANCE.

POLICIES OF LIFE INSURANCE as a fund for payment of creditors, i. 102-3.

Cases in which a life policy may accrue to creditors, *ib.*Cases in which policies on life may be opened, *ib.*

Assignment of life policy, i. 675-6.

Assignment by bankruptcy, i. 676.

Of sea policy, i. 675.

Of fire policy, *ib.*

See INSURANCE.

PUBLIC, contracts against, i. 320-1.

See PUBLIC POLICY.

PORT—

Power of shipmaster in home port, i. 554-5.

In foreign port, *ib.*

PORT—*continued*.

- Repairs and furnishings in home port, i. 572.
- In foreign port, i. 573.
- Calling at intermediate ports, i. 608, 668.
- Hypothec for repairs in foreign port, i. 574.
- What a home port, i. 575.
- What is a 'port' in a question of insurance, i. 671-2.

See CHARTER-PARTY—INSURANCE.

PORTIONERS, HEIRS, there is no collation among, i. 96-7.

- Whether an heir portioner, claiming a share of moveables, must collate, 198-9.

POSSESSION is the sasine of a lease, and gives right in the lands, i. 63-4.

- Temporary possession by vendee for a specific purpose, is not equivalent to delivery, i. 192-3.

COLLUSIVE, effects of, and of reputed ownership, i. 269-70.

LEGITIMATELY SEPARATED from the ownership, i. 274.

- For temporary purposes, i. 274.
- Under contract of loan, *ib*.
- In the course of contract of hiring, *ib*.
- In the course of contract of deposit, i. 276-7.
- Property remains with depositor, *ib*.
- Proof of identity of fungibles, i. 277-8.
- In the course of contract of pledge, *ib*.
- Of factory or mandate, i. 278-9.
- Money in hands of bank agent, i. 283.
- Goods sent on sale and return, i. 285.
- Transactions with bankers, i. 288-9.
- Consignments of goods for advances and sale, i. 294-5.
- Effect of changes on the property entrusted to bankrupt during possession, i. 294.
- Property acquired by fraud, i. 295.
- Change of property in temporary possession, i. 296-7.
- Fraudulent change, *ib*.

See REPUTED OWNERSHIP.

FOR FORTY YEARS, with charter of adjudication and sasine, i. 744-5.

- Necessary in pledge, ii. 20-1.
- By apparent heir for three years, i. 707-8.

SECURITIES RESULTING FROM, ii. 86-7.

- Lien or retention, ii. 87-8.
- Possession must be actual, *ib*.
- Must be legitimate, ii. 88-9.
- Lien expires with possession, *ib*.
- Whether it revives on possession, ii. 90-1.
- Compensation or set-off and balancing accounts on bankruptcy, ii. 118-9.

See LIEN—COMPENSATION.

POSSESSIONE RETENTA—

- Conveyance, i. 272-3.

See REPUTED OWNERSHIP.

POSTNUPTIAL contracts of marriage—

- Provisions by, how far effectual against creditors, i. 686-7.

- Where husband, at the time of granting, solvent, i. 687-8.
- How far effectual against Act 1621, ii. 177-8.

See MARRIAGE CONTRACT.

POST OFFICE not responsible on edict *Nautæ Caupones*, etc., i. 497-8.

- Officers liable for negligence, *ib*.

POSTPONED heritable creditors, whether have any control in a sale by preferable creditor, ii. 271-2.

POWER of sale in heritable securities, ii. 269-70.

See SALE.

PRACTICAL consultations as to arrangements between insolvent debtors and their creditors, i. 646, 651.

See ARRANGEMENTS.

PRÆCEPTIO HÆREDITATIS, i. 704-5.

PRÆPOSITURA—

- Implied mandate by, i. 509-10.
- Wife's *præpositura*, *ib*.
- When it ceases, *ib*.

PRÆPOSITURA—*continued*.

- Others who may be held *præposita rebus domesticis*, i. 509-10.

Institorial power, i. 510-1.

To clerk or shopman, *ib*.

To wife managing shop, *ib*.

To officers of a bank or bank agent, *ib*.

To traveller or rider in taking orders, receiving money, etc., i. 515.

Recall of general power *præpositura*, i. 522.

Effect of death, bankruptcy, *ib*.

Insanity, i. 525-6.

Express revocation, *ib*.

Mandate for particular occasion, *ib*.

Limited mandate, i. 526-7.

PRECEPT of *clare constat* personal to the heir, and cannot be assigned, i. 736-7.

Not necessary to describe the special character of the heir, *ib*.

Granted to heirs of provision, though particular character not specified, *ib*.

PRECEPT of sasine, i. 715, 716.

In what cases held as exhausted, i. 735-6.

In what case after execution a new sasine may be taken, *ib*.

Special precept, i. 736-7.

PRE-EMPTION, a legitimate condition of a feudal grant, i. 27-8.

It qualifies vassal's right while personal, i. 25-6.

Entering infeftment, it qualifies the feudal right, *ib*.

Irritancy not essential, *ib*.

If omitted in infeftment, does not affect third parties, i. 26-7.

How condition may be enforced by superior, *ib*.

Superior's remedy where fee already full without condition, *ib*.

Practical effect of the clause, i. 27-8.

PREFERABLE Creditor. See PREFERENCES.

PREFERENCES—

Of alienations challengeable under second branch of Act 1621, as in prejudice of diligence begun, ii. 92-3.

Title to challenge, ii. 185-6.

Deeds liable to challenge, ii. 187-8.

Preferences to particular creditors in prejudice of rest, granted after bankruptcy, Commentary on the Act 1696, c. 5, ii. 191-2.

History of the statute, ii. 192-3.

Comparison between Scottish rule as to retrospective bankruptcy, and that of England and France, ii. 193-4.

Statute consists of two branches—against securities for debts existing, and for debts to be afterwards contracted, ii. 194.

OF ALIENATIONS FOR DEBTS ALREADY DUE, ii. 194-5.

Provisions of the statute, *ib*.

Title to challenge, *ib*.

Trustee, interim factor, assignees, bankrupt, ii. 195.

There must be an interest to maintain it, ii. 195-6.

Form of the action, a reduction and declarator, *ib*.

Competent only to Court of Session, *ib*.

DEEDS LIABLE TO CHALLENGE, ii. 195-6.

Direct alienations, *ib*.

Delivery of goods, *ib*.

Returning goods, ii. 196-7.

Endorsations of bills and drafts, *ib*.

Security by absolute conveyance and backbond, *ib*.

Where debtor has been in possession of goods so as to raise credit on reputed ownership, ii. 197-8.

Security not granted to a creditor of bankrupt, but to creditor of another person, *ib*.

Indirect alienations, *ib*.

Giving obligation and vouchers of debt, *ib*.

Liens, etc., incident to transaction, ii. 199-200.

PREFERENCES—*continued.*DEEDS LIABLE TO CHALLENGE—*continued.*

Sale to creditor which raises a plea of compensation, ii. 199-200.

Supplementary deeds, *ib.*

EXCEPTIONS TO THE RULE of the statute, ii. 200-1.

Payments in cash, *ib.*

Cash includes circulating notes, ii. 201-2.

Transactions, payments, etc., in ordinary course of trade, ii. 202-3.

Payments by bills and notes, *ib.*

By bills and drafts, *ib.*

Analogy of English jurisprudence as to this, ii. 203-4.

Cases where payment by bills and drafts unchallengeable, *ib.*

Sale with indirect preference by set-off, ii. 204-5.

Factor transmitting bills, ii. 205-6.

Nova debita, *ib.*

Difficulties on this subject, *ib.*

Transaction with a security of date of advance, but sasine not taken till within sixty days of bankruptcy, ii. 206-7.

Security on moveables completed after the advance, ii. 207-8.

Acceptance within sixty days, ii. 208-9.

Where the completion requires debtor to interfere, *ib.*

Where the act to be done by debtor supposed to have been done at first, *ib.*

Where advance made on faith of security being afterwards completed, ii. 209.

Doubts on this question, ii. 209-10.

Security to a cautioner engaging for a prior debt, ii. 210-1.

TERM OF RETROSPECT, deed must be within sixty days of bankruptcy, ii. 213-4.

See BANKRUPTCY, ii. 166-7.

DATE OF THE DEED, ii. 213.

Date of heritable securities, *ib.*

Registration of sasine the rule, *ib.*

Where sasine not necessary, *ib.*

Where debtor not infert, ii. 213-4.

Conveyance without precept, ii. 214-5.

Dates of assignation of moveables, ii. 215-6.

Tradition in contract of sale, *ib.*

Acceptance the date of a draft, *ib.*

Date of endorsements, *ib.*

Effect of the reduction, ii. 216-7.

Where there is a sequestration, trustee should pursue to entitle all to the benefit, *ib.*

Where a general bankruptcy, but no sequestration, creditors should assign their debts to a trustee for general behoof, *ib.*

Not safe to trust to a reduction by one or two creditors, *ib.*

Defender entitled to assignation of pursuer's debt, *ib.*

Whether bankrupt can acquire right to challenge, *ib.*

Whether reduction to be accompanied with restitution to defender of his original rights, *ib.*

Distinctions, ii. 217.

OF SECURITIES FOR DEBTS TO BE AFTERWARDS CONTRACTED, and of the manner of securing a cash account heritably, ii. 217-8.

History of frauds practised under such securities, ii. 218-9.

See, for preliminary view of nature of heritable securities, i. 711-2.

No security for indefinite sums, ii. 218-9.

Description of securities for future debts, ii. 219.

What deeds are safe from challenge, and what reducible, *ib.*

Security for cautionary obligations, conveyance in real warrandice, security for discharge of office, *ib.*

Where part of sum only advanced, *ib.*

PREFERENCES—*continued.*OF SECURITIES, ETC.—*continued.*

Where part of sum paid, and purchaser or lender binds himself to pay rest to list of creditors, ii. 219.

No objection that money not paid on day sasine completed, ii. 219-20.

Of the method of securing cash accounts, and objections to heritable securities for that purpose, *ib.*

Attempts to reconcile such securities with law, ii. 220-1.

Security in relief of cautioner for cash account, ii. 222.

Where absolute disposition used as cover to future debt, ii. 222-3.

This security restricted, by recording backbond or judicial proceedings, ii. 223-4.

Heritable securities for cash accounts allowed by 33 Geo. III. c. 74, *ib.*

Nature of the cash accounts or credits that may be secured under the statute, ii. 224-5.

Ordinary cash accounts with bankers for limited sum, *ib.*

Similar credits with merchants, *ib.*

Whether security for credit in commodities allowable under the Act, *ib.*

Where credit stipulates that operations shall be by bills, and that person granting it shall never be in advance, ii. 225-6.

Effect of recording backbond where creditor holds absolute disposition, the bond describing the debt at a random sum, *ib.*

Securities for future debts over moveables, *ib.*

Challenge of trust-deeds under the Act 1696, ii. 389-90.

See BANKRUPTCY—HERITABLE SECURITIES—CHALLENGE.

BY ALIENATIONS and securities objectionable as frauds at common law, ii. 225-6.

Conveyances *omnium bonorum* to particular creditors, ii. 227-8.

Where deed not professedly *omnium bonorum*, *ib.*

Payment anticipated, ii. 228-9.

Concealment and false appearance necessary, *ib.*

Circuitous transaction, ii. 229-30.

Bestowing preferences unasked, *ib.*

Bankruptcy under acts not necessary to challenge, ii. 203-4.

Advancing money to insolvent not objectionable, *ib.*

Concealment of security, *ib.*

BY BANKRUPT AFTER SEQUESTRATION, ii. 232-3.

Of real securities on price of land sold under sequestration, ii. 344, 364.

What real securities, *ib.*

Effect of inhibition, *ib.*

How far creditors with preferable securities liable for expenses of sequestration, ii. 347-8.

Creditors with real securities must value and deduct security previous to ranking, ii. 306-7.

Effect of changes on value of security, *ib.*

See RANKING.

Payments and securities received abroad after first deliverance must be communicated, ii. 315-6.

Assignation in composition contract to bankrupt of right to challenge preferences, ii. 356-8.

Effect of discharge by composition against creditors with preference, *ib.*

See CONCURRENCE.

ARISING FROM REAL VOLUNTARY SECURITIES over feudal estate, i. 711.

Voluntary securities, i. 712.

By judicial securities on land, i. 739-40.

Adjudication, *ib.*

Adjudication in implement, i. 782-3.

Judge and warrant, i. 784.

Declarator, i. 785.

Accessories to land, i. 786.

See ADJUDICATION—SECURITIES—SASINE—ANCESTOR.

PREFERENCES—*continued.*ARISING FROM REAL VOLUNTARY SECURITIES—*continued.*

- By voluntary securities on simple heritage, i. 789-90.
- Leases criterion of preference, *ib.*
- Completion of right to woods, i. 792-3.
- To quarry, mines, or coal, *ib.*
- Assignations of liferent, *ib.*
- Servitude, i. 793-4.
- Incorporeal subjects, *ib.*
- Assignation to rents, *ib.*
- Judicial securities over simple heritage, i. 794-5.
- Rules of preference of adjudications of heritage not feudal, *ib.*

See SECURITIES.

- By voluntary securities over moveables, ii. 10.

- By assignations, ii. 15.

- By pledge, ii. 19-20.

- By hypothec, *ib.*

- By judicial securities over moveables, ii. 40-1.

- Extent of Crown, *ib.*

- By poiding, ii. 55-6.

- By arrestment, ii. 62, 69.

- Pari passu* preference of arrestments, ii. 73.

- Of debtor's creditors after his death, ii. 82-3.

- Of creditors of deceased over creditors of executor, ii. 85-6.

See ASSIGNATION—POINDING—ARRESTMENT—EXTENT.

PARI PASSU PREFERENCE of adjudications within year and day, i. 754-5.

- Preference of ancestor's creditors, i. 763-4.

See ADJUDICATION—ANCESTOR.

OF PREFERENCES FROM POSSESSION, ii. 86-7.

- Lien or retention, ii. 87.

- By compensation, ii. 118.

See LIEN—COMPENSATION.

BY EXCLUSION, ii. 132-3.

- Personal exceptions to claims of preference, and consents to a preference, *ib.*

- Preference by inhibition, ii. 133-4.

- Preference by litigiousity, ii. 143-4.

- From privileged debt, ii. 147.

- Ranking of preferences on moveable fund, ii. 405-6.

- Of preferences by exclusion, ii. 406-7.

- Inhibitors with adjudgers, *ib.*

- Canons of ranking, ii. 413.

- Ranking of double securities, ii. 413-4.

MEASURES OF CREDITORS under trust-deed to prevent, ii. 386, 389, 490-2.

- Under a private composition, ii. 399-400.

See ARRANGEMENTS—TRUST-DEED.

- Preferences received abroad, ii. 574.

See FOREIGN.

PREMIUM of insurance, i. 645-6.

- History and use of the receipt in policy, *ib.*

- Claim of underwriter for, *ib.*

- Bankruptcy of broker entitles underwriter to claim unpaid premiums, i. 646-7.

- Onus probandi* on underwriters to show that premiums not paid, i. 648-9.

- Claim by broker for premiums, *ib.*

- Grounds of claim, *ib.*

- Receipt in policy no bar, *ib.*

- Proofs to support claim, i. 648-9.

- Amount of claim, *ib.*

- Diminished by return premiums, *ib.*

- When return premiums are due, *ib.*

- Claim for loss no answer to broker, *ib.*

- Premiums cannot be retained till risk determined, *ib.*

- Premium under fire insurance, i. 673-4.

- No lien on premium, ii. 115.

- Question of compensation in relation to premiums on bankruptcy, ii. 126-7.

VOL. II.

PREMIUM—*continued.*

- Return premiums, whether can be set off by broker on underwriter's failure, ii. 128-9.

See INSURANCE—LIEN—COMPENSATION.

PREPOSITUS NEGOTIIS, implied power of partner of company as, ii. 503-4.

See PREPOSITURA—PARTNERSHIP.

PRESCRIPTION—

- Commentary on certain prescriptions presuming falsehood, i. 346-7.

VICENNIAL, of holograph obligations, *ib.*

- Computation of the twenty years, i. 347-8.

- Point to be proved by oath of party after the twenty years, *ib.*

- It runs not against minors, *ib.*

QUINQUENNIAL, of bargains, i. 347-8.

TRIENNIAL PRESCRIPTION of book debts or accounts, i. 348-9.

- Debts to which this prescription is applicable, *ib.*

- Time from which the three years run, *ib.*

- Where the debt is payable termly, *ib.*

- What is held the close of an account, *ib.*

- Where it is an account of successive articles, *ib.*

- Where the account is continuous, without an interval of three years, *ib.*

- Effect of interruption or interval of three years, i. 349-50.

- Death of the debtor, *ib.*

- Points to be established by the creditor where prescription has run, *ib.*

- Constitution of the debt, *ib.*

- Answer to the plea of prescription, *ib.*

- Written constitution of the debt, *ib.*

- Effect of a written order for goods, *ib.*

- Proof of resting owing, *ib.*

- By writing, *ib.*

- Writing after the three years, *ib.*

- Within the three years, *ib.*

- Nature of the writing required, i. 350-1.

- Jottings, books of accounts, etc., *ib.*

- Proof by oath of party, *ib.*

- Points to be referred, *ib.*

- Questions and answers, *ib.*

- Intrinsic and extrinsic qualities in the debtor's oath, *ib.*

- Erroneous doctrine of Erskine where demand made during the three years, *ib.*

- Bankruptcy of debtor does not bar the reference to his oath, i. 351-2.

- Where debtor is dead, *ib.*

- Minority not pleadable in bar of this prescription, *ib.*

- Interruption of, by proving debt in ranking and sale, ii. 266-7.

- In sequestration, ii. 219-20.

- Fatal to adjudication, i. 776-7.

NEGATIVE, of simple money bonds or agreements, i. 352-3.

SEPTENNIAL, of cautionary obligations, i. 373-4.

SEXENNIAL, of bills, i. 418-9.

- Time from which the term runs, *ib.*

- How to preserve bill from prescription, *ib.*

- Difference between the Scottish prescription and the English limitation, i. 419-20.

- Construction of the Scottish law as to annulling the obligation, *ib.*

- Interruption of prescription, i. 420-1.

- Years of minority not computed, *ib.*

OF ARRESTMENT, ii. 65.

OF SEAMEN'S WAGES, i. 562-3.

PRESENTATION, bond of, i. 401-2.

- Cautioner's obligations, *ib.*

- Distinction between it and bond of caution *judicio sisti*, i. 398-9.

PRESENTMENT of bill for acceptance, i. 432-3.

- For payment, i. 433.

- Time of presenting, i. 434.

PRESENTMENT—continued.

- Place, i. 436.
- Presentment of debtor frees cautioner *de judicio sisti*, i. 399-400.
- Fulfillment of obligation under bond of presentation, i. 401.
- Presentment of sasine for recording, i. 718-9.
- PRESERVATION** of bankrupt estate previous to election of interim factor, measures for, ii. 299-301.
- PRESUMED** fraud, i. 262, 263.
- See **FRAUD—FRAUDULENT ALIENATIONS.**
- PRESUMPTION** against owners of stage-coaches, as to carelessness, etc., of drivers, i. 492-3.
- Of seaworthiness, i. 663-4.
- How defeated, *ib.*
- Of gratuitous, under 1621, ii. 177-8.
- PRICE** of lands in judicial sale—
 - Upset price, ii. 252-3.
 - Lowering of, *ib.*
 - Security for payment of, ii. 256-7.
 - Consignment of price, *ib.*
 - Discharge of price, ii. 257-8.
 - Title to the reversion, ii. 261-2.
 - Recovery of price, ii. 268-9.
 - Preferable securities on price of land sold under sequestration, ii. 344, 363.
 - What are preferable securities, *ib.*
 - Purchaser no concern with application after discharging burdens, *ib.*
 - Whether price heritable or moveable, ii. 6.
 - Where it has been consigned, *ib.*
- PAYMENT OF**, effect of, in questions of delivery, i. 179.
- As to stopping *in transitu*, i. 241.
- Part payment, *ib.*
- Effect of payment where subject sold acquired by fraud, i. 295-6.
- See **DELIVERY.**
- UNDER CONTRACT OF SALE** must be certain, i. 481-2.
- PRIMAGE**, or hat money, i. 614-5.
- PRINCIPAL AND AGENT—**
 - Right of stopping *in transitu* does not exist between, i. 244-5.
 - Compensation between, ii. 124-5.
 - Factor dealing in his own name, *ib.*
 - Or *factorio nomine*, ii. 125-6.
 - Where he holds a *del credere* commission, *ib.*
 - See **MANDATE—FACTOR.**
- RESPONSIBILITY FOR SERVANTS**, i. 494-5.
- See **NAUTÆ CAUPONES**, etc., *ib.*
- Claims under contracts of commission or mercantile agency, i. 526-7.
- On bankruptcy of principal against third parties, *ib.*
- Against agent, i. 530-1.
- By agent against principal, *ib.*
- By third parties, *ib.*
- On bankruptcy of factor, i. 537-8.
- Against third parties, *ib.*
- Against principal, i. 539-40.
- By third parties, *ib.*
- By principal against agent's estate for negligence, i. 544-5.
- See **COMMISSION—MANDATE—RANKING—CROSS BILLS.**
- PRINCIPAL AND INTEREST**, accumulation of, i. 695-6.
- PRINCIPAL DEBTOR**, discharge of, its effect in freeing cautioner, ii. 356, 367.
- PRINTER** cannot sell unpublished book for his payment, i. 113-4.
- His lien over it, ii. 99.
- CALICO**, lien of, ii. 102-3.
- PRIOR** debts, securities for, challengeable on 1696, ii. 191-2.
- Concealment of security a fraud, ii. 232-3.
- Challenge by prior creditors on 1621, ii. 172 3.

PRIOR—continued.

- OBLIGATIONS**, deeds in fulfilment of, how far onerous in sense of Act 1621, ii. 177-8.
- Security to a cautioner for a prior debt, ii. 210-1.
- PRISON**, responsibility of magistrates for sufficiency of, ii. 437-8.
- Jail fees, ii. 444.
- Debtor cannot be detained for jail fees after paying debt, *ib.*
- Prison in the sanctuary, ii. 463-4.
- See **IMPRISONMENT.**
- PRISONER** may insist on being carried to next sufficient prison, ii. 436-7.
- Recording in jail books, *ib.*
- How may be liberated, ii. 437-8.
- Liability of magistrates and messengers for, *ib.*
- Liberation on bill of health, ii. 441-2.
- Certificate of surgeon must be on oath, *ib.* note.
- Restraint upon debtor, *ib.*
- Provision for safe custody, *ib.*
- Must be confined to a house, unless illness requires air and exercise, *ib.*
- Security for his return, ii. 442-3.
- Maintenance of prisoners, ii. 443-4.
- Creditors bound for, if debtor unable, ii. 444-5.
- Jail fees for fire, bedding, etc., must be paid by prisoner, *ib.*
- Jail fees a good debt against prisoner, *ib.*
- Cannot be detained for them after debt paid, *ib.*
- Whether different where liberated for want of aliment, *ib.*
- Jailor cannot retain fees out of aliment, *ib.*
- Act of Grace, liberation under, ii. 445.
- Application of the Act, *ib.*
- Applies only to prisoners for civil debt, *ib.*
- Prisoner, for damages to private party, although *ex delicto*, entitled to benefit of Act, ii. 445-6.
- Prisoner denied *cessio* entitled to benefit, *ib.* note.
- Where imprisonment for punishment of crime, or fine to public, *ib.*
- Prisoners *ad factum præstandum*, ii. 446-7.
- Rate of aliment, *ib.*
- Debtor must be unable to maintain himself, ii. 447-8.
- Intimation to creditor of application, *ib.*
- Conveyance *omnium bonorum*, *ib.*
- Effect of liberation on the Act, ii. 448-9.
- Prisoner *ad factum præstandum* denied sanctuary, ii. 461-2.
- See **CESSIO—IMPRISONMENT—ACT OF GRACE—SANCTUARY.**
- ON MEDITATIO FUGÆ WARRANT**, difference between, and prisoner for debt, ii. 456-7.
- Liberation of, on bail, ii. 457-8.
- May be imprisoned within sanctuary, ii. 456-7.
- IN ABBEY JAIL**, for debt contracted within sanctuary, ii. 463-4.
- Entitled to bill of health and Act of Grace, *ib.*
- PRIVATE COMPOSITIONS** for settling insolvency, ii. 398-9.
- See **TRUST-DEEDS—COMPOSITIONS—ARRANGEMENTS.**
- PRIVILEGE** of Admiralty as to previous attachment of debtors, ii. 449-50.
- Of protection from arrest for debt to soldiers and sailors, ii. 454-5.
- From *meditatio fugæ* warrants, *ib.*
- PERSONAL** exemption from imprisonment for debt by, ii. 458-9.
- Privilege of time or place, ii. 460-1.
- See **PROTECTION.**
- PRIVILEGED** persons—
 - Persons holding privilege of Parliament, or any other privilege against arrest, may be rendered bankrupt, ii. 156-7.

PRIVILEGED—continued.

Diligence requisite, ii. 163-4.

Protection of, from imprisonment for debt, ii. 459-60.

DEBTS, ii. 147-8.Funeral expense, *ib.*Where person dies a bankrupt, or where insolvency unknown, *ib.*

Mourning included, ii. 148-9.

Funeral expense of wife or children, *ib.*Medical attendance, *ib.*Servants' wages, *ib.*Domestic servants, *ib.*

Farm servants, ii. 149-50.

Wages of artisans, overseers, clerks, not privileged, *ib.*Revenue privileges, *ib.*

Ministers' Widows' Fund, ii. 150-1.

Friendly societies, *ib.***DEEDS, i. 341-2.**

See WRITINGS.

CREDITORS, ranking of, on moveable fund, ii. 406-7.**PROCEEDINGS at meetings of creditors, ii. 330-2.**Minutes, *ib.*

At meeting electing trustee, ii. 312-3.

See SEQUESTRATION—MEETINGS.

PROCULEIANI, their controversy with the Sabiniani concerning specification, i. 294-5.**PROCURATION—**

To subscribe bills, i. 424-5.

Inferred from practice of so subscribing, *ib.*, 509-10.

Requisites in subscribing per procuration, i. 425-6.

Recall of procuration, *ib.*

Subscription of policies of insurance by procuration, i. 646-7.

GENERAL or *præpositura*, i. 509, 517.

How recalled, i. 522-3.

Effect of death, bankruptcy, insanity, *ib.*Express revocation must be made publicly known, *ib.*, 525-6.**PRODUCTION—**

Of claims in ranking and sale, ii. 265-6.

Does not render debt heritable, ii. 6.

Of grounds and vouchers of claim in sequestration, ii. 309-11.

PROFESSIONAL men, responsibility of, for skill, i. 488-9.

See LOCATION.

PROFIT, insurance of, i. 653-4.**PROFIT and LOSS—**

Partners equal sharers in, except where otherwise stipulated, ii. 503-4.

Participation of profits infers partnership, ii. 510, 534.

Division of, on dissolution of company, ii. 537-8.

See PARTNERSHIP.

PROFITS, ranking of creditors on, ii. 406-7.**PROHIBITIONS—**

In feudal grants, i. 25-6.

Against alienation, *ib.*

Clause of pre-emption, i. 27-8.

Prohibitions to subfeu, i. 28-9.

Effect of, in entails, i. 43-4.

Obligation on heir to re-invest price where he has sold under prohibition, but without irritant and resolute clauses, *ib.*

See CONDITIONS.

PROMISE by letter to accept bill equivalent to assignation, i. 422-3.

See OBLIGATIONS.

PROMISSORY NOTES, i. 412-3.

See BILLS OF EXCHANGE.

PROOF—

Of insolvency, ii. 155, 158.

Of onerous consideration in a challenge on 1621, ii. 176-7.

PROOF—continued.

Of alienations without consideration reducible at common law, ii. 184-5.

Proof of insolvency in ranking and sale, ii. 237-9.

Of value of land in ranking and sale, ii. 251-2.

Of rental, ii. 251.

Of debts in ranking and sale, ii. 265.

Stops prescription, ii. 266-7.

Form of proof, ii. 265.

OF DEBTS UNDER BANKRUPTCY, ii. 288, 309, 361.

See SEQUESTRATION.

Proof of debts in sequestration of a company, ii. 564-5.

OF DEBT by account, i. 347-8.

After triennial prescription, i. 349.

Effect of debtor's bankruptcy, i. 351.

Parole proof allowed in mercantile contracts, i. 347-8.

OF LOSS under the edict *Nautæ Caupones*, etc., i. 500.

To support claim for premiums of insurance, i. 648.

To support claim for loss, i. 653-4.

Master and crew good evidence, log-book, i. 658-9.

OF CHARTER-PARTY, i. 586.

Of built of a ship, i. 151.

Of accession to trust-deed, ii. 393-4.

Proof necessary to support application for *meditatio fugæ* warrant, ii. 451-2.

See ONUS PROBANDI—EVIDENCE.

PROPERTY in hands of bankrupt, how identified after having suffered change, i. 294-5.

Property acquired by fraud, i. 295-6.

Change on property possessed on legal contract, i. 296-7.

Effect of fraud and personal exceptions against purchasers and creditors, i. 297-8.

Effect of radical objections, and of conditions and personal exceptions in questions of property, *ib.*

See RIGHTS—POSSESSION—REPUTED OWNERSHIP.

PROPOSALS of insurance, a part of the contract, i. 672, 675.**PROROGATION of lease, i. 65, 69.**

See LEASE.

PROTECTION, personal, to bankrupt, ii. 298.

Personal protection to partners in sequestration of a company, ii. 565.

FROM IMPRISONMENT FOR DEBT, ii. 458-9.By personal privilege, *ib.*

Minors, idiots, lunatics, ii. 459.

Privilege of Parliament, Peers, and members of Parliament, ii. 459-60.

By privilege of time and place, *ib.*Holidays, *ib.*

Sanctuary, ii. 461-2.

Implied where debtor taken from sanctuary by warrant of Court, ii. 462-3.

PERSONAL PROTECTION and SUPERSEDERE, ii. 464-5.History of protections, *ib.*

In England, ii. 465.

In Scotland, *ib.*

Royal protection, ii. 466.

Temporary, for purposes of justice, ii. 466-7.

Under Bankrupt Acts, *ib.*

For attending examinations, ii. 469-70.

For giving assistance to creditors, *ib.**Supersedere, ib.*

English law of protection to bankrupts, ii. 469-70.

See CESSIO.

PROTEST OF BILLS and notes, i. 437-8.Requisites of instrument of protest, *ib.*

Whether can be dispensed with, i. 438.

For non-acceptance, i. 439.

For non-payment, *ib.*

Equivalents of protest, i. 444-5.

Protest for honour, i. 447-8.

Exceptions to rules as to protest, *ib.*

Rules as to, in accommodation bills, i. 450-1.

PROTEST OF BILLS—continued.

- Want of protest in accommodation bills, i. 450-1.
- FOR DEMURRAGE, i. 624-5.
- Not indispensable, *ib.*
- PROVISION, bonds of, challengeable on deathbed, i. 88-9.
- Heir of, extent of his liability, i. 703-4.
- PROVISIONS in contract of marriage, how far onerous in sense of Act 1621, c. 18, ii. 177-8.
- Where children have *jus crediti*, *ib.*
- Postnuptial provisions, *ib.*
- CLAIMS FOR, by wives and children, i. 676-7.
- Legal rights of wife and children independently of special contract, i. 678-9.
- Dissolution of marriage within year and day, i. 679-80.
- Where marriage subsists for a year, or is productive of a living child, i. 679-80.
- Distinction between the claim for aliment of a lawful and of an illegitimate child, i. 680.
- BY WIFE AND CHILDREN under bonds of provision and marriage contract, i. 680-1.
- Antenuptial contracts, i. 681-2.
- Provisions to children by antenuptial contract, i. 684-5.
- Provisions under postnuptial contracts, i. 686.
- How far provisions safe from challenge under 1621, c. 18, ii. 176-7.
- See MARRIAGE CONTRACTS—BONDS OF PROVISION.
- PUBLIC BURDENS, i. 739.
- Land-tax, *ib.*
- Repairs of churches and manſes, i. 739-40.
- Hypothec for duties, ii. 39-40.
- PUBLIC CARRIERS, responsibility of, i. 491-2.
- On edict *Nautæ Caupones*, etc., i. 496-7.
- Limitation of their responsibility, i. 501-2.
- Transference of goods in hands of, i. 212.
- Delivery to, for buyer, i. 219-20.
- See CARRIER.
- PUBLIC COMPANIES, constitution of, ii. 545-6.
- Chartered companies, *ib.*
- Stock of, i. 101.
- See PARTNERSHIP.
- PUBLIC HOLDING, sasine on preference of, i. 722-3.
- PUBLIC OFFICERS, whether salary of, attachable, i. 123-4.
- PUBLIC POLICY, contracts against, i. 320-1.
- Contracts inconsistent with internal policy, *ib.*
- Restraints on marriage, *ib.*
- On natural liberty, i. 321-2.
- Contracts against public policy and the revenue law, i. 322-3.
- Of war policy, *ib.*
- Neutrals, i. 323-4.
- Licences, *ib.*
- Contraband of war, i. 324.
- Blockade, *ib.*
- Alien enemy's debt, i. 325.
- Contraband of trade or smuggling contracts, *ib.*
- Usurious contracts, i. 327-8.
- Effect of illegal contracts against strangers, i. 330-1.
- See OBLIGATIONS—CONTRACTS.
- PUBLICATION of first effectual adjudication, i. 759-60.
- Recording abbreviate, *ib.*
- Of sequestration and meetings of creditors, ii. 297, 330.
- Of petition for bankrupt's discharge, ii. 366.
- For approval of composition, ii. 349.
- Of dissolution of partnership, ii. 529-30.
- Of interdictions, i. 135-6.
- Of inhibition, ii. 134-5.
- PUPIL—
- Of restitution against the deeds of pupils, i. 127-8.
- Deeds by pupils, *ib.*
- By tutors, *ib.*
- Deeds affecting land, *ib.*
- Deeds of administration, i. 128-9.

PUPIL—continued.

- Of extraordinary administration, i. 128 9.
- Deeds by pupil *ipso jure* null, i. 129-30.
- Deeds with concurrence of tutors, *ib.*
- Reduction, i. 130-1.
- Extent of restitution, i. 131-2.
- See RESTITUTION.
- May be made bankrupt, ii. 156-7, 164-5.
- Incapable of consent, i. 127-8.
- Protected from imprisonment, ii. 458-9.
- Whether may be partner of company, ii. 513-4.
- Cognition and sale of lands by, ii. 239-40.
- PURCHASE, generic and specific, distinction between, in question as to delivery, i. 179-80.
- JOINT, not a partnership, ii. 543-4.
- PURCHASER, effect of radical defeat of title against, i. 298-9.
- In heritable rights, incorporeal rights, moveables, i. 299-300.
- Purchaser in public market, *ib.*
- Fraud of debtor not a radical defect of title affecting purchaser, i. 300-1.
- Effect of rights held under qualifications and conditions, *ib.*
- In land rights, *ib.*
- In personal rights to land, i. 301-2.
- In *jura incorporalia* unconnected with land, i. 302.
- In moveables, i. 304.
- Sale by breach of trust, *ib.*, 306-7.
- In public market, *ib.*
- Stellionate, i. 307-8.
- DANGER OF, from lands being disposed in real warrandice beyond the years of prescription, i. 733-4.
- How far safe from challenge on 1621, ii. 182.
- Effect of notice, ii. 183-4.
- Security against challenge on second branch of 1621, ii. 190-1.
- FACTOR IN SEQUESTRATION, whether he can become, ii. 247.
- Common agent in ranking and sale, ii. 250.
- Trustee in sequestration cannot purchase, ii. 344.
- AT JUDICIAL SALE, security by, for payment of price, ii. 256-7.
- Consignment of the price, *ib.*
- Discharge of the price, ii. 257-8.
- Title of the purchaser, effect of stipulations in the articles of roup, and extent of the right, *ib.*
- Security which purchaser enjoys, *ib.*
- Where no defect in bankrupt's right, *ib.*
- How far creditors protected against future warrandice, *ib.*
- General idea of the effect of decree of sale, *ib.*
- Against bankrupt, and those in his right, ii. 258-9.
- Res noviter veniens ad notitiam*, ii. 259-60.
- Decree in absence of holders of real burdens, *ib.*
- Minority, insanity, etc., of person interested to challenge sale, *ib.*
- Effect of decree against the creditors, ii. 260-1.
- Warrandice to the purchaser, *ib.*
- Conveyances to him by the creditors, *ib.*
- Reversion of price, who is to discharge it, ii. 261-2.
- Stipulations as to title in articles of roup, ii. 262.
- Extent of the purchaser's right, ii. 262-3.
- Effect of the description in judicial rental, *ib.*
- Deductions for what not made effectual, *ib.*
- Effect of statements of value, advantages, etc., ii. 262-3.
- Effect of a measurement in the description, ii. 263-4.
- Creditors bound to assign their securities to purchaser, ii. 268-9.
- AT A SALE BY AN HERITABLE CREDITOR under his security, ii. 270-1.
- WITH A PERSONAL RIGHT, his danger of being defeated by creditors, ii. 496-7.

PURCHASER—*continued*.WITH A PERSONAL RIGHT—*continued*.

Competition of adjudication in implement by purchaser, with adjudication by creditors in implement of a judicial or voluntary conveyance, ii. 496-7.

PURE DEBT, nature of, i. 332-3.

Pure debt as warrant for sequestration, ii. 286-7.

Ranking of, with interest accumulated as at date of first deliverance, ii. 364-6.

PURSUE, title to. See TITLE—PERSONA.

PURSUER, his interest in multiplepoinding, ii. 276-7.

Of *cessio*, his title, ii. 472-3.

Of reduction under 1621, ii. 171, 185.

Under 1696, ii. 194.

Of ranking and sale, ii. 240.

Death of, ii. 241-2.

QUADRIENNIUM UTILE, i. 130.

QUALIFICATION to vote at meetings of creditors, ii. 331-2.

Agents and attorneys with mandates, *ib*.

To vote for trustee, ii. 304-5.

Conjunct and confident, *ib*.

Contingent creditor, *ib*.

To vote for commissioner, ii. 320-1.

See PROOF OF DEBTS.

TO BE INTERIM FACTOR, ii. 299-301.

To be trustee, ii. 302-3.

Conjunct and confident persons ineligible, *ib*.

Creditor with adverse interest also, *ib*.

Incompatibility, ii. 303.

Distant residence, *ib*.

Corrupt election, *ib*.

Effect of bankruptcy, *ib*.

To be commissioner, ii. 320-1.

OF SHIPMASTER, must be a British subject, i. 554-5.

QUALIFICATIONS and conditions in land rights, how far effectual against creditors or purchasers, i. 300-1.

Real rights, *ib*.

IN PERSONAL RIGHTS TO LAND, how far effectual against third parties before infeftment, i. 301-2.

How the qualification is discharged, and becomes merely personal, *ib*.

IN PERSONAL RIGHTS UNCONNECTED WITH LAND, commonly called *jura incorporalia*, i. 302-3.

Jura incorporalia in hands of a purchaser, are not qualified by any collateral obligation or latent trust not appearing in deed by which they are constituted, *ib*.

Whether creditors entitled to benefit of same rule, i. 304-5.

QUALIFICATIONS OF RIGHTS IN MOVEABLES, i. 304-5.

Distinction between creditors and purchasers, *ib*.

Purchasers of moveables in market, or otherwise *bona fide*, acquire right to them, though sold by person who was not owner, i. 306-7.

Stolen goods, *ib*.

Where a creditor holding moveables in pledge sells them, is *bona fide* purchaser entitled to hold goods against true owner? *ib*.

In England true owner may follow his property unless where sale took place in open market, *ib*.

In Scotland no such regard paid to open market, *ib*.

A factor having goods consigned to him may sell; in England he cannot pledge them for his own debt, *ib*.

See PLEDGE—PERSONAL EXCEPTIONS—FRAUD.

QUALIFIED RIGHTS, i. 300-1.

Cases where qualification of bankrupt's right effectual against third parties, *ib*.

QUALIFIED TRUST-DEED, ii. 382-3.

QUARRY, completion of a right to, i. 792-3.

QUINQUENNIAL prescription of bargains, i. 347-8.

RADICAL defect of title, effect of, against purchasers and creditors, i. 298-9.

RANKING and SALE—

History of judicial sale, ii. 232-3.

See SALE.

Of the ranking of the creditors after judicial sale, ii. 263-4.

Object of this part of the process, *ib*.

Relation of the two parts of the process, ii. 264-5.

Proof of debts, 265-6.

Form of proof, *ib*.

Stops prescription, ii. 266-7.

Effect of decree of certification, *ib*.

State of interests and order of ranking, *ib*.

Scrutiny of the debts, *ib*.

Objections discussed, *ib*.

Decree of ranking, ii. 267-8.

Effect of it against creditors, *ib*.

Scheme of division and decree, *ib*.

Recovery of price, ii. 268-9.

Creditors must assign their securities, *ib*.

Ranking and sale under sequestration law, ii. 269-70.

Whether ranking and sale competent after trust-deed, ii. 390-1.

OF CREDITORS UNDER SEQUESTRATION. See PROOF OF DEBTS, ii. 364-5.

See SEQUESTRATION.

CLAIM IN A, whether makes debt heritable, ii. 6.

Of personal creditors, i. 331-2.

Debt gratuitous, *ib*.

Future and contingent debts formerly excluded in England, i. 332-3.

Distinction betwixt Scottish and English law as to this, *ib*.

Principle of English law as to future and contingent debts, i. 333-4.

Claims on bonds and agreements, i. 352-3.

Simple money bonds, *ib*.

English double bonds, *ib*.

Bonds *ad factum præstandum*, *ib*.

Claims for liferent annuities and other contingent debts, i. 352-3.

Liferent annuities, *ib*.

Rules of ranking, i. 353-4.

Rules of ranking redeemable annuities, i. 359-60.

Cautionary obligations, i. 364-5.

On counter accommodation bills, i. 574-5.

Can be no double ranking, *ib*.

Effects of the several ways of disposing of cross paper, i. 576-7.

See MERCANTILE CONTRACTS.

Maritime contracts, i. 545.

Bottomry creditors, i. 588.

Insurance contract, i. 643, 671, 675.

Marriage contract and provisions to wife and children, i. 679.

Warrandice, i. 689.

Damages, i. 697.

Penalties, i. 698.

Of reserved burdens, i. 731, ii. 406-7.

AND DIVISION OF FUNDS amongst creditors, ii. 401-2.

Each division of the estate a distinct fund, *ib*.

Order of ranking of creditors holding securities over feudal estate, where no excluding diligences or consents, *ib*.

Competition on a single feudal estate, *ib*.

Where the only competitors are creditors of bankrupt himself, and the estate a single indivisible subject, creditors holding only one security each, *ib*.

Order of ranking, *ib*.

Superior—securities, voluntary or judicial, completed by *sasine*, *ib*.

Security by reservation, terce, courtesy, ii. 403-4.

RANKING and SALE—*continued.*AND DIVISION OF FUNDS—*continued.*

- Adjudications completed by signature or charge, ii. 403-4.
- Ranking of adjudgers in competition with each other, *ib.*
- Adjudications within year and day—after year and day—
—a security coming between first effectual and posterior
adjudgers—voluntary security coming between ad-
judgers, *ib.*
- Principle and mode of ranking of intervening inhibitions,
ii. 404-5.
- State of the effect of the different modes of ranking two
pari passu adjudgers, and an heritable bond interven-
ing between the adjudications, *ib.* note.
- Adjudication in implement among simple adjudgers, *ib.*
- Creditors of ancestor competing with creditors of heir, i.
765.
- See ANCESTOR.
- OF CREDITORS CLAIMING PREFERENCE over heritable prop-
erty unfeudalized, ii. 405.
- OF CREDITORS HOLDING SECURITIES over moveable fund, ii.
405-6.
- Goods in general, order of ranking on, ii. 406-7.
- Debts in general, order of ranking on, *ib.*
- Debts in general, *ib.*
- Ship, order of ranking on, *ib.*
- Freight, order of ranking on, *ib.*
- Cargo, order of ranking on, ii. 407.
- Subject of an action, ranking on, *ib.*
- Rents, *ib.*
- Profits, *ib.*
- Corn-stacks, *ib.*
- OF CREDITORS ENTITLED TO PREFERENCES BY EXCLUSION, ii.
406-7.
- Confusion of principles arising from supposed equity, *ib.*
- Rule for ranking, *ib.*
- First mode of ranking *vinco vincentem*, ii. 407-8.
- Grounds on which it was maintained, *ib.*
- Error of this ranking, *ib.*
- Second mode of ranking, *ib.*
- Grounds on which it was maintained, *ib.*
- Error also in this scheme, *ib.*
- Third and true mode of ranking, *ib.*
- Ground of this scheme, *ib.*
- Sketch of the effect of these several modes of ranking, ii.
409-10, note.
- View of the decisions, *ib.*
- Cockburn of Langton's bankruptcy, *ib.*
- Sir William Nicholson's bankruptcy, ii. 410.
- Doubtful points remaining, ii. 411-2.
- From whom of the adjudgers, etc., the inhibitor is to be
paid, ii. 412.
- Canons of ranking, ii. 413-4.
- View of ranking on true principle, *ib.* note.
- OF DOUBLE SECURITIES, ii. 413-4.
- One indivisible estate over which creditors hold double
securities, ii. 414-5.
- Adjudication by creditor holding heritable security, *ib.*
- Uses of such diligence, *ib.*
- For what to be ranked, *ib.*
- Effect of inhibition on bond of corroboration, *ib.*
- Cannot adjudge same estate twice for same debt, ii.
415-6.
- Where two or more distinct subjects, over each of which
there are securities for same debt, *ib.*
- Double securities over separate estates, *ib.*
- Where creditor holds collateral securities by caution, or
over property not the bankrupt's, ii. 416.
- OF CATHOLIC AND SECONDARY CREDITORS, ii. 416-7.
- Creditor bound to claim against primary debtor, or to
assign to the cautioner, *ib.*
- And to claim equally against co-principals, or to assign
to obligant paying the whole, *ib.*

RANKING and SALE—*continued.*OF CATHOLIC AND SECONDARY CREDITORS—*continued.*

- Where two estates of debtor covered by same security,
creditor may take payment from either, ii. 417-8.
- But where a separation of interest (*ex. gr.* debtor dying
and succeeded by two heirs), catholic creditor bound
to claim equally from the two estates, *ib.*
- Same where secondary creditors; where secondary credi-
tors on one estate only, *ib.*
- What interest sufficient to affect catholic creditor, *ib.*
- Same doctrine in moveables, ii. 418-9.
- Distinction where catholic creditor interested, *ib.*
- Right of creditors holding securities to rank on general
fund, ii. 419-20.
- Right at common law, *ib.*
- Altered by Sequestration Act, *ib.*
- Still subsists in other cases, *ib.*
- Valuing securities, *ib.*
- Effect of payments and intromissions on claims of credi-
tors holding securities, ii. 424-5.
- Effect of bankruptcy in claiming against co-obligants,
ii. 426-7.
- Where creditor holds securities under Bankrupt Statute,
ib.
- Mode of valuing and giving effect to securities under
Sequestration Act, *ib.*
- RASHNESS of drivers of coaches, claims by passengers for,
i. 491-2.
- RATE of aliment to prisoner for debt, ii. 446-7.
- Of commission or brokerage, i. 515.
- Of interest, i. 595.
- Of trustee's commission, ii. 320, 361.
- RATIFICATION of exceptionable deeds, i. 137-8.
- Ratification by married woman, *ib.*
- By minors, i. 138-9.
- By an heir, *ib.*
- In what cases ratification may be ineffectual, i. 139-40.
- Implied assent, or confirmation of previous deeds or con-
tracts, *ib.*
- Homologation, *ib.*
- Approbate and reprobate, i. 141-2.
- REAL RIGHT—
- Criterion of, i. 297-8.
- Jus in re* and *jus ad rem*, *ib.*
- Radical defect of title in the debtor, i. 298-9.
- Rights held under qualifications and conditions, i. 300-1.
- Land rights, *ib.*
- Real rights, *ib.*
- Personal rights, i. 301-2.
- Jura incorporalia* unconnected with land, i. 302-3.
- Personal exceptions, i. 306.
- Exceptions of fraud, i. 309.
- CONTRACTS, how constituted, i. 335-6.
- BURDEN, constitution of, i. 641-2.
- See BURDEN.
- SECURITIES, or BURDENS—
- Effect of decree of sale in absence of holders of, ii. 259-60.
- To be paid out of price of lands sold under sequestration,
ii. 344-6.
- What are real securities entitled to preference, *ib.*
- Effect of inhibition, *ib.*
- Creditor with, must value and deduct security previous
to ranking, ii. 306-7.
- Whether may alter valuation where it undergoes change,
ib.
- Real securities over heritable estate—voluntary, i. 711.
- Judicial, i. 739.
- Over property simply heritable—voluntary, i. 789.
- Judicial, i. 793.
- Over moveables, ii. 10.
- Judicial, ii. 40.
- Effect of partial payments on securities, ii. 425-6.

REAL RIGHT—continued.**SECURITIES, or BURDENS—continued.**

Real rights, ranking of, on moveable fund, ii. 406.

See RANKING.

ACTIONS, litigiousity in, ii. 143-4.

WARRANTICE, i. 732-3.

Conveyance in, not challengeable as a security for future debt under 1696, ii. 219-20.

See RANKING—HERITABLE SECURITIES—DEBITA FUNDI.

REAL AND PERSONAL, division of property into, in England, i. 711-2.

RECALL of sequestration, ii. 294.

See SEQUESTRATION.

OF PERSONAL PROTECTION, ii. 298.

OF MERCANTILE FACTORIES or mandates, i. 463-4.

Effect of death, bankruptcy, insanity, *ib.*

Express revocation must be publicly known, i. 464-5.

Effect against factor, *ib.*

Limited mandates, i. 526-7.

OF ARRESTMENT, ii. 66-7.

RECEIPT in policy of insurance, i. 645-6.

Transference of carrier's receipt, effect as to delivery, i. 219-20.

Receipt for goods on board ship, possession of, carries right to bill of lading, i. 595-6.

RECKONING of votes at meetings of creditors, i. 371-2.

Action of count and reckoning against a trustee, i. 546-7.

RECOMMENDATION, letters of, how may infer a guarantee, i. 388, 389.

RECORDING abbreviate of adjudication, i. 742, 759.

Omission of, i. 781.

Of sasines, i. 717.

Of inhibition, ii. 134.

Of petition for sequestration, ii. 297-8.

See REGISTRATION.

RECORDS afford no security against radical defect of title, i. 299-300.

All qualifications of land rights, to be effectual against third parties, must enter record, i. 300-1.

See QUALIFIED RIGHTS—ENTAILS—CONDITIONS.

RECOURSE on bills, i. 429.

Not lost by omission of protest and notice where no funds in drawee's hand, i. 447, 450.

See BILLS OF EXCHANGE.

RECOVERY of price of lands sold under judicial sale, ii. 268-9.

Of bankrupt estate, ii. 334-5.

Actions to be raised by trustee, *ib.*

Compounding and submitting claims, ii. 321-2.

Cases which may thus be settled, *ib.*

Powers of trustee and commissioners, *ib.*

Individual creditors or bankrupt may still pursue it, *ib.*, 356-8.

Disposal of heritable estate, ii. 344-5.

Judicial contrasted with voluntary sale, *ib.*

Voluntary sale, ii. 345-6.

Disposal of moveable estate, ii. 344-5.

Outstanding debts, *ib.*

Lodging money in bank, ii. 318-9.

REDDENDO, how stated in proving value of lands in ranking and sale, ii. 252-3.

REDEEMABLE bond of annuity—

Nature of, i. 359-60.

Valuation of, *ib.*

Rule of ranking, i. 360-1.

REDEMPTION of adjudications within the legal, i. 743-4.

Right rendered irredeemable by declarator of expiry of legal, *ib.*

Decree of declarator in absence, *ib.*

Mere expiry of legal not sufficient to foreclose, must be a declarator, *ib.*

REDEMPTION—continued.

Charter of adjudication and sasine, with forty years' possession after expiry of legal, though without declarator, an irredeemable title, i. 744-5.

Effect of personal exceptions against debtors, i. 746-7.

Whether an heir who has renounced on a charge to enter, may afterwards redeem, i. 751-2.

REDUCTION on first branch of 1621, c. 18, ii. 171-2.

On second branch of 1621, c. 18, ii. 184-5.

At common law, ii. 225-6.

See ALIENATION—FRAUDULENT ALIENATION.

ON THE ACT 1696, c. 5, ii. 191-2.

Title to challenge, ii. 194.

Form of the action, ii. 195.

Only competent to Court of Session, *ib.*

Deeds liable to challenge, *ib.*

Effect of the reduction, ii. 217-8.

See PREFERENCES.

ON MINORITY AND LESION, i. 129-30.

On the ground of insanity, i. 131-2.

On facility, circumvention, and lesion, i. 136.

Ex capite interdictionis, i. 134.

See RESTITUTION.

OF A COMPOSITION CONTRACT unfairly accomplished, ii. 355-6.

To whom competent, *ib.*

Ex capite lecti, i. 80-1.

See DEATHBED.

REDUCTION and IMPROBATION, action of, introduced as to judicial sale and ranking, ii. 234-5.

RE-EXCHANGE—

Whether acceptor of bill liable for, i. 429-30.

Whether drawer, *ib.*

Circuitous re-exchange, *ib.*

REFERENCE to oath, proof by, i. 349-50.

To bankrupt's oath, effect of, ii. 329-30.

REFUSAL of bankrupt to answer at examination, ii. 325-6.

Refusal of magistrate to grant *meditatio fugæ* warrant, ii. 458-9.

Refusal of shipmaster to deliver registry, i. 556-7.

REGISTERED owners of ships, responsibility of, for repairs and furnishings, i. 584-5.

See OWNERS—REPAIRS.

REGISTERING of British ships, i. 150-1.

Persons authorized to make registry and grant certificate, i. 151-2.

Where to be registered, *ib.*

Proof of the built or condemnation, *ib.*

Of the ownership, *ib.*

Survey of the ship, *ib.*

Register and certificate, i. 152-3.

Bond, *ib.*

Custody and use, *ib.*

Ships held in shares, i. 153-4.

See REGISTRY.

REGISTRATION—

Decree of, its nature, i. 4-5.

Analogy betwixt it and the English warrant of attorney to confess judgment, *ib.*

Form of a clause of registration, *ib.* note.

Decree of registration on protested bills, *ib.* note.

Registration of entails, i. 46-7.

Of interdictions, i. 135.

Registration of sasines, i. 717.

History of the register, *ib.*

Minute-book of entries to be recorded, *ib.*

Registration the criterion of preference, i. 718-9.

Requisites of registration, *ib.*

Date of recording, i. 719-20.

Whether within sixty days, *ib.*

Transcription in the register, *ib.*

Criterion of priority, i. 720-1.

Registration of burghage sasines, i. 722-3.

REGISTRATION—*continued*.

- OF ABBREVIATE OF ADJUDICATION, i. 742-3, 759.
 - Omission to record, i. 781.
 - Of petition for sequestration, ii. 297-8.
 - Effect of omitting to register petition, *ib*.
 - Duty of petitioning creditor to record, *ib*.
 - Of sasines, i. 717, 722.
 - Of inhibition, ii. 134.
 - Of interdiction, ii. 132-3.
- REGISTRY of a ship, certificate of, i. 152-3.
 - Precautions against abuse of certificate, *ib*.
 - Bond by master and owners, *ib*.
 - Master custodier under obligation to deliver it, *ib*.
 - Lost certificate, *ib*.
 - Effect of certificate as proof of property, *ib*.
 - Registry of ship held in shares, i. 153.
 - Recital of certificate in bill of sale, i. 155.
 - Endorsement on certificate, i. 156.
 - New registry, i. 157.
 - Effect of endorsement, *ib*.
 - Duties of shipmaster as to keeping and exhibiting certificate, i. 615-6.
- REGISTRY ACTS, history and policy of, i. 146-7.
- REI INTERVENTUS in obligations bars the parties from resiling, i. 345-6.
 - Nature of the doctrine, *ib*.
 - What is considered *rei interventus*, i. 346-7.
- REJECTION of goods by the buyer for which he is unable to pay, i. 253-4.
 - Cases in which buyer may reject, *ib*.
 - Doctrine in England, *ib*.
 - Buyer, foreseeing his failure, may reject goods, *ib*.
 - Power subsists only where goods *in transitu*, i. 253-4.
 - When once delivered, cannot be restored, *ib*.
 - Effect of an act of bankruptcy in England, *ib*.
 - After bankruptcy, i. 254-5.
 - Doctrine in Scotland, *ib*.
 - Goods actually delivered, *ib*.
 - Partly delivered, *ib*.
 - Where goods only constructively delivered, i. 256-7.
 - Goods on cart at buyer's cellar door, *ib*.
 - Buyer taking goods into cellar, *custodiæ causa*, for behoof of seller, *ib*.
 - Where goods taken into custody by clerk or warehouseman acting without orders, *ib*.
 - Whether fraudulent after bankruptcy to take goods liable to stoppage, *ib*.
 - See DELIVERY—RESTITUTION.
- RELATIONS of bankrupt, if they are creditors, may concur in his discharge, ii. 352-3.
 - Alienations to conjunct and confident persons, ii. 174-5.
 - See ALIENATION.
- RELICTÆ, JUS, claims for, i. 678-9.
 - Vests *ipso jure*, i. 137.
- RELIEF DUTIES, i. 22-3.
- RELIEF amongst cautioners, i. 364-5.
 - See CAUTIONARY.
- RE MERCATORIA, writings in, excepted from the solemnities of deeds, i. 341-2.
 - See MERCANTILE OBLIGATIONS.
- REMITTANCE to a factor, effect of possession under, i. 281-2.
 - Responsibility of factor for mode of making remittances, i. 395-6.
 - See MANDATE.
- REMOVAL—
 - Of trustee, ii. 317-8.
 - Ex parte judicis*, *ib*.
 - Judicial, by summary complaint, *ib*.
 - By majority of creditors in value at general meeting, ii. 318.
 - FROM ONE PART OF SCOTLAND to another will not authorize *meditatio fugæ* warrant, ii. 453-4.

REMOVAL—*continued*.

- FROM ONE PART OF SCOTLAND—*continued*.
 - Not requisite to support warrant that removal be fraudulent where going abroad, ii. 453-4.
- RENEWAL of personal protection, ii. 298-9.
- RENT—
 - Nature of, as between landlord and tenant, i. 68-9.
 - How it may be affected by stipulations in the lease, *ib*.
 - Paying of warehouse rent by buyer where goods still in seller's warehouse, how far completes delivery, i. 192-3.
 - Goods in hands of custodier, i. 194-5.
- HYPOTHEC FOR, ii. 26.
 - Ranking of creditors on, ii. 406-7.
- WHETHER HERITABLE OR MOVEABLE, ii. 7-8.
 - Anticipated rent, *ib*.
 - Postponed rent, *ib*.
- APPARENT HEIR'S RIGHT to rents, i. 94-5.
 - Arrears at his death, *ib*.
 - Where he renounces, creditors of ancestor take arrears, i. 95-6.
- CONVEYANCE OF, by assignation, i. 793-4.
 - By disposition or heritable bond, *ib*.
 - Competition for, *ib*. See ii. 16-7.
- RENUNCIATION by heir to enter, i. 748-9.
 - Distinction between the case of heir renouncing on charge by ancestor's creditors, and where required to enter by his own creditors, *ib*.
 - Proceeding where heir renounces succession, i. 751-2.
 - Whether he can afterwards redeem, *ib*.
 - By a partner of company, whether it dissolves the whole concern, ii. 521-2.
 - May be at any time where no term fixed, *ib*.
 - Must not be fraudulent, ii. 522-3.
 - Renunciation of securities in cautionary obligations, i. 396-7.
- REPAIRS of church and manse not *debita fundi*, i. 739-40.
 - Arrears of those burdens, *ib*.
 - Purchasers and creditors not liable for, *ib*.
- AND FURNISHINGS TO SHIPS, made to shipshusband, claims for, against owners, i. 554-5.
 - Contracts for, i. 567-8.
 - General principles of these contracts, *ib*.
 - Owners bound against their will, *ib*.
 - Where owners liable *pro rata*, *ib*.
 - Where *singuli in solidum*, i. 568-9.
 - Persons liable for furnishings, etc., *ib*.
 - Liability of owners generally, *ib*.
 - Contract of owners, *ib*.
 - Furnishings on other credit than that of owners, *ib*.
 - Order of master, *ib*.
 - Part owners, *ib*.
 - Purchaser, *ib*.
 - Where vested owners have not legally transferred their right, *ib*.
 - Liability of hirer of ship, i. 569-70.
 - Where ship under lease, *ib*.
 - Mortgagees in possession, and appearing on register as such, not liable, *ib*.
 - Contracts with shipmaster for repairs, i. 570-1.
 - Ground of master's authority to bind owners, i. 571-2.
 - Owners jointly and severally liable for furnishings to master, *ib*.
 - Distinction between furnishings, etc., in home and foreign port, i. 572-3.
 - Repairs, etc., in home port, *ib*.
 - Where common and necessary, may be on master's authority, *ib*.
 - Evidence to support demand, *ib*.
 - No answer that master got money to pay, *ib*.
 - In foreign port, i. 573-4.
 - Furnisher bound to see that supply justified by apparent necessity, *ib*.

REPAIRS—*continued*.AND FURNISHINGS TO SHIPS—*continued*.

Furnishings, evidence of, i. 593-4.

Money, *ib.*Naval stores, provisions, repairs, *ib.*

Hypothec on ship for foreign repairs, i. 573-4.

Continental law, *ib.*

English law, i. 574-5.

Scottish law, *ib.*No hypothec for home repairs, *ib.*For foreign repairs, *ib.*Whether foreign ship liable to hypothec here, *ib.*

What is a home port? i. 575-6.

Loans of money to master abroad, *ib.*Checks upon master's power, *ib.*

Evidence of furnishing, i. 576-7.

Loans of money on master's bond, bill, or by bottomry, and *respondentia*, i. 577-8.

Sale of ship or cargo for supply of necessities, i. 583-4.

Claims for repairs and furnishings on bankruptcy of owners, i. 584-5.

Distinction as to liability of owners where the contract with them or with shipmaster, *ib.*Compensation by master where indebted to owner, *ib.*Claims on master's bankruptcy, *ib.*Master liable for all furnishings, *ib.*

Where owners and master have failed, i. 585-6.

Compensation by master where furnishings have been fairly applied, *ib.*Where master has abused his powers, owners have relief, *ib.*

See BOTTOMRY—SHIPMASTER.

LIEN ON SHIP FOR, ii. 92-3.

Possession necessary, ii. 90-1.

Exceptions from lien by local usage, *ib.*Repairs without possession, *ib.*No lien for furnishings, *ib.*Indirect lien attempted by shipmaster engaging his personal credit, *ib.*

REPARATION—

See DAMAGES—RESPONSIBILITY.

REPORT in sequestration, by trustee as to debts, etc., and concurrence of creditors to composition, ii. 350.

REPRESENTATION—

At entering into a contract, effect of, i. 457-8.

Distinguished from warranty in insurance, i. 668.

In fire insurance, i. 673.

REPRESENTATION, PASSIVE, i. 703-4.

See PASSIVE TITLE.

REPRESENTATIVES—

Of cautioner for cash-credits, their liability, i. 386-7.

May sign a bill after drawer's death, i. 420-1.

REPUDIATION of a deed to which a condition is annexed, effect of, as to the person in whose favour the condition is imposed, i. 145-6.

REPUTED OWNERSHIP of moveables as raising responsibility for the debts of the possessor, i. 268-9.

Reputed ownership, doctrine of, i. 269-70.

Rule in England, *ib.*

In Scotland, i. 270-1.

The possession must be accompanied with uncontrolled power and disposal, *ib.*

The possession must be unequivocal, i. 271-2.

Public sale under landlord's sequestration, goods being still with tenant, *ib.*

Property sold by debtor, and not delivered, or redelivered to the seller, i. 272-3.

Where moveables placed with debtor not formerly belonging to him, *ib.*Conveyance of moveables in security *retenta possessione*, *ib.*

VOL. II.

REPUTED OWNERSHIP—*continued*.

Conveyance in security with symbolical delivery, i. 273-4.

Effect of reputed ownership on a suspending condition in a sale, *ib.*Where the thing possessed is usually let out, *ib.*Retained possession of furniture, stock, implements of trade, *ib.*

Notice to the public of the retained possession, i. 274-5.

Claim by the owner where the creditors of reputed owner take the goods, *ib.*

Of possession for temporary purposes in the course of legal contracts, i. 274.

Goods sent on sale and return, i. 279.

Bills in the hands of bankers, i. 288-9.

Rights held by debtor under qualifications and conditions, i. 300-1.

Effect of fraud and personal exceptions, i. 309-10.

See POSSESSION—FRAUD.

Statutes 4 Geo. IV. c. 83, and 6 Geo. IV. c. 94, as to the rights of parties contracting with the apparent owners of goods, or with factors, etc., i. 520-1.

REQUISITES of petition for sequestration, ii. 285, 293.

Primary requisites, ii. 285-6.

Of ships entitled to benefit of Registry Acts, i. 150-1.

Of bills, i. 413.

Of instrument of protest, i. 437.

Of policy of insurance, i. 649.

Of imprisonment, ii. 160, 163.

Of sasine, i. 715.

RES NOVITER VENIENS AD NOTITIAM, effect of, on decree of sale, ii. 259.

On decree of ranking, ii. 267-8.

RESCUE from capture, salvage for, i. 641-2.

RESERVATION of objections *contra executionem* in adjudication, i. 762-3.

Reservation, in composition contract, of right to bankrupt to challenge preferences, ii. 356-8.

RESERVED BURDENS, i. 38-9.

See BURDENS.

RESERVED LIFERENT, i. 52-3.

RESIGNATION of trustee, ii. 317-8.

Creditors not bound to accept, *ib.*Trustee may either apply to general meeting or petition court, *ib.*

AD REMANENTIAM, i. 723-4.

Where to be made, i. 715-6, note.

Preference of right by, i. 723.

RESISTANCE, or forcibly defending, an ingredient of bankruptcy, ii. 160.

Evidence of it, ii. 161.

Date of it, ii. 165.

RESOLUTIONS of creditors, effect of, ii. 330-1.

Power of bringing under review, *ib.*

Reviewing resolutions as to management, ii. 342.

Power of bankrupt to bring under review resolutions as to management, ii. 342-3.

RESOLUTIVE condition in a sale not effectual against creditors, i. 259-60.

CLAUSE IN ENTAIL, i. 44-5.

RESPONDENTIA, contract of, i. 578.

Claims under, i. 578-9.

See BOTTOMRY.

RESPONSIBILITY—

For debt, and the several kinds of estate liable, i. 3-4.

Of seller for negligence in following directions as to carriage of goods, i. 473-4.

For neglect or diligence prestable in contracts of hiring, etc., i. 482.

In hiring of labour among workmen, i. 487-8.

Of professional men and artists for skill, i. 488-9.

Writers, messengers, etc., i. 489-90.

Owners of stage-coaches for drivers, i. 491-2.

4 P

RESPONSIBILITY—*continued.*

Of public carriers for negligence in carriage of goods, i. 492.

Principals liable for servants, i. 493.

What sufficient to charge carrier with goods, *ib.*

Delivery requisite, *ib.*

ON EDICT NAUTÆ CAUPONES, etc., i. 494.

Persons liable, i. 495.

Extent of responsibility of public carriers, i. 498.

Proof of loss, i. 500.

How far responsibility may be limited, i. 501-2.

See NAUTÆ, etc.

OF FACTORS FOR NEGLECT TO INSURE, i. 544-5.

For going beyond limits, etc., *ib.*

Of owners for shipmaster, i. 571-2.

Of shipowners and master under edict *Nautæ Caupones*, etc., i. 605-6.

For collision of ships, i. 626.

Of messengers, magistrates, etc., for prisoners, ii. 436-7.

Of magistrates, in granting *meditatio fugæ* warrants, ii. 451, 457.

For prisoner in Abbey jail, ii. 463-4.

See NAUTÆ, etc.—CAUTIONARY.

RESTITUTION, faculties or rights of, available to creditors, i. 129-30.

AGAINST DEEDS OF PUPILS AND MINORS, *ib.*

Right of minor's creditors, on his majority and insolvency, to challenge alienations in minority, *ib.*

Where a minor is succeeded by one insolvent, *ib.*

Difference between deeds done in pupillarity and in minority, *ib.*

Deeds in pupillarity, *ib.*

Deeds by pupils, whether with or without tutors, *ib.*

Deeds by tutors, *ib.*

Deeds affecting land, *ib.*

In what cases a sale of pupil's land is competent, *ib.* i. 128.

Deeds of administration by tutors, i. 128-9.

Acts of extraordinary administration, *ib.*

Deeds in minority, i. 129-30.

By minor without curators, *ib.*

Minor with curators, *ib.*

Deeds without their consent, *ib.*

Where curators concur, *ib.*

Restitution on lesion against deeds in minority, *ib.*

Deeds *ipso jure* null, *ib.*

Deeds by minors with curators without their concurrence, *ib.*

With curators' concurrence, *ib.*

Challenge by minor or his creditors within the *quadrimum utile*, *ib.*

Homologation, *ib.*

Effect of minor's oath not to challenge, *ib.*

Prosecution of reduction after the four years, if raised within them, *ib.*

Where creditors pursue, *ib.*

Points in the pursuer's action, minority and lesion, *ib.*

Minority, *ib.*

Answers to the plea of minority, *ib.*

Lesion, how made out, *ib.*

Presumption, proof, *ib.*

The lesion must have proceeded directly from the transaction, i. 131-2.

Conditions on which restitution granted, *ib.*

Extent of restitution, *ib.*

AGAINST DEEDS BY INSANE OR FATUOUS PERSONS, i. 131-2.

Brief of idiocy or furiosity, *ib.*

Verdict, *ib.*

Cases in which verdict may be questioned, i. 132-3.

Deed granted before term of insanity fixed by verdict, *ib.*

Deed after term in lucid interval, *ib.*

Challenge on insanity though no verdict, *ib.*

RESTITUTION—*continued.*AGAINST DEEDS BY INSANE PERSONS—*continued.*

Rules of law in the action of reduction, i. 132-3.

Onus probandi, *ib.*

Proof of insanity, *ib.*

Different classes of insanity, i. 133-4.

Idiocy, furiosity, *ib.*

Proof of lucid intervals, *ib.*

AGAINST DEEDS OF INTERDICTED PERSONS, i. 134-5.

Interdiction applicable to alienations of heritage only, *ib.*

Available to creditors, *ib.*

Judicial interdiction, *ib.*

Summons of interdiction, *ib.*

Registration, i. 135-6.

Effect of interdiction, *ib.*

Points in the reduction on interdiction, *ib.*

Voluntary interdiction, *ib.*

ON THE GROUND OF FACILITY, circumvention, and lesion, i. 136-7.

Where facility and lesion concur, or facility and circumvention, *ib.*

Effect of the ratification of exceptionable deeds in barring a claim for restitution, i. 137-8.

See RATIFICATION.

OF GOODS AFTER DELIVERY, i. 256-7.

Presumptive fraud, now abandoned as a ground of restitution, i. 226-7.

Distinction between the doctrines of restitution and stopping *in transitu*, i. 226-7.

HISTORY OF THE LAW OF, as depending on conditions in sale, i. 256-7.

By Roman law, delivery did not transfer, unless price paid, where no agreement to give credit, i. 256-7.

Stipulation to void contract, unless price paid by a certain day, *ib.*

Subject of controversy, whether seller was not to be held as giving credit for price, by mere delivery of goods, *ib.*

Result of this controversy, *ib.*

Doctrine of continental states, *ib.*

In Britain, no restitution after actual delivery, *ib.*

Doctrine in England, *ib.*

In Scotland, i. 257-8.

Although bargain be for ready money, yet if subject be delivered, the property is altered, *ib.*

Suspensive conditions in sale, *ib.*

Dissolving conditions, i. 259-60.

Pactum Legis Commissoriae, *ib.*

Doctrine of Stair and Erskine, as to conditions incident to sale, contrasted, *ib.*

ON THE GROUND OF FRAUD in contract of sale, i. 260-1.

Where seller incapable of full and legal consent, restitution will be given, i. 261-2.

No restitution in this country but on ground of fraud, *ib.*

See FRAUD—PERSONAL EXCEPTIONS.

ON A REDUCTION under Act 1696, c. 5, ii. 216-7.

OF LOSS UNDER INSURANCE, settled on imperfect information, i. 648-9.

RESTRAINTS on natural liberty, how far may be effectually imposed by contract, i. 321-2.

Restraints on marriage, i. 321.

RETENTA POSSESSIONE conveyance, i. 272-3.

See CONVEYANCE.

RETENTION of charter by superior to secure casualties, i. 25-6.

Landlord's right of, for payment of rent, ii. 31.

Doctrine of retention or lien, ii. 87-8.

Cross bills, ii. 420.

Of rents by tenant, i. 68.

Order of ranking of merchant's claim of retention on freight, ii. 406-7.

RETENTION—*continued*.

Seller of goods, his right of retention for the price, i. 222-3.

Retention by executors for debt due them by deceased, ii. 80-1.

Retention of seamen for wages, i. 562-3.

See LIEN.

RETROSPECT, term of, in challenging on 1696, ii. 168, 213.
On deathbed, ii. 168.

RETROSPECTIVE BANKRUPTCY, ii. 166-7.

Principle of it, *ib*.

France, *ib*.

In England, ii. 167-8.

In Scotland, sixty days from actual bankruptcy the term of retrospect, *ib*.

RETROVENDENDO, CLAUSE DE, i. 25, 27.

RETURN. Goods sent on sale and return, with whom is the reputed ownership, i. 287-8.

RETURN PREMIUMS—

Effect of receipt in policy of insurance in questions as to, i. 645-6.

When return premiums due, i. 646-7.

Whether can be set off on underwriter's failure by broker, ii. 128-9.

See INSURANCE.

RETURNING goods once delivered, challengeable on 1696, c. 5, ii. 196-7.

REVENUE LAWS, contracts against, i. 322-3.

Smuggling contracts, i. 325-6.

REVENUE PRIVILEGES as preferable debts, ii. 149-50.

REVERSION—

Right of, assignation to, i. 793-4.

Of price of lands in judicial sale, title to, ii. 261-2.

REVIEW—

Appeal from trustee's judgment rejecting claim, ii. 362-3.

Power of bringing resolutions of creditors under, ii. 331-2.

Of resolutions of creditors as to management, ii. 342-4.

Power of bankrupt in bringing resolutions under review, ii. 344.

REVOCATION of mandate, i. 522, 525.

RHODIAN LAWS—

The most ancient maritime laws in Europe, i. 547-8.

Commentators on, *ib*.

De jactu mercium, i. 630-1.

Text of the law, *ib*.

Commentators on, *ib*.

See AVERAGE.

RIDER or Agent, implied mandate to, in receiving orders, etc., i. 515-6.

Cannot swear to verity of debt, ii. 304.

RIGGING and TACKLE of ship must be sufficient in question of seaworthiness, i. 597-8.

RIGHTS of property or ownership, how affected by radical objections and conditions, and personal exceptions, i. 297-8.

Jus in re and *jus ad rem*, *ib*.

Radical defect of title in the debtor, i. 298-9.

Rights held under qualifications and conditions, i. 300-1.

Land rights, *ib*.

Real rights, *ib*.

Personal rights, i. 301-2.

Jura incorporalia unconnected with land, i. 302.

Moveables, i. 304.

Exception of fraud as it affects creditors, i. 309-10.

See HERITABLE SECURITIES—PERSONAL EXCEPTIONS—QUALIFIED RIGHTS—SUPERIOR—LEASE.

RISK or *Periculum*, i. 179.

As affecting the question of transference of goods, i. 179-80.

Periculum rei venditæ nondum traditæ est emptoris, *ib*.

Sale and price paid, *ib*.

RISK—*continued*.

Where the subject is not specific, but indefinite, i. 179-80.

Doctrine of risk in England, i. 180-1.

Of bottomry and *respondentia* creditors, i. 580-1.

Claim by seller where goods have perished, i. 471-2.

Rules as to risk till completion of sale, *ib*.

Negligence as to means of conveyance, i. 473-4.

In contract of hiring, i. 481, 483.

Under edict *Nautæ Caupones*, etc., i. 494-5.

Limitation of, by notices, advertisements, etc., i. 501-2.

Responsibility of owners and shipmaster, i. 605.

Exceptions, i. 606.

Exception of, in bill of lading, i. 590-1.

In insurance contract, i. 652.

In fire insurance, i. 672.

Life insurance, i. 676.

Misrepresentation and concealment of, in insurance contract, i. 665-6.

ROBBERY, responsibility of public carriers for, i. 498-9.

ROMILLY'S, Sir Samuel, Act regarding the ranking of contingent creditors in England, i. 353-4.

ROYAL protections against imprisonment, history of, ii. 464.

In France, ii. 465, note.

In England, ii. 465.

In Scotland, *ib*.

BANK OF SCOTLAND, how erected—nature of stock—how attached, i. 101-2.

RUNNING DAYS, i. 623-4.

See DEMURRAGE.

SHIP, concealment in insurance of vessel being a running ship, i. 667-8.

SABINIANI, their controversy with the Proculiani concerning specification, i. 294-5.

SAILING of ship under charter-party—

Obligations on shipmaster as to, i. 602.

Sailing with convoy, *ib*.

Misrepresentation of day of sailing in contract of insurance, i. 665-6.

Concealment of, i. 667.

SAILORS and SOLDIERS—

How far protected from arrest for civil debt, ii. 454-5.

Not liable to *meditatio fugæ* warrant, *ib*.

See SEAMEN.

SALARY of an office—

Whether attachable for debt, i. 122-3.

Salary of a judge or other inalienable office, i. 123-4.

Arrears of salary, *ib*.

When office abolished on a salary to officer, i. 125.

Salary of a comedian, i. 126.

SALE of the transfer of goods and merchandise by sale and delivery, i. 176-7.

Distinction between the law of England and Scotland as to the effect of sale on the right of property, *ib*.

Titulus transferendi, i. 177-8.

Modus transferendi, *ib*.

RESTITUTION AFTER DELIVERY on the ground of conditions in the contract, i. 256.

Suspensive conditions, i. 257.

Dissolving conditions, i. 259-60.

Pactum legis commissoriæ, *ib*.

Restitution on the ground of fraud, i. 260-1.

See RESTITUTION—FRAUD.

Of stopping *in transitu*, i. 222-3.

Of the buyer's rejection of goods on insolvency, i. 281.

Sale by bill of lading, i. 212.

CONTRACT OF, i. 457-8.

Constitution of the contract, i. 458-9.

Completed by consent, *ib*.

Sales by brokers, *ib*.

Sale note, *ib*.

SALE—*continued*.CONTRACT OF—*continued*.

- Implied condition in, i. 459-60.
- Completion of the contract, *ib*.
- Price, i. 461-2.
- Subject, *ib*.
- Where subject to be separated from larger quantity, *ib*.
- Where commodity sold, with reference to a certain criterion, i. 463-4.
- Conditions implied or express, *ib*.
- Implied conditions, *ib*.
- Subject fit and sound, *ib*.
- Fit for purpose bought, *ib*.
- Modifications of rules as to implied conditions, i. 464-5.
- Defect not secret, *ib*.
- Delay in rejecting, *ib*.
- Effect of usage on implied conditions, i. 465-6.
- Express conditions of sale, *ib*.
- Cash or bill in course, *ib*.
- Bill must be good, i. 469-70.
- Sale conditionally on arrival of goods from abroad, *ib*.
- By sample, *ib*.
- By taste, i. 470-1.
- Suspending or dissolving conditions, i. 256-7.
- Whether bankruptcy of one frees the other, i. 470-1.
- Claims by seller against buyer's estate, i. 471-2.
- Goods delivered, *ib*.
- Where goods still undelivered, *ib*.
- Where goods have perished, *ib*.
- Rules as to risk till contract completed, *ib*., 473-4.
- Obligation on seller to send goods in ordinary course, *ib*.
- Buyer's directions as to carriage must be strictly followed, i. 475-6.
- Information for insuring, *ib*.
- Transmission of bill of lading, *ib*.
- Notice of shipment by ship or ships, *ib*.
- Notice of time of sailing, where bill of lading cannot be transmitted, i. 476-7.
- Information unduly delayed, and insurance prevented, *ib*.
- Claims by buyer for delivery, *ib*.
- Where price has not been paid, *ib*.
- Price paid and goods undelivered, i. 477-8.
- Buyer's claim for repayment of whole price undiminished by intermediate fall in subject, *ib*.
- Buyer's claim for damages, *ib*.
- Consequential damage, i. 478-9.
- Direct damage, *ib*.
- Constructive or extraneous loss, i. 479-80.
- Restraint of equity in direct damage, where failure not fraudulent, i. 478-9.
- Regard should be paid to express or presumed will of parties in estimating damage, *ib*.
- Time at which damage to be struck, *ib*.
- Where damage constructive, equity interposes, *ib*.
- Distinction between sale and contract of location, i. 480-1.
- By BILL OF LADING, i. 212-3.
- See DELIVERY—STOPPING IN TRANSITU—REPUTED OWNER—SHIP—FRAUD—PERSONAL EXCEPTIONS.

SALE AND RETURN—

- Goods sent on, with whom is the reputed ownership, i. 287-8.
- Goods sent subject to approbation, i. 288-9.
- Nature of the transaction where goods sent on sale and return, *ib*.

SALE, JUDICIAL, of lands, and ranking of creditors upon the price, ii. 232.

- History of judicial sale, *ib*.
- Improvement of judicial sale, ii. 233-4.
- Sale by apparent heir, ii. 234-5.
- Ranking of the creditors, *ib*.
- Action of reduction improbation introduced, *ib*.
- Diligence of individuals stopped, *ib*.

SALE, JUDICIAL—*continued*.

- Further improvements suggested to empower debtors themselves to bring the action, ii. 235.
- Description and nature of the action of ranking and sale—distinctions when pursued by a creditor or an apparent heir—legal effects of the commencement of the action, ii. 235-6.
- Nature and objects of the process, ii. 236-7.
- Summons at the instance of a creditor, *ib*.
- By debtor's apparent heir, ii. 237.
- Sale by creditors, ii. 238.
- The whole estate included, *ib*.
- Production of claims, ii. 239-40.
- Proceedings, *ib*.
- Proof of insolvency, *ib*.
- Cognition and sale where proprietor a minor, *ib*.
- Title to pursue, ii. 240-1.
- When by a creditor, *ib*.
- Creditors must be in possession, *ib*.
- When by apparent heir, ii. 241-2.
- Apparency alone a sufficient title, *ib*.
- Act 1695, c. 24, *ib*.
- Whether heir barred by having incurred a passive title, *ib*.
- Effect of behaviour as heir, *ib*.
- Of a general service *cum beneficio inventarii*, *ib*.
- Where heir entered and infeft, he is barred, *ib*.
- Course of proceeding in such case, an action of valuation of the estate in the inventory, *ib*.
- Creditors, however, may persist in sale, *ib*.
- Not bound to take it at the value in heir's action of valuation, *ib*.
- Heir entering on inventory may voluntarily sell and pay *primo venienti*, if not interpellated, *ib*.
- Effect of entail, ii. 241-2.
- Sale by apparent heir does not infer passive title, *ib*.
- Where an objection to pursuer's title in sale by a creditor, another creditor may concur and persist, *ib*.
- Effect of the death of the pursuer, *ib*.
- Distinction where the sale by creditors and by apparent heir, *ib*.
- Sale of a ship, i. 154-5.
- See SHIPS.
- SUBJECTS LIABLE to judicial sale, ii. 242-3.
- Litigiosity, *ib*., 146-7.
- Against voluntary deeds, ii. 242.
- Against diligence, *ib*.
- Decree of sale an adjudication for all creditors as at first calling, ii. 243-4.
- SEQUESTRATION OF HERITABLE ESTATE, and of the management previous to judicial sale, ii. 243-4.
- Nature and object of this process, *ib*.
- Circumstances in which the Court sequestrates, ii. 244-5.
- Effect of the sequestration, *ib*.
- Form and proceedings in the sequestration, ii. 245-6.
- Who may oppose, *ib*.
- Factor, *ib*.
- His duties and powers, *ib*.
- Factor becoming insolvent, ii. 247.
- Whether allowed to purchase, *ib*.
- COMMON AGENT in judicial sale, ii. 247-8.
- Right of electing, *ib*.
- Qualification to vote, ii. 248-9.
- Disqualification to be elected, *ib*.
- Disputes concerning election, *ib*.
- Office and duty of common agent, *ib*.
- Minutes to be printed, ii. 249-50.
- Answerable on summary application, *ib*.
- Whether he can purchase the estate, ii. 250.
- Committee of creditors to prevent delay, *ib*.
- SALE OF THE LANDS, ii. 250-1.
- Proof of value, *ib*.
- Possession of title-deeds, ii. 251.

SALE, JUDICIAL—*continued*.SALE OF THE LANDS—*continued*.

- Proof of rental, ii. 251-2.
- Valuation of services, etc., *ib*.
- Where land subject to liferent, *ib*.
- Reddendo*, ii. 252-3.
- Where, in sale by creditors, the proved value exceeds amount of debts, *ib*.
- Heir bringing the action after creditors have abandoned, may take benefit of proof in former action, *ib*.
- Memorial and abstract, *ib*.
- Lowering of upset price, *ib*.
- Time of sale, ii. 253-4.
- Intimation of sale, *ib*.
- Preparations for sale, ii. 254-5.
- Plan of the lands, *ib*.
- Inventories, *ib*.
- Articles of sale, *ib*.
- Clause of devolution where highest offerer fails, *ib*.
- Security for price, ii. 256-7.
- Consignation of price, *ib*.
- Discharge of price, ii. 257.

PURCHASER'S TITLE, its value, extent of right, ii. 257-8.

- Questions on purchaser's title, *ib*.
- General idea of the effect of decree of sale against third parties, *ib*.
- Against bankrupt and those in his right, ii. 259.
- Res noviter veniens ad notitiam*, ii. 259-60.
- Decree in absence of holders of real burdens, *ib*.
- Insanity and minority of those interested to challenge, *ib*.
- Effect of decree against the creditors, ii. 260-1.
- Sale by apparent heir has no certification, *ib*.
- Warrandice, *ib*.
- Conveyances by creditors, *ib*.
- Title to the reversion, ii. 261-2.
- Special stipulation as to title in articles of roup, ii. 262.
- Questions on extent of right conveyed, *ib*.
- Description of subject, *ib*.
- Deduction for what is not made effectual, *ib*.
- Statements of value, advantages, etc., ii. 262-3.
- Measurements, ii. 263-4.

THE RANKING, ii. 264.

- Object of this part of the process, *ib*.
- Relation of the two parts of the process, ii. 264-5.
- Proof of debts, ii. 265-6.
- Form of proof, *ib*.
- Stops prescription, ii. 266-7.
- Effect of decree of certification, *ib*.
- State of interests and order of ranking, *ib*.
- Scrutiny of the debts, *ib*.
- Objections discussed, *ib*.
- Decree of ranking, ii. 267-8.
- Scheme of division and decree, *ib*.
- Recovery of the price, ii. 268-9.
- Creditors must assign their securities, *ib*.

EFFECT OF JUDICIAL SALE in stopping adjudications, i. 769-70.

- Effect of, in accumulating principal and interest, i. 697.
- Effect of, as to diligence requisite by ancestor's creditors to acquire preference, i. 678, 679.
- Production of claim in, does not render debt heritable, ii. 6.

Price of lands sold under, is heritable, *ib*.

BY TRUSTEE under the sequestration statute, ii. 269-70.

OF POINDED GOODS, ii. 58-9.

- Time of notice, *ib*.
- Time for lodging minute of sale, *ib*.

AS AN INDIRECT PREFERENCE challengeable on 1696, i. 234, 238.

OF THE HERITABLE ESTATE OF BANKRUPT under sequestration, ii. 344.

SALE, JUDICIAL—*continued*.OF THE HERITABLE ESTATE OF BANKRUPT—*continued*.

- May be by judicial or voluntary sale, ii. 344.
- Judicial contrasted with voluntary sale, *ib*.
- Voluntary by trustee, ii. 344-5.
- Cannot sell privately till three times exposed to public sale, *ib*.
- Title of purchaser at sale, *ib*.
- Real securities preferable to extent of price, *ib*.
- Where disputes as to application of price, ii. 344-6.
- Inhibition not a preferable security, *ib*.
- Securities to be discharged from price only such as are preferable to disposition, or vesting of estate in trustee, *ib*.
- Sale of moveable estate, ii. 344-5.
- Of outstanding debts, *ib*.
- Moveable estate may be sold at discretion of creditors, *ib*.

BY CREDITORS UNDER POWERS contained in their securities, ii. 345-6.

See HERITABLE CREDITORS.

SALE OF GOODS acquired by fraud, etc., i. 295, 299, 306.

See PERSONAL EXCEPTIONS.

SALE OF LANDS, how far challengeable on deathbed, i. 87-8.

SALE NOTE, i. 458-9.

SALVAGE—

- Nature and principle of it, i. 638-9.
- Who entitled to it, i. 639.
- Master and crew, passengers, *ib*.
- Pilots, i. 639-40.
- Claim as joint salvors, *ib*.
- Joint recapture, *ib*.
- Claim of conveying ship for recapture, *ib*.
- King's ship, *ib*.
- Owners of saving ship, i. 640-1.
- What acts entitle to salvage, *ib*.
- Ship stranded, magistrate giving aid, etc., *ib*.
- Aid applied for, i. 641-2.
- Voluntary aid, *ib*.
- Salvage of cables, etc., *ib*.
- Rescue or recapture, *ib*.
- Who is liable for salvage, i. 642-3.
- Amount of salvage, *ib*.
- On recapture, *ib*.
- On rescue from capture, *ib*.
- Jurisdiction of Admiralty in fixing *quantum meruit*, *ib*.
- Salvage in derelict, in cases of wreck, *ib*.
- Lien for salvage, ii. 98-9.

SAMPLES—

- Taking samples not equivalent to delivery while goods remain with seller, i. 192-3.
- Tasting or taking samples of goods in public warehouse or cellar completes delivery, i. 219-20.
- Sale by samples, conditional, i. 469-70.

SANCTUARY—

- Doctrine of, in England, ii. 461.
- In Scotland, *ib*.
- History of sanctuary, *ib*.
- Holyrood House now the only sanctuary in Scotland, ii. 461-2.
- Affords protection only to debtors, *ib*.
- Criminals not protected, *ib*.
- Nor prisoner *ad factum præstandum*, *ib*.
- Nor king's debtors, ii. 462-3.
- Debtor must be booked after twenty-four hours to entitle to privilege, *ib*.
- Privilege available only within precincts, *ib*.
- Leaving sanctuary and returning, *ib*.
- Debtor taken from sanctuary by warrant of Court is under protection, *ib*.
- Insidiously drawing debtor out of sanctuary, *ib*.
- Persons may be imprisoned within the sanctuary, ii. 463-4.

SANCTUARY—*continued*.

- For debts there contracted, ii. 464-5.
- On a *meditatio fugæ* warrant, *ib.*
- Imprisonment must be within jail of sanctuary, *ib.*
- Prisoners in jail of sanctuary entitled to Act of Grace, *ib.*
- Not to *cessio*, *ib.*
- Retiring to, an equivalent of imprisonment to infer bankruptcy, ii. 163-4.
- Debtor protected for twenty-four hours without booking, *ib.*
- Date of taking sanctuary, ii. 165-6.
- Whether debtor who has found caution *judicio sisti* may take benefit of, i. 398-9.
- Whether retiring to, a ground for *meditatio fugæ* warrant, ii. 453-4.
- Debtor may be brought out for examination, ii. 325-6.

SASINE—

- Delivery of land by, i. 20-1.
- Right first completed by sasine carries the property, *ib.*
- Actual possession without sasine ineffectual to pass the property, *ib.*
- Where seller not infeft, his creditors completing their right by sasine, take property in preference to disponee subsequently infefting, *ib.*
- If a person uninfeft grants disposition with precept, the sasine taken on it not effectual till granter infeft, i. 21-2.
- Where two dispositions granted, the second disponee being first infeft carries the property, *ib.*
- In a competition with the creditors of a proprietor infeft, where none of the competitors infeft, first disposition carries the right, *ib.*
- Where purchaser becomes insolvent, may seller stop sasine from being taken on precept? i. 228-9.
- Conveyancing of land still feudal, i. 711-2.
- Superior, in eye of law, proprietor, under burden of vassal's right, *ib.*
- Sasine the only badge of real right in feudal subjects, *ib.*
- New sasine when given, *ib.*
- Subsisting sasine disburdened of vassalage where superior the purchaser, *ib.*
- Sasine the only legitimate method of completing conveyances to feudal subjects, *ib.*
- Except in judicial securities, *ib.*

SASINE AS A CRITERION OF PREFERENCE, i. 715-6.

- Of the instrument, *ib.*
- Requisites, *ib.*
- Form of giving sasine, *ib.*
- Discontiguous lands, *ib.*
- Recording, date of, the rule of preference, i. 717-8.
- Minute-book, *ib.*
- Act 1617, c. 16, *ib.* note.
- Date of presentment according to minute-book held to be date of recording, i. 719-20.
- Where sasine recorded out of order of minute-book, how is preference to be regulated? i. 720-1.
- Criterion of priority, *ib.*
- Sasine not recorded within sixty days, i. 721-2.
- How omission to be remedied, *ib.*
- Sasines in burgage subjects, *ib.*
- Preference of sasines, as depending on the nature of the precept, state of the titles, etc., i. 722-3.
- Base infeftment, criterion of, *ib.*
- Sasine on precepts *a me* null till confirmed, *ib.*
- Mid-impediment, i. 723.
- Alternative holding, *ib.*
- Effect of obligation to infeft in fixing the holding, *ib.*
- Omission to mention that heritable state and sasine, real, actual, and corporal possession, was given, *ib.*
- Erasure in date, *ib.*
- Resignation *ad remanentiam*, i. 723-4.

SASINE—*continued*.SASINE AS A CRITERION OF PREFERENCE—*continued*.

- Exhausted precept, i. 735.
- Special, i. 736.
- Accretion, i. 737.
- See REGISTRATION—OBJECTIONS.
- SCHEDULE of poinding, ii. 58-9.
- SCHEME of division, and decree in ranking and sale, ii. 267.
- Of division preparatory to dividend in sequestration, ii. 364-5.
- Must be objected to within fifteen days, *ib.*
- Scheme of division, and setting apart dividends, ii. 365-6.
- SCOTLAND, BANK OF, how erected—nature of stock—how attached, i. 101-2.
- Royal Bank of Scotland, *ib.*
- SCRUTINY—
- Of debts in ranking and sale, ii. 266.
- Of debt, in applying for a writ of extent, ii. 41, 46, 48.
- Of votes at meeting of creditors, ii. 314-5.
- How objections to be stated, *ib.*
- How judicially disposed of, *ib.*
- SEA—
- Goods at, how transferred, i. 212-3.
- Goods sent by, how to be stopped *in transitu*, i. 248-9.
- Consignment of, in security, ii. 11-2.
- Transfer of bills of lading, ii. 14-5.
- Of invoices without bill of lading, ii. 14.
- LOSS AT, i. 653-4.
- See INSURANCE—LOSS.
- PERILS OF, i. 606-7.
- See CHARTER-PARTY.
- SEAMEN—
- Hiring of, i. 557-8.
- General principles of the contract and regulations in hiring, *ib.*
- Must be a special agreement in writing, *ib.*
- Regulations for, by statute, *ib.*
- Time of payment of wages, i. 558-9.
- No demand competent under a custom for additional wages not mentioned in articles signed, *ib.*
- No parole agreement effectual for additional wages where there are articles signed, *ib.*
- Agreement to give an extra sum as inducement to extraordinary exertion null, i. 560-1.
- This does not apply where the inducement is to incur danger to life, *ib.*
- The production of articles laid on master and owners, *ib.*
- Claim personal against master or owners, and privilege against ship, *ib.*
- Claims on bankruptcy of owners, i. 561-2.
- Where voyage has been completed, *ib.*
- Preference, *ib.*
- Remedy of seamen against freight by hypothec, and against ship by lien, i. 562-3.
- Where ship sold, *ib.* See also ii. 98-9.
- Claim limited to six years in England, i. 562.
- Whether this is the case in Scotland, *ib.*
- Disability of mariner when hired by voyage, *ib.*
- Hired by month, i. 562-3.
- Where improperly discharged, *ib.*
- Claim where ship does not proceed on voyage, *ib.*
- Desertion a forfeiture of wages, *ib.*
- Entering king's service voluntarily, or by impress, *ib.*
- Bad treatment, *ib.*
- Where voyage has not been completed, i. 564.
- If no freight earned, wages not due, *ib.*
- Also if ship captured, *ib.*
- Claim *pro rata itineris* where voyage not a single run, *ib.*
- Where ship recaptured, i. 565.
- Wages a debt on the wreck, *ib.*
- Embargo no discharge of wages, i. 565-6.
- Effect of hostile detention or seizure, *ib.*

SEAMEN—*continued.*

- Embargo before voyage, i. 566-7.
- Where ship not seaworthy, seamen may claim damages, *ib.*
- What a good answer to claim for wages, *ib.*
- Fault of seamen, *ib.*
- Seamen engaged to receive part of gain not partners, *ib.*
- Female sailor, *ib.*
- ORDER OF RANKING of seamen for wages on ship, ii. 406-7.
- On freight, *ib.*
- Whether crew of a ship entitled to salvage, i. 639, 640.

SEARCH—

- Execution of, by messenger, where debtor cannot be found, ii. 436-7.
- Search for encumbrances prior to judicial sale, ii. 248-9.
- See PURCHASER.

SEAWORTHINESS of ship under contract of affreightment—

- Responsibility of owners and master for, i. 597-8.
- Definition of seaworthiness, *ib.*
- Implied in the contract, *ib.*
- Ignorance of defect no defence to owners, i. 597-8.
- No survey before sailing, *ib.*
- Sufficiency of ship, rigging, and tackle, *ib.*
- Skill of captain and crew, i. 598-9.
- Pilots, *ib.*
- Bills of health, licences, and necessary papers, i. 601-2.
- Warranty of, in policy of insurance, i. 663.
- Ignorance of defect no excuse, *ib.*
- Opinion of carpenters not conclusive, *ib.*
- Presumption for seaworthiness, *ib.*
- Where defeated, *ib.*
- Disrepair of hull, rigging, or tackling, i. 664-5.
- Deficiency of crew, *ib.*
- Overloading, *ib.*
- Defect remedied before harm done, *ib.*
- Warranty of, in contract of bottomry, i. 581-2.

SECOND bankruptcy, ii. 357-8.

See BANKRUPTCY.

SECONDARY—

- With catholic creditors, ranking of, ii. 416-7.
- Catholic creditor bound to claim against primary debtor, or to assign to the cautioner, *ib.*
- And to claim equally against co-principals, or to assign, *ib.*
- Bound to claim equally from two estates of same debtor where separate interests, ii. 417-8.
- Same where secondary creditors, *ib.*
- Where secondary creditor on one estate only, *ib.*
- What interest sufficient to affect catholic creditor, *ib.*
- Doctrine in moveables, ii. 418-9.
- Distinction where catholic creditor interested, *ib.*

SECRET BARGAINS with creditors for bankrupt's discharge, ii. 355, 371.

SECRET PARTNERSHIPS, ii. 510-1.

- Must be regularly dissolved, ii. 561-2.
- How to proceed against partners, ii. 562.

SECURITIES challengeable on 1621, c. 18, ii. 171-2.

- Conveyances to the prejudice of diligence begun, ii. 184-5.

See ALIENATIONS.

To PARTICULAR CREDITORS in satisfaction or security after bankruptcy, ii. 191-2.

- Commentary on the Act 1696, c. 5, *ib.*
- For debts already due, ii. 194-5.
- Title to challenge, *ib.*
- Form of action, ii. 195-6.
- Deeds challengeable, *ib.*
- Exceptions to rule of statute, ii. 200-1.
- For future debts, ii. 217-8.

See PREFERENCES.

CHALLENGEABLE AT COMMON LAW, ii. 184-5, 225.

See COMMON LAW.

SECURITIES—*continued.*

- To BE ENUMERATED in oath of verity on bankrupt estate, ii. 304, 306.

Valuing and deducting securities, *ib.*

The balance, deducting securities, must be specified, ii. 306.

Where it is necessary to value and deduct, *ib.*

- REAL, ARE PREFERABLE ON PRICE of lands sold under sequestration, ii. 344-6.

What securities entitled to preference, *ib.*Inhibition, *ib.*

Creditor with, must value and deduct previous to ranking, ii. 306-7.

Change on value, ii. 306.

Deduction of dividends from other estates, ii. 305-6.

- VOLUNTARY, OVER THE FEUDAL ESTATE, i. 711-2.

Sasine the criterion of, *ib.*Sketch of the history of the several heritable securities, *ib.*Wadset, *ib.*

Infeftment of annualrent, i. 712-3.

Heritable bond, *ib.*

Heritable bond and disposition in security, i. 713-4.

Absolute disposition with backbond, *ib.*Securities for relief of sums and engagements, *ib.*

Securities for cash-credits, i. 714-5.

- COMPLETING SECURITIES in feudal subjects, and of Sasine as the criterion of preference, i. 715-6.

See SASINE.

Completing securities over burgage subjects, i. 721-2.

- ENUMERATION AND EFFECT of securities where preference depends on sasine, i. 723-4.

Superior for feu-duties, *ib.*

Securities for debt on feudal and burgage subjects, i. 724-5.

Forms of these securities, *ib.*

Bond and disposition in security, i. 725-6.

Absolute disposition with backbond, i. 724-5.

Effect of indefinite security in terms of absolute conveyance, *ib.*

Reserved burdens, i. 725-6.

See SASINE, and the titles of the respective securities.

- By REAL WARRANTICE, i. 733-4.

Excambion, *ib.*

Objections to voluntary securities, i. 734-5.

To the debt, *ib.**Pactum illicitum*, *ib.*Prescription, *ib.*Limited obligation under Act 1695, c. 5, *ib.*Objections to the securities, *ib.*

See OBJECTIONS.

- JUDICIAL, ON LAND AND HOUSES, i. 739-40.

History of adjudication, *ib.*

Adjudication in implement, i. 782-3.

Jedge and warrant, i. 784.

Decree of declarator, i. 785-6.

See ADJUDICATION—OBJECTIONS.

HERITABLE—

Whether accessories to land included in, i. 786-7.

Distinction between heritable and moveable property, ii. 1.

See ACCESSION.

- REAL, OVER PROPERTY SIMPLY HERITABLE, i. 789-90.

Voluntary securities, completion of, *ib.*Completion of right to a lease as a security, *ib.*

To woods, i. 792-3.

Of right to a quarry or coal-work as a security, *ib.*Completion of assignation to a liferent, *ib.*

Completion of right of servitude, i. 793-4.

Incorporeal subjects, *ib.*Completion of assignation to rents, *ib.*Assignation to rents by disposition or heritable bond, *ib.*

SECURITIES—*continued.*REAL, OVER PROPERTY SIMPLY HERITABLE—*continued.*

Patents, completion of transfer, i. 793-4.

Judicial securities over simple heritage, completion of, i. 794.

Adjudication, completion of, *ib.*

Effect of, *ib.*

Adjudication of rights having tract of future time, i. 794-5.

See ADJUDICATION.

VOLUNTARY, OVER MOVEABLES, ii. 10-1.

Voluntary assignments of corporeal moveables, *ib.*

Mortgage of ships, *ib.*

Should be aided by insurance, ii. 11-2.

Cargoes at sea, *ib.*

Consignment to creditor directly, *ib.*

Appropriation of consignment, ii. 12-3.

Consignment to factor for behoof of creditors, *ib.*

With or without notice, *ib.*

For particular creditors, *ib.*

Rules of preference, ii. 13-4.

Consignee's lien, *ib.*

Bill of lading, assignment of, *ib.*

Assignment of invoice, etc., ii. 14-5.

Of, in another's custody, *ib.*

Transference of debts, ii. 15-6.

Assignment—history, form, *ib.*

Intimation, ii. 16-7.

Equipollents, *ib.*

Assignations not requiring intimation, ii. 17-8.

English assignations, *ib.*

Of dividends, ii. 18-9.

Pledge, ii. 19.

Hypothec, ii. 24-5.

See MARITIME HYPOTHECS—LANDLORD'S HYPOTHEC—BILL—BOTTOMRY—ASSIGNATION.

JUDICIAL, OVER MOVEABLES, ii. 40-1.

Writ of extent, *ib.*

Poining, ii. 55.

Arrestment, ii. 62-3.

After death, ii. 76-7.

FROM POSSESSION, ii. 86-7.

Lien or retention, ii. 87.

On ship, ii. 92.

On goods, ii. 94.

Of shipmaster, ii. 97-8.

Of seamen, ii. 98.

For salvage and average, *ib.*

Of innkeepers, *ib.*

For grass-mail, ii. 99-100.

Of workmen, *ib.*

General liens, ii. 100-1.

Writer's lien, ii. 106.

Factor's lien, ii. 109.

Banker's lien, ii. 112.

Broker's lien, ii. 115.

To trustees, ii. 117.

To cautioners, *ib.*

Compensation, ii. 118-9.

BY EXCLUSION, ii. 132-3.

Personal exceptions, and by consent to a preference, *ib.*

Inhibition, ii. 133.

Litigiousity, ii. 143.

Privileged debt, ii. 147.

Order of ranking of creditors holding securities over feudal estate, ii. 402.

Over unfeudalized heritable estate, ii. 405.

Over moveables, *ib.*

Securities by exclusion, ii. 406-7.

Double securities, ii. 413-4.

Of creditor with collateral security, ii. 416-7.

Catholic and secondary creditors, *ib.*

SECURITIES—*continued.*

EFFECT OF PAYMENTS, intronmissions, etc., on claims of creditors holding securities, ii. 424-5.

See PAYMENT.

SEDERUNT, ACT OF, 28th February 1662, as to equality of defunct's creditors, commentary on, ii. 82.

SEDERUNT BOOK of creditors—

Duty of trustee as to recording proceedings in, and lodging copy thereof with clerk to the sequestration, ii. 818-9.

SELLER—

Transference of goods in his own possession, i. 182.

In the custody of third parties, i. 194.

In hands of shipmasters and carriers, i. 212-3.

Claims by seller against buyer's estate, i. 471-2.

Where goods delivered, *ib.*

Where goods still with him undelivered, *ib.*

Where the goods have perished, *ib.*

Rules as to risk in contract of sale, *ib.*

Negligence of seller as to carriage of goods, i. 473.

Buyer's directions must be followed, i. 475.

Neglecting to forward bill of lading, *ib.*

To notify shipment, *ib.*

Seller's right of retention for the price, and stoppage *in transitu*, i. 222-3.

See SALE.

SEPARATION—

Contracts or decrees of, between husband and wife, claims under, i. 688-9.

Voluntary and judicial separation, *ib.*

By decree-arbitral, *ib.*

SEPTENNIAL limitation of cautionary obligations, i. 373-4.

SEQUESTRATION IN BANKRUPTCY—

PROCESS OF SEQUESTRATION—

History of the law of sequestration, ii. 281.

Nature and object of sequestration, ii. 283.

Forum, *ib.*

Whose estates may be sequestered, ii. 284.

Application for, and awarding sequestration, ii. 285.

Where no opposition, and sisting new parties, ii. 285-6.

Gazette notice, ii. 286.

Where the debtor applies or concurs, ii. 285.

Where creditors alone apply, ii. 286.

After the debtor's death, *ib.*

By or against companies, ii. 286-7.

Qualification of creditors to apply or concur, ii. 288.

Nature of the debt, *ib.*

Amount of debt, ii. 289-90.

Oath of creditor, ii. 291-2.

Vouchers of the debt, ii. 292.

Citation of debtor, ii. 293.

Awarding sequestration after citation and opposition, ii. 293-4.

Gazette notice, ii. 297.

Recall of sequestration, and Gazette notice, ii. 294.

On the merits, *ib.*

By deed of arrangement, ii. 296.

Publication and recording of sequestration, ii. 297.

Protection and liberation of debtor, ii. 298.

Gazette notice, *ib.*

Judicial factor, and interim preservation of the estate, ii. 299-301.

CONSTITUTION OF THE TRUST—

Order to elect a trustee, and parties disqualified to be trustee, ii. 302-3.

Creditor's oath to vote and claim, ii. 304.

The oath, and who to take it, *ib.*

Deduction of payments, ii. 305-6.

Valuation and deduction of securities, ii. 306-7.

Interest and discount, ii. 308.

Contingent debt and annuity, ii. 308-9.

Rectification of oath, ii. 309.

SEQUESTRATION IN BANKRUPTCY—*continued.*CONSTITUTION OF THE TRUST—*continued.*

- Accounts, vouchers, and title, ii. 309.
- Accounts, *ib.*
- Vouchers, ii. 310-1.
- Title, ii. 311.
- Meeting for and election of trustee, ii. 312.
- Constitution of the meeting, *ib.*
- Election, ii. 312-3.
- Objections to candidates to be stated, ii. 313-4.
- Objections to votes, ii. 314-5.
- Caution for trustee, ii. 315.
- Confirmation, removal, resignation, and death of trustee, *ib.*
- Confirmation, *ib.*
- Removal, resignation, death, ii. 317-8.
- Duties, liabilities, and emoluments of the trustee, ii. 318.
- Duties, ii. 318-9.
- Liabilities of trustee, ii. 319-20.
- Emoluments, ii. 320.
- Election, removal, and duties of commissioners, *ib.*
- Election, *ib.*
- Removal, ii. 321.
- Duties, ii. 321-2.
- Accountant, ii. 322.
- Law agent, and others employed by the trustee, ii. 322-3.
- Bankrupt's duties, allowances, and rights, ii. 323.
- Duties, *ib.*
- Allowance, ii. 323-4.
- Rights, ii. 324-5.

INVESTIGATION, MEETINGS OF CREDITORS, AND JUDICIAL PROCEEDINGS—

- Examination of the bankrupt, ii. 325-6.
- Gazette notice, ii. 325.
- Examination of others than the bankrupt, ii. 327-8.
- Wife, ii. 328.
- Family, *ib.*
- Others, ii. 328-9.
- Evidence of bankrupt as a witness, and reference to his oath, ii. 329.
- Witness, *ib.*
- Reference to oath, *ib.*
- Meetings of creditors, ii. 330.
- Stated meetings, ii. 330-1.
- Occasional meetings, ii. 331.
- Rules as to meetings, *ib.*
- Gazette notices, ii. 330.
- Review of resolutions and judgments, ii. 331.
- Resolutions of meetings, and judgments of trustee, *ib.*
- Judgments of sheriff, ii. 332.
- Judgments of Lord Ordinary, *ib.*
- Appeals to the House of Lords, *ib.*

ATTACHMENT, VESTING, MANAGEMENT, AND REALIZATION OF THE ESTATE—

- Effect of sequestration in attaching the estate, and on diligence, ii. 333.
- On payments and preferences, *ib.*
- In competition with diligence, ii. 333-4.
- On deceased debtor's estate, ii. 334.
- Vesting of the moveable estate in the trustee, ii. 334-5.
- New acquisitions and Gazette notice, *ib.*
- Vesting of the heritable estate in the trustee, ii. 337-40.
- Vesting the heritable estate of a deceased debtor in the trustee, ii. 341.
- Vesting of real estate out of Scotland in the trustee, *ib.*
- Management of the estate, ii. 342-4.
- Sale of moveable estate, ii. 344.
- Sale of heritable estate, ii. 344-6.
- Sale by the trustee, ii. 344.
- Sale by heritable creditors, ii. 345.
- Liability of heritable creditors for expenses, ii. 346.

VOL. II.

SEQUESTRATION IN BANKRUPTCY—*continued.*ATTACHMENT, ETC., OF THE ESTATE—*continued.*

- General expenses, ii. 347.
- Special expenses, ii. 348.
- Allocation of expenses, *ib.*
- COMPOSITION CONTRACT, DISTRIBUTION OF THE FUNDS, WINDING UP, AND DISCHARGE.
- Composition contract, ii. 348.
- Offer and acceptance, ii. 349.
- Gazette notice, ii. 349-51.
- Reckoning the concurrence, ii. 352.
- Caution, ii. 352-3.
- Composition by a company, ii. 354-5.
- Judicial opposition, ii. 355-6.
- Oath, ii. 356.
- Discharge, and effect of it, ii. 356-8.
- Enforcement and challenge of the composition contract, ii. 358.
- Enforcement of the contract, *ib.*
- Challenge of the contract and of preferences, ii. 359-60.
- Fund of division, claims for dividend, and ranking of creditors, ii. 361.
- Fund of division, *ib.*
- Oaths and claims for dividend, ii. 361-2.
- Judgment on claims, appeals, ii. 362-3.
- Gazette notice, ii. 362.
- State of funds, ii. 363-4.
- Scheme of division and ranking, ii. 364-5.
- Payment of dividends, ii. 365-6.
- First dividend, ii. 365.
- Second dividend, *ib.*
- Gazette notice, *ib.*
- Subsequent dividends, ii. 366.
- Accelerated dividends, *ib.*
- Postponed dividends, *ib.*
- Gazette notice, *ib.*
- Winding up the estate, and sale of residue, *ib.*
- Gazette notice, *ib.*
- Discharge of the bankrupt, ii. 367.
- General view of the discharge, *ib.*
- When discharge is competent, ii. 367-8.
- Requisite concurrence, ii. 368-70.
- Evidence of concurrence, ii. 371.
- Judicial opposition, ii. 371-2.
- Oath of bankrupt, ii. 372.
- Discharge, and effect of it, ii. 372-3.
- Discharge of the trustee, lodging unclaimed dividends, and disposal of surplus, ii. 373.
- Gazette notice, *ib.*
- Discharge of trustee, *ib.*
- Lodging unclaimed dividends, ii. 374.
- Disposal of surplus, *ib.*
- Winding up of the estate of a deceased debtor, *ib.*
- Intestacy, and lapsed trust, *ib.*
- Existing trust, ii. 375.
- Discharge of bankrupt as in *cessio*, *ib.*
- INTERNATIONAL LAW IN RELATION TO BANKRUPTCY—
- General principles of international law in bankruptcy, ii. 375-6.
- Effect of international law on moveable estate, ii. 376-8.
- Effect of international law on heritable or real estate, ii. 378-9.
- Effect of international law on the bankrupt's discharge or certificate, ii. 379-81.
- DATE OF FIRST DELIVERANCE ON PETITION for sequestration is the date of actual bankruptcy, ii. 164-5.
- Effect of sequestration in stopping adjudications, i. 769.
- As to diligence requisite by ancestor's creditors to acquire preference, *ib.*
- In competition against Crown's extent, ii. 52-3.
- As to *pari passu* preference of arrestments and poindings, ii. 75-6.

4 Q

SEQUESTRATION IN BANKRUPTCY—continued.**DATE OF FIRST DELIVERANCE ON PETITION—continued.**

Effect of payments made and transactions entered into by bankrupt after sequestration, ii. 232-3.

Whether debtor may concur in after trust-deed; competency and effect of, after completed trust-deed, ii. 390.

Effect of, as to pursuer of *cessio*, ii. 478.

Certificate to him by trustee, *ib.*

Effect of, on interest of debts, i. 694.

By landlord, to render his hypothec effectual, ii. 32-3.

Three points in the process essential to competition, *ib.*

Warrant to sell, *ib.*

Warrant to pay, ii. 33-4.

Criterion of preference, *ib.*

Landlord's right in competition, *ib.*

With the Crown, *ib.*

With creditors, *ib.*

With farm-servants, ii. 34-5.

See LANDLORD'S HYPOTHEC.

SEQUESTRATION OF LAND ESTATES, and management previous to sale, ii. 243-4.

Circumstances in which Court sequestrates, ii. 244-5.

Of the awarding sequestration, ii. 245-6.

Who may oppose, *ib.*

Judicial factor, *ib.*

His duties and powers, *ib.*

Becoming insolvent, ii. 247-8.

See SALE (JUDICIAL).

SERVANTS—

Wages of, how far attachable, i. 126-7.

Prescription of, i. 348.

How far preferable, ii. 148-9.

Domestic servants, *ib.*

Farm-servants, ii. 149, 34.

Artisan, servants, or overseer not privileged, *ib.*

Implied mandate to accredited servants, i. 509-10.

Delivery to buyer's servants, clerks, and agents, same as delivery to buyer himself, i. 214-5.

SERVICE of a widow to her terce, i. 50-1.

Entry of heir by service, liability under, i. 703-4.

SERVICES, valuation of, in prying value of lands in judicial sale, ii. 251-2.**SERVITUDE, completion of, as a security, i. 793-4.****SESSION, COURT OF—**

Its equitable interposition in facilitating adjudications, i. 752-3.

In mitigating penalties, i. 700-1.

Jurisdiction in sequestration, ii. 283-4.

Exclusive in reduction on 1621, ii. 181.

On 1696, c. 5, ii. 195.

SET-OFF, ii. 118-9.

See COMPENSATION.

SETTING apart dividends, ii. 365.**SETTLEMENTS, extrajudicial—**

Between insolvent debtors and their creditors, ii. 381, 488-9.

Settlements *mortis causa*, challenge of, *ex capite lecti*, i. 88-9.

See TRUST-DEEDS—ARRANGEMENTS.

SETTLING with creditors under a composition contract in a sequestration, ii. 348.**SEXENNIAL prescription of bills, i. 418-9.**

See PRESCRIPTION.

SHARES in private or public company are moveable, ii. 2-3.

In public company not arrestable, ii. 4.

How attached, ii. 507-8.

See PARTNERSHIP.

SHIPS HELD IN, i. 153-4.

Transfer of such ships or shares, i. 157-8.

See SHIPS.

SHEEP—

How delivery of, completed, i. 187-8.

Conveyance of, *retenta possessione*, ineffectual, i. 273-8.

SHERIFF, his jurisdiction in mercantile sequestration, ii. 203.

ADJUDICATION CONTRA HEREDITATEM JACENTEM before, i. 751-2.

SHIP-CARPENTER, order of ranking on ship, ii. 406.**SHIPMASTER—**

Contract between owners and master, i. 554-5.

Qualification of master, *ib.*

Must be a British subject, *ib.* note.

How appointed, i. 554-5.

Powers of owners in dismissing him, *ib.*

Majority of owners entitled to appoint him, *ib.*

Power and authority of master, *ib.*

Power to delegate his authority, *ib.*

In employment of ship in home port superseded by owners, *ib.*

In foreign port may make charter-party, etc., *ib.*

Receiving goods where ship on general freight, i. 555-6.

Presumed agent in fitting out, victualling, and managing ship abroad, *ib.*

May hypothecate for furnishings abroad, *ib.*

How far presumed power will bind owners in home port, *ib.*

Owners liable though they have furnished master with money, *ib.*

No authority to hypothecate in home port, *ib.*

His negligence will bind owners, *ib.*

Their responsibility extends only to value of ship, *ib.*

Master liable to full extent, *ib.*

Personally liable for furnishings, i. 556-7.

Must keep and produce certificate of registry when required, *ib.*

Where he refuses, *ib.*

Claims on bankruptcy of owners, i. 557-8.

On master's bankruptcy, *ib.*

Master's obligation in hiring of seamen, *ib.*

Claim against master for wages, i. 560-1.

Contracts for repairs and furnishings, i. 567-8.

Who liable, *ib.*

Contracts with master for repairs, etc., i. 570-1.

Ground of his authority, i. 571.

Repairs, etc., in home port, i. 572.

Master may order common and necessary furnishings, etc., *ib.*

Responsibility of owners, *ib.*

Power of master in foreign port, i. 573-4.

Furnishings, borrowing money in foreign port, *ib.*

Evidence of master to furnishings, *ib.*

Master's power of raising pecuniary supplies abroad, *ib.*

By bond or bill, i. 577-8.

Contracts of bottomry and *respondentia*, *ib.*

See BOTTOMRY.

Power to raise supply of necessities by sale of ship and cargo, i. 583-4.

Claims for repairs, etc., on master's bankruptcy, i. 584-5.

Where both owners and master have failed, claim may be against both, i. 585-6.

Master may compensate freight, *ib.*

Where he has abused his power, owners have relief, *ib.*

Charter-party by master, i. 586, 589.

Bills of lading, i. 590-1.

Obligation of master as to conduct of voyage, i. 602.

Sailing, *ib.*

With convoy, *ib.*

Delay or deviation by storm or enemy, i. 603-4.

Termination of voyage and delivery, i. 604-5.

Responsibility on edict *Nautæ Caupones*, etc., i. 605-6.

Departure from proper course, i. 608.

SHIPMASTER—*continued*.

Limitation of responsibility under statutes, i. 608-9, 606-7.

Evidence of shipmaster in proof of loss under insurance, i. 658-9.

Order of ranking on ship, ii. 406-7.

On freight, *ib.*

Transference of goods in the hands of, i. 212-3.

See DELIVERY — SHIP — CHARTER-PARTY — BILL OF LADING.

WHETHER ENTITLED TO SALVAGE, i. 639-40.

Evidence of, as to loss, i. 659-60.

Claim by, for wages merely personal without hypothec, i. 557-8.

No lien on ship, freight, or cargo for his engagements, ii. 97-8. See i. 557-8.

SHIPMENT of goods—

Notice of, i. 475-6.

Effect of receipt to seller for goods, i. 476-7.

SHIPOWNERS' liability under contracts relative to the equipment of vessel, i. 551-2.

Shipshusband, i. 553.

Master, i. 554.

Responsibility for, i. 555.

Claims on bankruptcy, i. 557.

Contracts of affreightment, i. 586.

Responsibility on edict *Nautæ Caupones*, etc., i. 605-6.

Ranking on cargo, ii. 406-7.

Part owners are common proprietors, not partners, ii. 544-5.

Title and right of the several owners, *ib.*

Responsibility to third parties, *ib.*

How share attached, ii. 545-6.

See OWNERS, etc.—SHIPMASTER—CHARTER-PARTY—REPAIRS.

SHIPPER of goods bound to intimate shipment, i. 475-6.

Obligation on, under contract of affreightment, i. 612-3.

To furnish a cargo, *ib.*

Quantity, *ib.*

Time, i. 613-4.

To pay freight, i. 614-5.

Lay-days and demurrage, i. 621-2.

See FREIGHT.

SHIPS—

OF PROPERTY IN, i. 145-6.

May be either of British or foreign vessels, *ib.*

Difference between them, *ib.*

Whether British subject owner of foreign-built ship may employ it in same trade which alien owner might, i. 146-7.

Property in British ships depends on written titles, *ib.*

NAVIGATION ACTS—

History and policy of the, i. 146-7.

Monopoly of trade secured to British ships, i. 148-9.

Privileges guarded by forfeitures and alien duties against foreign ships, *ib.*

Of a ship's national character, *ib.*

Description of British privileged ships, *ib.*

Registered ship, *ib.*

Captured ship, owners must be British, i. 149-50.

Within king's dominions, *ib.*

Ships not registered, *ib.*

Honduras ships, *ib.*

Navigated as British, *ib.*

Description of foreign privileged ships, *ib.*

Registering of British ships, i. 150-1.

Persons authorized to make registry and grant certificate, i. 151-2.

Where to be registered, *ib.*

Proofs of the built, *ib.*

Where ship a condemned prize, *ib.*

Survey of the ship, *ib.*

SHIPS—*continued*.NAVIGATION ACTS—*continued*.

Proofs of the ownership, i. 151-2.

Register, i. 152-3.

Certificate of registry, *ib.*

Bond to keep certificate for use of the ship, *ib.*

Custody and use of certificate, *ib.*

Lost certificate, *ib.*

The certificate the badge of ownership, *ib.*

SHIPS HELD IN SHARES, i. 153-4.

Requisite division into sixty-four shares, *ib.*

Oath as to number held by each, *ib.*

Ship held by a partnership or company, *ib.*

Limitation in number of owners, *ib.*

Exceptions, minors, legatees, creditors, etc., *ib.*

Joint-stock companies, *ib.*

SALE AND TRANSFERENCE OF SHIPS, i. 154-5.

Requisites under the statutes 4 Geo. IV. c. 41, and 6 Geo. IV. c. 110, *ib.*

1. Bill of sale, *ib.*

Recital of the registry, i. 155-6.

Error in recital, *ib.*

2. Entry in book of registry, i. 156-7.

Effect of entry, *ib.*

3. Endorsement on the certificate or new registry, *ib.*

Neglect of endorsement, *ib.*

Order of endorsement, *ib.*

New registry, i. 157-8.

Effect of endorsement, *ib.*

It is the criterion of preference, *ib.*

Sale of shares in a ship, *ib.*

Transfer of shares, *ib.*

Sales in absence of owners, *ib.*

Power of the agent or correspondent, *ib.*

Registry *de novo* where, by death, absence, etc., bill of sale cannot be produced, *ib.*

Transference to heir's creditors, etc., i. 158.

Transfers by law, *ib.*

Competition between purchaser or mortgagee and creditors, *ib.*

MORTGAGE OF SHIPS and deeds in security, i. 158-9.

Methods of using property in ships as a fund of credit, *ib.*

Transfer in security, or assignment for payment of debt, i. 159.

Entry in book of registry, *ib.*

Endorsement, *ib.*

Mortgagee not deemed owner, *ib.*

Preference of mortgage or assignment on bankruptcy, *ib.*

Vendition in security, ii. 10.

Should be aided by insurance, ii. 11.

EVIDENCE IN QUESTIONS OF OWNERSHIP in vessels or shares, i. 159-60.

Exhibition of oaths, affidavits, registers, and entries, *ib.*

Copies thereof, or extracts, *ib.*

[PRESENT STATE OF THE LAW OF PROPERTY IN SHIPS, i. 159.

Acquisition of ship property, i. 160.

Registration of ship property, i. 161.

Sale of ship property, i. 164.

Transfer otherwise than by sale, i. 167.

Mortgage of ship property, i. 169.

Sale and mortgage proceeding on certificate], i. 171.

CONTRACTS RELATIVE TO EQUIPMENT OF SHIPS, i. 551-2.

Employment of the ship, *ib.*

Remedy where dissension among the owners, *ib.*

Rule in England, majority to bind minority, *ib.*

Remedy in Scotland, i. 552.

Shipshusband, how appointed, *ib.*

Duties and powers, i. 552-3.

His claim on bankruptcy of owners, *ib.*

Claims by owners on bankruptcy of shipshusband, *ib.*

SHIPS—*continued.*

- CONTRACT BETWEEN OWNERS AND MASTER, i. 554.
 - Qualification of master, *ib.*
 - Appointment, i. 554-5.
 - Power and authority in home and foreign port, *ib.*
 - Responsibility of owners for his acts, i. 555-6.
 - He is personally liable for furnishings, i. 556-7.
 - Must keep and produce, when required, certificate of registry, *ib.*
 - Refusal to produce it, *ib.*
 - Claims on bankruptcy of owners, i. 557.
 - On master's bankruptcy, *ib.*
 - See OWNERS—SHIPMASTER.
 - Hiring of seamen, i. 507-8.
 - General principles of the contract, *ib.*
 - Claims for wages, i. 560-1.
 - See SEAMEN.
- CONTRACTS FOR REPAIRS AND FURNISHINGS, i. 567-8.
 - With owners, *ib.*
 - With master, i. 570-1.
 - Master's power in home or foreign port, i. 572-3.
 - Articles furnished, i. 573.
 - Money, i. 575.
 - Loans on bottomry and *respondentia*, i. 577.
 - Sale of ship or cargo for supplies, i. 583-4.
 - Claims on bankruptcy of owners, i. 584-5.
 - On master's bankruptcy, *ib.*
 - See REPAIRS.
- CONTRACTS FOR EMPLOYMENT OF SHIP on general or special freightage, i. 585.
 - Charter-party, i. 586.
 - Obligation of owner and master, i. 588-9.
 - Of the merchant, *ib.*
 - Of ships on general freight, i. 589-90.
 - Bills of lading, i. 590.
 - Claims on bankruptcy of parties, i. 595-6.
 - In relation to the loading, *ib.*
 - Goods taken on board, i. 596-7.
 - Care and skill in taking goods on board, *ib.*
 - Stowage, *ib.*
 - Claims in relation to the condition of ship, i. 597.
 - Ship, rigging, and tackle, must be sufficient, i. 597-8.
 - Captain and crew, i. 598-9.
 - Pilot, how appointed, *ib.*
 - In what cases necessary, i. 599-600.
 - How far owner responsible where pilot on board, i. 601-2.
 - Bills of health, licences, and necessary papers, *ib.*
 - Conduct of voyage, i. 602.
 - Ready at port of delivery, *ib.*
 - Sailing, *ib.*
 - Sailing with convoy, i. 602-3.
 - Delay or deviation by storm or enemy, i. 603-4.
 - In relation to termination of the voyage and delivery, i. 604-5.
 - Responsibility of owners and master under edict *Nautæ Caupones*, etc., i. 605-6.
 - See NAUTÆ CAUPONES, etc.
 - Claims on bankruptcy of merchant or shipper, i. 612-3.
 - Obligation to furnish a cargo, *ib.*
- FREIGHT, OBLIGATION FOR, i. 613-4.
 - Who liable for it, i. 614-5.
 - When due, i. 616.
 - Ship stopped and goods carried forward, *ib.*
 - Goods arriving damaged, *ib.*
 - Stopped short of destined port, i. 617-8.
 - Abandonment of goods for freight, *ib.*
 - Dead freight, i. 620.
 - Demurrage, i. 621.
 - See DEMURRAGE—FREIGHT.
- COLLISION OF SHIPS, damages by, i. 625-6.
 - Owners of ship in fault liable, i. 626-7.

SHIPS—*continued.*

- COLLISION OF SHIPS—*continued.*
 - Where no fault proved, but loss arises from some error or neglect of which no evidence, i. 626-7.
 - Pure accident, or act of God, *ib.*
 - Actual fault or negligence, *ib.*
 - Where impossible to say who is to blame, *ib.*
 - How contribution for loss to be struck where ships of unequal value, i. 628-9.
 - Of loss by general average, i. 629-30.
 - See COLLISION—AVERAGE.
 - Of salvage, i. 638-9.
 - See SALVAGE.
 - Contracts of insurance of ships, i. 643-4.
 - See INSURANCE.
- ORDER OF RANKING of creditors on ship, ii. 406.
 - On freight, *ib.*
 - On cargo, ii. 406-7.
 - The property of ships moveable, and goes to executor; attachable by arrestment and poiding, ii. 1-2.
 - Ships, and goods on board, whether can be poided, ii. 59.
 - Arrestment, ii. 63.
- HYPOTHEC ON—
 - For foreign repairs, i. 574-5.
 - What is a home port? i. 575.
 - Hypothec for seamen's wages, i. 562.
 - Hypothec to freighters, ii. 38.
 - For average loss, ii. 39-40.
- LIEN ON—
 - For repairs, etc., ii. 92-3.
 - Possession necessary, ii. 93-4.
 - Exception from lien by local usage, *ib.*
 - Repairs without possession, *ib.*
 - Furnishings, *ib.*
 - Indirect lien attempted, *ib.*
 - Lien for freight, ii. 94-5.
 - Seamen's lien or privilege for wages, ii. 406-7.
 - For average loss, ii. 98-9.
 - Salvage, *ib.*
- SHIPSHUSBAND, i. 552.
 - How appointed, *ib.*
 - His duties, i. 552-3.
 - Powers, *ib.*
 - Claims by, on bankruptcy of owners, i. 554-5.
 - Claims by owners on shipshusband's bankruptcy, *ib.*
 - Order of ranking on ship, ii. 406-7.
- SHOPMAN, institorial power of, i. 510-1.
- SHOPS, landlord's hypothec over *invecta et illata* in, ii. 30-1.
- SHORT-DATED bills given for discount, and long-dated bills lodged in pledge, i. 291-2.
 - See BANKER.
- SHORT ENTRY of bills in banker's account, i. 290-1.
 - See BANKER.
- SIMPLE AVERAGE, i. 581, 629.
- SINE QUA NON, effect of the non-acceptance or death of trustee so named, i. 30-1.
- SINGULAR successors, composition for entry of, with the superior, i. 22-3.
- SIXTY days of retrospective bankruptcy, ii. 168, 194.
 - Survivance of granter of deed for sixty days in a question of deathbed, i. 84-5, ii. 168.
- SKELETON BILLS, i. 415-6.
- SKILL—
 - Of professional men and artists, etc., responsibility for, i. 488.
 - Writers, messengers, etc., i. 489.
 - Drivers of coaches, i. 491-2.
- SLEEPING PARTNER—
 - Evidence of, ii. 510-1.
 - Notice of, at dissolution, ii. 533.
 - Proceedings against, ii. 561.

SLIP preceding policy of insurance, effect of, i. 649-50.

SMALL DEBT ACTS, imprisonment on, ii. 434-5.

SMUGGLERS, whether entitled to *cessio*, ii. 478-9.

SMUGGLING contracts, i. 325-6.

Action denied for price of goods, *ib.*

Contracts for smuggling, *ib.*

Where party pursuing is participant, *ib.*

Natives, *ib.*

Foreigners, *ib.*

Proof of accession to the smuggling, i. 326-7.

Contracts for purchase of smuggled goods where seller has no accession to the breach of law, *ib.*

Sale abroad by foreign merchant, *ib.*

By native abroad, *ib.*

Criterion for sustaining or dismissing action, *ib.*

Where the goods are prohibited, *ib.*

Knowledge of duties not being paid, *ib.*

Claim by *bona fide* purchaser for delivery after goods in circulation, *ib.*

Bills for smuggled goods void in hands of original parties, *ib.*

SOCIETIES, Friendly, sums due by office-bearers, privileged debts, ii. 150-1.

SOCIETY. See PARTNERSHIP, ii. 500-1.

SOLDIERS and SAILORS—

How far protected from arrest for debt, ii. 454-5.

Not liable to *meditatio fugæ* warrant, *ib.*

SOLEMNITIES of formal deeds, i. 340-1.

Holograph writings, i. 341-2.

Privileged writings, *ib.*

Writings in *re mercatoria*, *ib.*

Testamentary deeds, *ib.*

See SASINE.

TO BE USED BY MESSENGER at apprehending debtor, in order to infer bankruptcy, ii. 160, 436.

SOLVENCY and Bankruptcy, general view of the law of debtor and creditor in the two states of, i. 4-5.

Evidence of restoration to solvency after bankruptcy, i. 267.

Insurance of solvency, i. 393.

See GUARANTEE.

Question of solvency in a challenge under 1621, c. 18, ii. 179.

Proof of solvency defeats challenge, *ib.*

Where deed to a confidant, and grantor insolvent at time of challenge, insolvency presumed at date of deed, *ib.*

What is to be reckoned solvency? ii. 153-4.

Sufficient if debtor had at time of deed a visible estate, *ib.*

Rights in *spe* cannot be taken into account, *ib.*

How value of life interests computed, *ib.*

Return to solvency, ii. 169-70.

Offer to prove solvency in application for sequestration, ii. 293-4.

SPECIAL and General Adjudication, i. 741-2.

CHARGE, defect in, i. 778-9.

AND GENERAL FREIGHT, contracts of, i. 585-6.

OR PARTICULAR LIENS, ii. 92-3.

PRECEPT of sasine, i. 736-7.

SPECIFIC Appropriation, effect of possession under a remittance for, i. 281-2.

Effect on factor's lien, ii. 110.

SPECIFICATION—

Effect of, in changing property, i. 294-5.

Controversy of the Proculian with the Sabinian concerning it, *ib.*

Effect of change on form of the property, *ib.*

Property acquired by fraud, i. 295-6.

Change on property in temporary possession, i. 296-7.

Fraudulent change, *ib.*

Where change necessary, *ib.*

OF A PATENT, i. 107-8. See PATENT.

SPES SUCCESSIONIS—

In rights to parent and child, in conjunct fee and life-rent, father *fiar*, child having a mere *spes successionis*, i. 54-5.

Exceptions to this rule, *ib.*

See LIFERENT AND FEE.

SPONSIONES LUDICRÆ, i. 319-20.

SQUALOR CARCERIS—

Derivation of the term, ii. 439-40.

Close confinement in England, *ib.*

Doctrine of the Scottish law, *ib.*

Responsibility of magistrates for, ii. 440, note.

Open jail, ii. 443.

Distinction between imprisonment for debt and *in medietate fugæ*, ii. 456-7.

See BILL OF HEALTH—ACT OF GRACE.

STABLERS—

Responsibility on edict *Nautæ Caupones*, etc., i. 498-9.

How far it may be limited, i. 501.

Lien to, ii. 99-100.

STACKS, ranking on corn-stacks, ii. 406-7.

STAGE-COACHES—

Responsibility of owners of, for carelessness or unskillfulness of drivers, i. 491-2.

Rashness, negligence, overloading, *ib.*

Presumption against owner, i. 492-3.

Where injury from rash or undue apprehension of alarm, *ib.*

Where damage by unforeseen accident, owners not liable, *ib.*

Responsibility on *Nautæ Caupones*, etc., i. 496-7.

How far it may be limited by notices, advertisements, etc., i. 501-2.

Obligation to receive passengers, etc., *ib.*

Lien on luggage of passengers, ii. 99-100.

STAMP, commentary on the Acts regulating, i. 336-7.

Consolidating Acts, *ib.*

General rule as to agreements relative to real or personal property, *ib.*

Agreements not admitting of pecuniary calculation, *ib.*

Memorandum, letter, or agreement, as to sale or manufacture of goods, etc., *ib.*

Agreement contained in a series of letters, *ib.*

Bonds, *ib.*

Exemption from *ad valorem* duty, i. 337-8.

Bills of exchange, *ib.*

Want of stamp to bills cannot be supplied, *ib.*

Amount of the stamp, *ib.*

Policies of insurance, i. 332-3.

Conveyances of property, *ib.*

Trust-deed, *ib.*

In what cases a single stamp sufficient, i. 339-40.

Alterations in an instrument, *ib.*

Consequences of want of stamp, or having an improper one, *ib.*

AD VALOREM stamp on bills, i. 414.

Agreements with seamen, whether require a stamp, i. 558-9.

For charter-party, i. 586-7.

An unstamped policy of insurance, when lost, cannot be proved by parole evidence, i. 649-50.

How far a stamped policy may be altered without a new stamp, *ib.*

Objection of want of stamp in competition, i. 735-6.

Disposition with a wrong stamp may be supplied, i. 684-5, note.

Adjudication validated by proper stamp being affixed, *ib.*

BLANK, effect of signing, i. 415-6.

FOR BILL OF LADING, i. 590, 595.

STANDING GUARANTEE subsists till recalled, i. 393-4.

STATE of interests and order of ranking in judicial sale, ii. 266-7.

STATE—*continued.*

OF AFFAIRS to be made up by bankrupt before examination, ii. 323, 325.

Of funds, etc., to be made up by trustee previous to each dividend, ii. 365, 366.

STATEMENTS of value, advantages, etc., in a sale, warranty under, ii. 262-3.

STATUTE. See ACT OF PARLIAMENT.

MERCHANT OF ENGLAND as to imprisonment for debt, ii. 430-1.

Of Scotland, *ib.*

STEAMBOATS, responsibility of owners under the edict *Nautæ*, etc., i. 496-7.

ENGINES and machinery, whether heritable or moveable, i. 786-7, ii. 1-2.

STEERSMEN, i. 598-9. See PILOT.

STELLIONATE, effect of, against purchasers, i. 307-8.

STIPEND, minister's, whether attachable for debt, i. 123-4. Must be assigned in *cessio*, ii. 483-4.

STOCK—

Government stock, i. 100.

Nature of funded debt, moveable, but not arrestable, *ib.*

Whether it may be adjudged, *ib.*

Nature of the unfunded debt, *ib.*

How to be attached, *ib.*

Bank stock, nature of, and how attachable, *ib.*

Whether heritable or moveable, ii. 2-4.

Stock of Bank of England, i. 100-1.

Of Bank of Scotland, Royal Bank, and British Linen Company, i. 101-2.

COMPANY'S, moveable, ii. 2-3.

Lien of partners on, ii. 501-2.

Preference of company creditors on, *ib.*

Contribution of, by partners, *ib.*

How may be contributed, ii. 536.

Stock of joint adventure, ii. 542.

STOLEN PROPERTY may be vindicated by the owner against purchasers and creditors, i. 299.

STOPPING IN TRANSITU—

History of the doctrine, i. 222-3.

In England, doctrine first admitted in equity, i. 226-7.

Afterwards adopted in courts of law, i. 227-8.

Inquiry concerning the principle of the doctrine, i. 228-9.

Circumstances in which goods may be stopped, i. 229-30.

Where goods actually delivered into buyer's possession, *ib.*

Where the goods are still in the actual possession of the seller, *ib.*

Rules in England and Scotland in this case, *ib.*

Constructive delivery, i. 230-1.

Delivery into a warehouse for the buyer, *ib.*

To buyer, shipmaster, or ship, *ib.*

Where goods in hands of workmen, *ib.*

In a bonded warehouse, *ib.*

In dock warehouse, *ib.*

Goods on their passage from seller to buyer, *ib.*

Effect of bills of lading, *ib.*

Terms of the receipt, whether to buyer or seller, *ib.*

Where price not paid, *ib.*

Part delivered to buyer, and part still with carrier, i. 230-1.

Where goods are to be sent to a particular destination named by buyer, *ib.*

Whatever the form of bill of lading, vendor may, against the vendee or his general creditors, stop *in transitu*, i. 234-5.

Whether bill of lading endorsed to a *bona fide* purchaser divests the right to stop, i. 235-6.

Opinions of Valin and Emerigon as to the negotiability of bills of lading, *ib.*

In English mercantile practice, bills of lading negotiable, *ib.*

STOPPING IN TRANSITU—*continued.*

Right of stopping divested as against endorsee of bill of lading, *ib.*

This held settled law in Scotland, i. 236-7.

Cases where transference by bill of lading will not bar stoppage, *ib.*

Endorsee's right seems qualified by right of foreign vendor to seize goods while under a foreign jurisdiction, *ib.*

Confidential endorsement of bill of lading, or with notice that price not paid, endorsee comes in place of original holder, i. 238-9.

Qualified endorsement, *ib.*

Knowledge of consignee's insolvency, *ib.*

Endorsement of bill of lading to buyer's factor, i. 239-40.

Endorsement as a consignment, or for advances, *ib.*

Character of middleman in questions of stoppage, i. 240-1.

Middleman converted into special agent of buyer, *ib.*

Special agent, whether can be held a middleman, *ib.*

Circumstances essential to stoppage, i. 241-2.

Price must be unpaid, *ib.*

Effect of part payment, *ib.*

Circumstances of buyer, i. 242-3.

Absolute bankruptcy insolvency, *ib.*

Suspicious circumstances, *ib.*

Acts of ownership by buyer, conditionally or before end of voyage, *ib.*

Acts of virtual possession where transit terminated, *ib.*

Fraudulent anticipation of delivery, i. 245-6.

WHO MAY STOP *in transitu*, i. 244-6.

General rule is, that right exists between seller and buyer, *ib.*

Not between principal and factor, *ib.*

Nor between one having a lien, and the owner of goods, *ib.*

Consignor held a vendor in the sense of this rule, where he buys goods by order of consignee, and transmits them, charging a commission on price, i. 245-6.

Person sending goods to be sold on joint behoof of self and consignee, may stop, i. 246-7.

ON WHAT CONDITION seller obliged to allow goods to proceed, i. 246-7.

Where bills not already granted, seller may insist for good bills; not obliged to take bankrupt's bills with bond of caution or other unmarketable security, *ib.*

Where bills already accepted but not yet due, *ib.*

If price already due, *ib.*

Where there is such an objection to price as would warrant judicial suspension, *ib.*

MANNER OF STOPPING goods *in transitu*, i. 247-8.

Effect of bankruptcy of buyer in England, *ib.*

In Scotland, i. 248.

Whether bankruptcy of buyer be a stoppage, *ib.*

FORM OF STOPPING, i. 248-9.

No specific form or solemnity necessary for stopping, *ib.*

Where goods sent by sea, presentment by seller's agent of a bill of lading will complete the stoppage, *ib.*

Stoppage by warrant of a judge, i. 153-4.

Private countermand sufficient, though verbal, i. 249-50.

Seller held to stop by entering goods in custom-house to pay duties, though bankrupt has forcibly got possession, *ib.*

Where goods sent by a land carrier, *ib.*

Where goods stopped by *negotiorum gestor* of seller, the stoppage should be by warrant of a judge, *ib.*

Notice by seller to creditors of buyer of intention to stop, not sufficient stoppage, *ib.*

Notice to bankrupt buyer himself that warrant to stop applied for not sufficient stoppage, *ib.*

There must be a resumption of possession by seller, i. 250.

STOPPING IN TRANSITU—*continued.*FORM OF STOPPING—*continued.*

Creditors of buyer arresting preferred to seller subsequently stopping, i. 250.

EFFECT OF STOPPING *in transitu*, i. 250-1.

Is seller stopping *in transitu* entitled both to resume goods and to claim damages? *ib.*

Analogy between stopping *in transitu* and lien, *ib.*

Seller holding lien may claim damages, *ib.*

Distinction between stopping *in transitu* and lien, *ib.*

Analogy between stopping *in transitu* and buyer on his failure rejecting goods, i. 251-2.

See REJECTION—RESTITUTION—DELIVERY—FRAUD.

STORMS, deviation from voyage by, i. 603-4.

STOWAGE of goods, responsibility of owners and master for, i. 596-7.

STOWELL, Lord, authority of his decisions in maritime law, i. 549-50.

STRANDED SHIPS, salvage on, i. 640-1.

Protection of, by statute, against depredators, i. 641-2.

See SALVAGE.

SUB-CONTRACT with partner of a company to share his profit, ii. 543-4.

Other partners no concern with it, *ib.*

Stranger not liable for company debts, *ib.*

SUBFEUING, prohibition against, in a feudal grant, effect of, i. 28-9.

SUBLEASE by tenant may be challenged under Act 1621, though subtenants excluded by principal lease, ii. 178.

Landlord's hypothec where a sublease, ii. 30-1.

Tenant's right to hypothecate against subtenant, ii. 31.

Tenant's power of subsetting, i. 72-3.

See LEASE.

SUBMISSION, general, in contracts of partnership, ii. 538-9.

SUBMITTING and compounding claims under a sequestration, powers of trustee and commissioners as to, ii. 321-2.

SUBSCRIPTION of bills, i. 414.

By initials, etc., i. 415.

Of deeds, i. 340.

Of policy of insurance, i. 652.

SUBTENANT, landlord's hypothec against, ii. 30-1.

See LEASE—LANDLORD'S HYPOTHEC.

SUCCESSION in heritage as affecting the interests of creditors, i. 79-80.

Right to adjudge ancestor's estate for debts of the heir, *ib.*

Right of creditors to adopt heir's challenge on deathbed, i. 80-1.

Right of heir to claim a share of moveables with or without collation, i. 95-6.

See COLLATION—CONJUNCT RIGHTS—ENTAIL—MARRIAGE.

RIGHTS OF, IN MOVEABLES, i. 136-7.

Vesting of executry without confirmation, *ib.*

Special assignations and legacies, i. 137-8.

Legitim, *ib.*

Jus relictæ, *ib.*, 678-9.

See EXECUTRY.

OF TRUSTEES, election of, ii. 317-8.

SUMMARY EXECUTION on bills in Scotland, i. 412, 429.

Apprehension of debtor on *meditatio fugæ* warrant, ii. 450-1.

SUMMONS of adjudication—

Alternative, i. 742-3.

Of poinding the ground, i. 724, ii. 56.

Of declarator, i. 785-6.

SUNDAY—

Not lawful to execute warrants on, ii. 460-1.

Meditatio fugæ and criminal warrants an exception, ii. 461-2.

SUPERIOR—

Of the estates of, as affected by conditions in feudal grants, i. 21-2.

Elective franchise, i. 22-3.

Feu-duties, *ib.*

Casualties of superiority, *ib.*

Non-entry duties, *ib.*

Relief, *ib.*

Composition, *ib.*

Evasions of casualties, and the remedies, i. 24.

Conditions in feudal grants for forcing entry, i. 25-6.

Prohibition against alienation, *ib.*

Clause of pre-emption, i. 27.

Prohibition to subfeu, i. 28.

Superior in eye of law proprietor under burden of vassal's right, i. 711-2.

Conveyance by vassal to, how accomplished, i. 723-4.

Criterion of the preference of this right, *ib.*

Criterion of superior's preference for feu-duties and casualties, *ib.*

How made effectual, *ib.*

By poinding of the ground, *ib.*

Adjudication following poinding of the ground, i. 753-4.

See CONDITIONS—POINDING THE GROUND.

CHARGING SUPERIORS, history of the perplexity in, i. 755-6.

POWER OF ADJUDGING vassal's right, i. 758-9.

HYPOTHEC OF, for feu-duties, ii. 26-7.

Extent of it, *ib.*

Ranking for, ii. 402-3.

SUPERIORITY as responsible for debt, i. 21-2.

See SUPERIOR.

SUPERSEDERE in trust-deed and accession, ii. 395-6, 488.

Supersedere and personal protections, ii. 464.

SUPERVENING securities may render moveable debts heritable, ii. 4-5.

SUPPLEMENT, letters of, ii. 63-4, note.

DEEDS, how far affected by 1696, c. 5, ii. 199.

SURVEY of ship to obtain a proper register, i. 151-2.

SUSPECTED PORT, bill of health to ship sailing from, i. 601-2.

SUSPENSION, bond of caution in, i. 401-2.

EFFECT OF, on date of bankruptcy, ii. 165-6.

SUSPENSIVE conditions in sale, i. 257-8.

SYMBOLICAL delivery, i. 187-8.

Of trees, *ib.*

Of corn, *ib.*

Of cattle, *ib.*

Of land, i. 20-1.

See DELIVERY.

SYMBOLS of sasine, i. 715-6.

TACIT hypothecs, ii. 25-6.

TACK or lease, i. 63-4.

See LEASE.

TACKLE and rigging of ship, i. 597-8.

TAILZIE, i. 43-4.

See ENTAIL.

TANTUM ET TALE, i. 298-9.

TASTING, or taking sample of goods—

Whether completes delivery, i. 192, 219.

Sale by, when completed, i. 479.

See SALE.

TAX—

Land-tax, i. 739-40.

Hypothec for taxes, ii. 39.

TEAR and wear of ship, loss by, not demandable against underwriters, i. 657-8.

TEMPORARY purposes, effect of possession for, i. 274-5.

See POSSESSION.

PROTECTION from imprisonment, ii. 466.

TENANT under a lease—

- Completion of his right, i. 63-4.
- Hypothec of, against subtenant, ii. 31-2.
- Whether can plead compensation against an assignee, ii. 132-3.

See LEASE.

TERCE—

- Legal liferent of, i. 55-6.
- Nature and ground of the right, *ib.*
- Excluded by conventional provisions made and accepted, *ib.*
- Terce of mansion-house, i. 56-7.
- Exceptions from terce, *ib.*
- Extent of terce, i. 57-8.
- How it may be excluded or diminished, *ib.*
- Evasions of terce, i. 58-9.
- Aliment beyond the terce, *ib.*
- Completing right to the terce, *ib.*
- Service, *ib.*
- Kenning, *ib.*
- Widow's claim as against creditors selling the estate, *ib.*
- Extent and exercise of the liferenter's right, i. 60-1.
- See LIFERENT.

TERM of payment—

- Endorsations of bills after, i. 426-7.
- Of rent, i. 68-9.
- FOR PRODUCTION OF CLAIMS in ranking and sale, ii. 249-50.
- DECREE OF CERTIFICATION *contra non producta*, *ib.*
- Of imprisonment necessary to pursue *cessio*, ii. 472-3.
- OF RETROSPECT, in challenging on bankruptcy and death-bed, ii. 168.

TERMINATION of bankruptcy, ii. 168-9.

- Of mercantile factories, i. 522.
- Of voyage under charter-party, i. 604.
- Of interest on obligations, i. 694-5.

TERRITORIAL law rules the disposal of real property abroad, ii. 378, 575.

See FOREIGN.

TERROR, effect of, in vitiating obligations, i. 314-5.

TESTE of writ of extent, ii. 42-3.

TESTING of deeds, i. 340-1.

THEFT, responsibility of public carriers for, i. 499.

THREATS of violence, or of charging with crime, effect of, in vitiating obligations, i. 315-6.

THROWING overboard goods in a storm, i. 630-1.

See AVERAGE.

TIMBER, power of heir of entail to cut, i. 50-1.

- Liferenter's right to, i. 61-2.
- Sale of, how completed, i. 187, 792.
- See WOODS.

TIME for recall of sequestration, ii. 294-5.

- For reviewing resolutions of creditors, ii. 331.
- For meeting to elect trustee, ii. 312.
- For examination of bankrupt, ii. 325.
- For making dividends, ii. 365-6.
- For making offer of composition, ii. 348.
- For judicial sale, ii. 253-4.
- Time for presenting bill for acceptance, i. 432-3.
- And payment, i. 434.
- For notice of dishonour, i. 441.
- For notice of abandonment in insurance, i. 657-8.
- Computation of the sixty days in a challenge on death-bed, i. 84-5, ii. 168.
- In a reduction on 1696, *ib.*, ii. 213-4.

EFFECT OF LAPSE OF, in challenging on the statute 1621, ii. 181-2.

HIRING OF SHIP ON, i. 586, 614.

TITLE to challenge on 1621, ii. 171, 185-6.

On 1696, c. 5, ii. 194-5.

TO PURSUE RANKING AND SALE by a creditor, ii. 240-1.

By apparent heir, ii. 241.

TITLE—*continued.*TO PURSUE RANKING AND SALE—*continued.*

- To pursue a *cessio*, ii. 472.
- To pursue by assignees, ii. 573-4.
- OF PURCHASER AT JUDICIAL SALE, ii. 257-8.
- At sale under sequestration, ii. 344-5.
- See PURCHASER.

RADICAL DEFECT OF, effect of, against purchasers and creditors, i. 298-9.

TO PURSUE AN ADJUDICATION, i. 777-8.

Of claimant in a sequestration, ii. 304-5.

TITLE-DEEDS—

- Possession of them necessary in proving value of land in judicial sale, ii. 251-2.
- Hew to obtain them, *ib.*
- Inventories to be made up and signed by the Lord Ordinary, ii. 254-5.
- PLEDGE OF, ii. 23-4.
- English doctrine inconsistent with Scottish rule, *ib.*
- Hypothec over, ii. 107-8.

TITLES TO LAND—

- Charter of adjudication and sasine, with forty years' possession, an irredeemable title, i. 744-5.
- Titles in person of trustee in sequestration, ii. 337.
- See SEQUESTRATION—HERITABLE SECURITIES—SASINE—ACCRETION.

TITLES, PASSIVE, i. 702-3. See PASSIVE TITLES.

TOCHER of Wife, return of, where marriage dissolved within year and day, i. 679-80.

Deductions, *ib.*

TOTAL Loss, claim for, must be accompanied with abandonment, i. 653.

Adjustment of total loss, i. 659.

See INSURANCE.

TRACT of future time, rights having, are heritable, ii. 1-2.

TRADE—

- Payments and transactions in the course of, excepted from challenge on 1696, c. 5, ii. 202.
- Contracts against the policy of laws of trade, i. 325-6.
- Lien grounded on usage of trade or special custom, ii. 102-3.
- On special agreement, or the course of dealing between the parties, ii. 103-4.

TRADITION, i. 178-9.

See DELIVERY.

TRANSACTIONS to obtain preferences for prior debts, ii. 194-5.

For future debts, ii. 217.

In the ordinary course of trade not challengeable on 1696, ii. 202-3.

Circuitous transactions challengeable at common law, ii. 229-30.

With bankrupt after sequestration, i. 288-9.

Bill transactions with bankers, i. 290.

See BANKERS.

Usurious, i. 327-8.

See ACTS 1696, 1621—COMMON LAW.

TRANSFERENCE of ships, i. 154-5.

Of goods and merchandise, i. 176-7.

Of risk as the criterion of transference, i. 179-80.

Distinction between actual and constructive delivery, i. 181-2.

Delivery of goods in seller's own possession, i. 182.

In the custody of third parties, i. 194.

In the hands of shipmasters and carriers, i. 212-3.

Delivery to a third person as representing the buyer, i. 214-5.

Effect of fraud on transference, i. 260-1.

See FRAUD—DELIVERY—STOPPING IN TRANSITU—SALE.

OF GOODS AT SEA, or at a distance, by consignment in security or payment, ii. 11-2.

Of bills of lading, ii. 14.

TRANSFERENCE—*continued.*OF GOODS AT SEA—*continued.*

Of invoices without bill of lading, ii. 15.

Of goods in another's custody, *ib.*

Of debts, *ib.*

See CONSIGNMENTS—ASSIGNATION.

TRANSITUS of goods. See STOPPING IN TRANSITU, i. 222-3.

TRAVELLER, or Rider, implied mandate to, in receiving orders, etc., i. 515-6.

TREATISES, Scottish—

On maritime law, i. 545-6.

Foreign, i. 547.

English, i. 550.

TREES, marking of standing trees as buyer's, held to be good constructive delivery, i. 187-8.

See WOODS.

TRIENNIAL prescription of merchant's accounts, etc., commentary on, i. 348-9.

How claim established, after prescription, i. 349-50.

See PRESCRIPTION.

TROVER and Conversion, action of, in England, i. 269-70.

TRUST—

Of the settlement of estates in trust, limitation of uses and purposes, i. 29-30.

Occasions for trusts; arranging marriage contracts, family settlements, etc., i. 30.

CONSTITUTION OF THE TRUST, i. 30-1.

It cannot be constituted in the person of another without his consent, *ib.*

Effect of failure in the nomination, non-acceptance, or death of trustee, or of one named *sine qua non*, or of the quorum named, *ib.*

Rights of third parties interested, how secured in such events, *ib.*

Effect of the incapacity or bankruptcy of a trustee, i. 31-2.

Nomination of a married woman as trustee, *ib.*

The husband may prevent her acceptance, *ib.*

The nomination of a woman as trustee falls with her marriage, *ib.*

Where a husband and wife are named as trustees, *ib.* note.

A trustee abstaining from acceptance may afterwards accept, i. 31-2.

Trustees named in a marriage contract, i. 37-8.

Nomination of trustees by descriptive reference, *ib.*

ESTATE IN THE TRUSTEE, i. 37-8.

Estate absolute with verbal engagement, i. 32-3.

Act 1696, c. 25, regarding trusts, *ib.*

Where the trust results from the interference of the trustee merely, *ib.*

Effect of trust proved by written acknowledgment or oath, *ib.*

How the qualification of trust established, i. 33-4.

Right absolute with backbond, *ib.*

Trust in *grazmo*, *ib.*

Consequences of these rights, *ib.*

Vesting the estate in the trustee, *ib.*

Vesting in one person, *ib.*

In the whole trustees, *ib.*

Assumption of new trustees, i. 34.

Denuding of old trustees, *ib.*

Where the trust falls by failure of trustees, *ib.*

How in such case the interest of those having the radical right preserved, *ib.*

BENEFICIAL ESTATE UNDER THE TRUST, i. 34-5.

Radical right in the grantor, *ib.*

Effect on prior creditors, *ib.*

Effect on posterior creditors, i. 35-6.

Beneficial interest in others, *ib.*

ADMINISTRATION OF THE TRUST, i. 36-7.

Power of trustees, *ib.*

Liability of joint trustee to creditors, though not admitting, *ib.*

VOL. II.

TRUST—*continued.*ADMINISTRATION OF THE TRUST—*continued.*

Extinction of the trust and reinvestment in those having the radical right, i. 38-9.

Conveyance to creditors renders debts heritable, ii. 4-5.

Where trust merely personal, *ib.*

TRUST-DEEDS—

Extrajudicial settlement of bankruptcy by, ii. 382.

Distinction between trust-deeds for family purposes and for creditors, *ib.*

OF TRUST-DEEDS FOR BEHOOF OF CREDITORS, not affected by bankrupt statutes, ii. 382-3.

OF CONDITIONS IN THE TRUST, ii. 382-3.

Objects of a trust-deed, *ib.*

Power to trustee to judge of claims,—to an arbiter to determine questions in ranking, ii. 383-4.

Stipulation for discharge to the debtor, *ib.*

Whether such conditions destroy whole trust, or whether it may subsist as a simple conveyance, *ib.*

Limitation of time for claiming, *ib.*

REQUISITES OF TRUST CONVEYANCE, ii. 384-5.

Must be a complete transfer according to rules of conveying, *ib.*

Absolute conveyance to trustee, with a backbond, *ib.*

Backbond may be taken to the several creditors, *ib.*

May be recorded where suspicious circumstances against trustee, *ib.*

Trust proved by writ or oath, *ib.*

Ordinary form of conveyance to a trustee or trustees for sale of subject, paying debts, and reversion to grantor, *ib.*

Conveyance to creditors by name, inexpedient and cumbersome, *ib.*

Whether necessary to enumerate creditors, ii. 385-6.

Effect of enumerating debts, *ib.*

How trustee's right completed, to be effectual against non-acceding creditors, ii. 386-7.

Completion of his right regulates competition, *ib.*

Acceptance by trustee, *ib.*

Death of trustee, *ib.*

Assumption of trustees, ii. 387.

How assumed trustees act, *ib.*

Titles, *ib.*

EFFECT OF BANKRUPT LAWS ON TRUST-DEEDS, ii. 387-8.

Insolvency alone no ground of challenge, *ib.*

Effect of the statutes 1621 and 1696, ii. 388-9.

Objection on 1696, c. 5, ii. 389-90.

Varying decisions on this point, *ib.*

Deed challengeable if within sixty days of bankruptcy, ii. 389-90.

Effect of challenge on administration, *ib.*

How to secure against challenge, or to secure *pari passu* preference, *ib.*

Effect of sequestration, ii. 390-1.

A completed trust-deed, unless agreed to by all the creditors, may be superseded by sequestration, *ib.*

Effect of trust-deed with accession.

EFFECT OF TRUST-DEEDS IN RELATION TO THE CREDITORS, ii. 391-2.

Right in trustee, *ib.*

Against ranking and sale, etc., ii. 390-2:

Right held for creditors; for debtor; denuding; mode of compelling this, *ib.*

See below, ADMINISTRATION.

TRUST-DEED, AND DEED OF ACCESSION, ii. 392.

Of the trust-deed, *ib.*

Of the accession of the creditors, ii. 392-3.

Accession in general, *ib.*

To plan of distribution, ii. 394-5.

Proof of accession from circumstances, *ib.*

Implied conditions, *ib.*

Fairness and universal assent, *ib.*

TRUST-DEEDS—continued.**TRUST-DEED AND DEED OF ACCESSION—continued.**

Effect of accession, ii. 395.

On assignee, *ib.*On creditor acquiring another debt, *ib.***DEED OF ACCESSION**, and chief points to which it is commonly directed, ii. 395-6.Nature and object, *ib.*Creditor not bound by extraordinary conditions, unless assenting, *ib.*None bound till all accede, *ib.*Arrangements in the deed regulating the management, disposal, and distribution of the estate,—*supersedere* of diligence,—discharge of debtor, etc., ii. 395-6.**ADMINISTRATION OF THE TRUST**, ii. 397.Powers regulated by object of trust, *ib.*Provision for lodging money in bank, *ib.*

Effect of trustee's bankruptcy, where no such stipulation, and after dividend advertised and part paid, ii. 397-8.

Remedy of the creditors, *ib.***DISCHARGE OF BANKRUPT**, and exoneration of trustee, ii. 397-8.Deeds of *supersedere*, *ib.*Discharge of person, *ib.*

Exoneration, ii. 398-9.

See **ARRANGEMENTS—PRIVATE COMPOSITIONS.****WHETHER DEBTOR MAY CONCUR IN A SEQUESTRATION** after a trust-deed, ii. 490-1.**VESTING OF ESTATES IN TRUST**, ii. 496-7.Bankrupt feudally infeft, *ib.*How purchaser with personal right may be defeated, *ib.*Competition of adjudications in implement by purchaser, and by trustee for creditors, *ib.*

Where bankrupt not infeft, ii. 497-8.

Danger of completing his titles where he has granted conveyances with infeftments, *ib.*How to proceed in this case, *ib.*Where debtor's title a disposition without procuratory or precept, *ib.*Where he has succeeded to ancestor, and titles not complete, *ib.*See **VESTING.****BY A COMPANY**, for settling bankruptcy, ii. 560.

How executed, ii. 561.

How completed, *ib.***TRUSTEE** under sequestration the judge of claims, ii. 362-3.

Judicial inquiry into claims, in consequence of objections, ii. 363-4.

Appeal from trustee's judgment on debts, *ib.*See **PROOF OF DEBTS.****NATURE OF THE OFFICE OF TRUSTEE**, ii. 302, 318-9.His election, *ib.*, 312.See **SEQUESTRATION.****CERTIFICATE BY**, to bankrupt applying for *cessio*, ii. 478-9.

In the sequestration of company estates, ii. 564-5.

Where estates of partners require separate administration, ii. 565-6.

Vesting the estate, *ib.***ASSIGNMENT OF DEBTS** to a trustee, to pursue a reduction under 1696, for general behoof, ii. 216-7.**TRUSTEES—**

Under trust-deed for creditors, conveyance to, ii. 381-2.

Requisites, ii. 384.

Assignment of debts to, in order to secure equality, ii. 389.

Right of, how it must be completed to compete with non-acceding creditors, ii. 386-7.

Declarator of trust on death of trustee, *ib.*

Right of trustee, ii. 391-2.

Denuding, *ib.*Calling to account, *ib.*

Bankruptcy of, ii. 397-8.

See **TRUST-DEED.****TRUSTEES—continued.****LIEN OF**, ii. 117-8.**ARRESTMENT** in hands of, ii. 70-1.**COMPENSATIONS** in the case of trustees or administrators, ii. 124-5.

Whether compensation pleadable against trustee, ii. 132-3.

VESTING OF ESTATES in, ii. 496-7.See **VESTING.****UNDER A TRUST-RIGHT**, nomination of, i. 30-1.

Their powers, i. 36-7.

See **TRUST.****TUTORS—**

Restitution against deeds by, as available to pupil or creditors, i. 127-8.

Deeds of administration, i. 128-9.

Of extraordinary administration, *ib.*See **RESTITUTION.**

Securities by, effect of, on question of heritable or moveable, ii. 6-7.

UNCONDITIONAL Trust-deed, effect of bankrupt statutes on, ii. 388-9.Not challengeable unless on bankrupt statutes, *ib.*Prevents preferences, *ib.*See **TRUST-DEED.****UNDERTAKER**, his expense of funeral a privileged debt, ii. 147-8.**UNDERWRITERS**, claim of, against broker, and insured for premium, i. 645-6.

Effect of receipt in policy, i. 646-7.

As to the insured, *ib.*Where fraud in the insured, *ib.*

Effect of receipt against broker, i. 648.

In question as to return premiums, i. 648-9.

Where broker has failed without receiving premiums, underwriters may claim against insured, i. 646-7.

Proofs to support broker's claim, i. 648-9.

Diminished by return premiums, *ib.*By underwriters may be met by claim for loss, *ib.*Claims for repayment of loss settled on imperfect information, *ib.*Claims by insured on underwriter's bankruptcy, *ib.*Proofs, *ib.*

Of compensation or balancing of accounts on broker's failure, ii. 126-7.

Claims of underwriters, *ib.*Recall of broker's mandate where balance in favour of underwriter, *ib.*Where balance against the underwriter, *ib.*Payment of premium in such case by insured to broker, *ib.*Settlement of accounts between broker and insured, *ib.*Where premium merely entered in account between broker and insured, *ib.*Whether this secures insured against underwriter's demand, *ib.*

Demand by underwriter against insured for premiums on broker's bankruptcy, ii. 127-8.

Where insured also bankrupt, *ib.*Balancing accounts on underwriter's failure, *ib.*

Questions of compensation between underwriter's creditors and broker, ii. 128-9.

Between underwriter's creditors and the insured, ii. 130-1.

Balancing accounts on failure of insured, ii. 131-2.

See **INSURANCE—COMPENSATION.****UNFEUDALIZED** heritable estate, securities over, i. 789; 794.

Ranking of creditors holding preferences over, ii. 405-6.

UNFINISHED goods remaining in hands of seller to be completed, transferred by buyer paying price, i. 189-90.See **DELIVERY.**

UNFUNDED DEBT, i. 100-1. See STOCK.

UNILATERAL obligations, i. 351-2.

UNILATERAL trusts, ii. 381-2.

UNIVERSAL discharge in Scotland, i. 730-1.

UPSET price of lands in judicial sale, ii. 252-3.

Lowering of, *ib.*

Of lands sold under sequestration, ii. 344-6.

URBAN tenements, whether superior has hypothec over *invecta et illata* in, ii. 26-7.

Landlord's hypothec over *invecta et illata*, ii. 29-30.

Power to assign or sublet implied in lease of, i. 72-3.

Completed by possession, ii. 31-2, note.

Hypothec in, where a sublease, ii. 30.

USAGE, mercantile, effect of, in construing mutual contracts, i. 456.

On contract of sale, i. 465.

How far it may alter common law, i. 516-7.

LIEN GROUNDED ON, ii. 102-3.

EFFECT OF LOCAL CUSTOM or usage on the rights of tenants, i. 70-1.

USANCE, rate of, as to payment of bills, i. 433-4.

USES, statute of, in England, i. 32-3.

USURY, i. 327-8.

Usury statutes, *ib.*

Repeal of, *ib.* note.

Requisites to ground an action for penalties, *ib.*

There must be an actual taking of usury, *ib.*

Requisites to annul the contract, *ib.*

Stipulation of usury, *ib.*

Collateral stipulation, *ib.*

Taking of usury by subsequent act, i. 328-9.

Limitation Act, 31 Eliz. c. 5, *ib.*

Restriction of prosecution for penalties within twelve months, *ib.*

There must be interest taken with usurious intention in prosecuting for penalties, *ib.*

Stipulation for interest before it becomes due, *ib.*

Excessive discount on bills, *ib.*

Commission on bills discounted, i. 329.

Delivery of bills for cash, *ib.*

Taking full discount on bill, and giving in part payment another bill not due, *ib.*

Substituting goods for money at discounting a bill, i. 329-30.

Giving an acceptance for a commission, *ib.*

Commission at discounting a bill for guaranteeing solvency of acceptor, *ib.*

Stipulation for commission, beyond legal interest, on all goods purchased with money advanced, *ib.*

Where the lender runs part of risk of the employment of the money, *ib.*

Where principal and interest both put in hazard, i. 330-1.

Where interest only hazarded, *ib.*

Requisites to establish usury as an objection to a bond or contract, *ib.*

Claim for the debt where bond or contract annulled, *ib.*

Where debt has been paid, *ib.*

Where it existed independently of the usurious bond or contract, *ib.*

Whether a debt originating in usurious contract may be rendered legal by cancelling the original documents and granting new ones, *ib.*

ILLEGALITY OF DEBT AGAINST THIRD PARTIES, i. 330.

Rule in England, *ib.*

Statute 58 Geo. III. c. 93, as to usurious bills in hands of *bona fide* holders, i. 330-1, note.

Rule in Scotland, i. 331.

Debt partly illegal, i. 331-2.

VALUABLE consideration for granting deed, question as to, under 1621, ii. 177-8.

VALUATION—

Valuing and deducting securities in claiming to vote under a sequestration, ii. 306-7.

Value to be deducted and balance specified, ii. 307.

Reckoning votes in value and number, ii. 331, 352.

Creditor with real security must value and deduct before ranking, ii. 361-2.

Mode of settling value, *ib.*

Whether may alter valuation where security undergoes change, *ib.*

Ranking of partnership debts against individual partners, ii. 364-5.

See RANKING.

OF ANNUITIES, in order to ranking in bankruptcy, i. 355-6.

Whether redemption money the value of a redeemable annuity, i. 360-1.

AND ADJUSTMENT OF LOSSES under insurance contract, i. 657.

Fire insurance, i. 673.

Life insurance, i. 676-7.

GENERAL AVERAGE, mode of valuing and apportioning, i. 636-7.

VALUE of land in ranking and sale, proof of, ii. 251.

Proof of rental, ii. 251-2.

Valuation of services, etc., *ib.*

Effect of statements of value, etc. in a sale, ii. 262-3.

VALUED Policy of insurance, i. 659-60.

VASSAL—

Of the vassal's estate or *dominium utile*, i. 20-1.

Conveyance by, to superior, i. 723-4.

Superior adjudging his right, i. 753-4.

See SUPERIOR—DOMINIUM UTILE.

VENDEE, or Buyer—

Claim against his estate, i. 471-2.

Goods undelivered, *ib.*

Where goods have perished, *ib.*

Rules as to risk, *ib.*

Negligence of seller in following directions of buyer as to carriage, i. 473-4.

Obligation on seller to notify shipment, transmit bill of lading, etc., i. 475-6.

Claims by buyer on bankruptcy of seller, i. 476-7.

Where price has not been paid, *ib.*

Where price paid and goods undelivered, i. 477-8.

Intermediate fall in value of subject, *ib.*

Buyer's claim for damages, *ib.*

Direct damage, i. 478-9.

Constructively direct, *ib.*

Equity restrains excessive damages where failure not fraudulent, i. 479-80.

Time at which damage to be struck, and what the amount, *ib.*

Where damage constructive, equity interferes, *ib.*

Liability of vendee or consignee for freight, i. 615-6.

See DELIVERY.

VENDITION of a ship, i. 154-5.

In security, i. 158, ii. 10.

Should be aided by insurance, ii. 11-2.

See SHIPS—MORTGAGE.

VENDITIONI EXPONAS for sale of goods attached by writ of extent, ii. 43-4.

VENDOR, or Seller—

Transference of goods in his own possession, i. 182-3.

In the custody of third parties, i. 194.

In hands of shipmasters and carriers, i. 212.

Claim by, against buyer's estate, i. 491-2.

Where goods still undelivered, *ib.*

Where goods have perished, *ib.*

Rules as to risk of carriage, etc., *ib.*

Negligence in following directions of buyer as to carriage, i. 473-4.

VENDOR—*continued*.

- Obligation on, as to shipment of goods, transmission of bill of lading, etc., i. 475-6.
- Claim by buyer against seller on bankruptcy, i. 476-7.
- Where price not paid, *ib*.
- Price paid and goods undelivered, i. 477-8.
- Effect of intermediate fall in value, *ib*.
- Claim for damages, *ib*.
- Direct damage, i. 478-9.
- Constructively direct, *ib*.
- See DELIVERY—STOPPING IN TRANSITU.

VERBAL Contract, debts by, i. 347-8.

How debt proved, *ib*.

ACCEPTANCE of bill, i. 423-4.

VERGENS AD INOPIAM—

- A ground for stopping *in transitu*, i. 242-3.
- For arrestment in security, ii. 65.
- For inhibition, ii. 136-7.

VERITY—

- Oath of, by petitioning creditor in sequestration, ii. 291.
- By claimant, ii. 304-5.
- See OATH.

VESTING bankrupt estate in trustee, ii. 333.

See SEQUESTRATION.

OF ESTATES IN TRUST—

- Judicial or voluntary, ii. 496-7.
- Where bankrupt feudally infeft, *ib*.
- Where there is a purchaser with a personal right, how may he be deprived of a preference? *ib*.
- Adjudication in implement where a conveyance, judicial or voluntary, to trustee, *ib*.
- Purchaser may also bring an adjudication in implement, *ib*.
- First adjudication has preference, *ib*.
- Where the debtor not infeft, ii. 497-8.
- Danger of completing his titles where he has granted conveyances with infeftment, *ib*.
- How to proceed in such case, *ib*.
- Where bankrupt's right a disposition without precept or procuratory, *ib*.
- Where bankrupt has succeeded to his ancestor, and his titles not complete, *ib*.
- Vesting company estates in trustee under sequestration, ii. 565-6.
- Vesting estates in trustees under family trust, i. 33-4.

OF EXECUTRY without confirmation, i. 136-7, ii. 76.

In England, ii. 76.

VICENNIAL prescription of holograph obligations, i. 346-7.

VIGILANCE, responsibility of magistrates for vigilance of jailors, etc., ii. 437-8.

Of banks over their agents for cautioner's security, i. 380-1.

VINCO VINCENTEM VINCO TE in ranking, ii. 407-8.

VITIATION of bills, i. 416-7.

VITIOUS intromission, i. 705-6.

Of executors, ii. 81-2.

VOLUNTARY sale contrasted with judicial sale, ii. 342, 344.

SECURITIES OVER HERITAGE, i. 711-2.

Over property simply heritable, i. 789-90.

Over moveables, ii. 10-1.

See SECURITIES.

CONVEYANCE BY HEIR, inefficacy of, to defeat ancestor's creditors, i. 770-1.

TRUST-DISPOSITION, ii. 381-2.

See TRUST-DEED.

VOTES—

Qualification to vote in sequestration, ii. 312, 314.

See SEQUESTRATION.

VOUCHERS and grounds of debt to be produced when claiming on bankrupt estate, ii. 310.

What meant by grounds and vouchers, ii. 309-11.

VOYAGE under contract of affreightment—

- Claims in relation to the conduct of, i. 602-3.
- Ready at port of delivery, *ib*.
- Sailing, *ib*.
- Sailing with convoy, i. 602-3.
- Warranty to sail with convoy, *ib*.
- Rules of responsibility as to, *ib*.
- Capture on intermediate voyage, *ib*.
- Course of the voyage, i. 603-4.
- Delay or deviation by storm or enemy, *ib*.
- Termination of the voyage, and delivery of goods, i. 604-5.
- Responsibility of owners for departure from proper course, i. 608-9.
- Calling at intermediate ports, *ib*.
- Effect of deviation on contracts of insurance, i. 668-9.
- What to be held deviation, *ib*.
- Alteration of voyage, i. 669-70.
- See CHARTER-PARTY—SHIP—INSURANCE.

WADSET—

History of, i. 711-2.

Rules of preference of, as a security, i. 720-1.

WAGER, policy of insurance ineffectual, i. 653-4.

WAGERS, obligations for, void, i. 319-20.

WAGES of servants—

- How far attachable, i. 126-7.
- Prescription of, i. 348-9.
- How far privileged debts, ii. 148-9.
- Of domestic servants, *ib*.
- Farm-servants, ii. 149.
- Artisans, etc., *ib*.

OF SEAMEN—

- Regulations for, by statute, i. 558-9.
- No demand competent under a custom for additional wages not mentioned in articles, *ib*.
- No parole agreement effectual where written articles, *ib*.
- Claim personal against master or owners, and privilege on ship, i. 560-1.
- Claims for wages, voyage completed, i. 561-2.
- For whole wages, *ib*.
- Remedy against freight by hypothec, and against ship by lien, i. 562-3.
- Limitation of claim for wages, *ib*.
- Disability of mariner hired by voyage, *ib*.
- Hired by month, i. 563-4.
- Where improperly discharged, *ib*.
- Where ship does not proceed on voyage, *ib*.
- Desertion a forfeiture of wages, *ib*.
- Entering king's service voluntarily or by impress, *ib*.
- Bad treatment of seamen, *ib*.
- Where voyage has not been completed, i. 564-5.
- Where no freight earned, wages not due, *ib*.
- Also if ship captured, *ib*.
- Claim *pro rata itineris*, *ib*.
- Effect of recapture, i. 565-6.
- Where part saved from wreck, and freight earned for it, i. 565.
- Embargo, though attended with violent separation from ship, no discharge of wages, i. 565-6.
- Ship not seaworthy, i. 566-7.
- What a good answer to claim, *ib*.
- Female sailor, *ib*.
- See SEAMEN.

HYPOTHEC OF SEAMAN FOR, i. 561-2.

Remedy in England and Scotland, i. 562-3.

Preference on price where ship sold, *ib*.

LIEN OF SEAMEN FOR, ii. 98-9.

WAIVING negotiation of bills, i. 445-6.

Of lien, ii. 91.

WAR—

- Contracts against war policy, i. 322-3.
- Right of neutrals, i. 323-4.
- Licences, requisites of, to be effectual, *ib.*
- Principles regulating the war policy as betwixt the subjects of the belligerents, i. 324-5.
- Effect of war intervening after constitution of a contract, *ib.*
- Right of belligerents trading under licences, *ib.*
- Right of neutrals, *ib.*
- Restrictions, *ib.*
- Contraband of war, *ib.*
- Blockade, *ib.*
- Colonial and coasting trade, *ib.*
- Right of search, *ib.*
- Alien enemy's debt, i. 325-6.

WARDING, Act of—

- Imprisonment on, ii. 430, 435.
- Erroneously referred to stat. Rob. i., *ib.*
- Nature, ii. 431-2.
- History, *ib.*

WAREHOUSE—

- Delivery into buyer's warehouse, i. 183-4.
- Into king's warehouse, *ib.*
- Transfer of warehoused goods under bond, i. 203, 208.
- Effect of acts of ownership by buyer on goods in custody of warehouseman, i. 194.
- Goods in wharfinger's warehouse, how transferred, i. 194-5.
- Goods in general commission agent's warehouse, i. 198-9.
- In king's warehouse, *ib.*
- Who is custodian of king's warehouse, i. 196-7.
- See WAREHOUSE.

HYPOTHEC OF LANDLORD over *invecta et illata* in, ii. 30-1.

- Goods of third parties not liable, *ib.*

WAREHOUSING ACTS—

- Commentary on, i. 198-9.
- Analysis of, i. 200-1.
- Warehouses of special security, i. 202.
- Ordinary warehouse, *ib.*
- Distinction between warehouses and king's warehouse, *ib.* note.
- Security for duties, i. 202-3.
- General bond, *ib.*
- Special bond, *ib.*
- Regulations for preserving rights of parties, i. 203-4.
- For securing freight, etc., of goods, *ib.*
- Dock warehouses, i. 205.
- Ordinary bond warehouses, i. 208.

WARRANTICE—

- Claims on, in relation to transference, i. 689-90.
- Implied where onerous consideration, *ib.*
- Where right gratuitous, *ib.*
- Consideration not fully adequate, *ib.*
- Losses not falling under warrantice, *ib.*
- Implied warrantice, questions relative to the nature of the warrantice to be granted, *ib.*
- Right of action on eviction, i. 690-1.
- Extent of claim on eviction, *ib.*
- Notice of the eviction, *ib.*
- Warrantice to purchaser at judicial sale, ii. 260-1.
- Effect of description of the subject, *ib.*
- Deduction for what not made effectual, *ib.*
- Effect of statements of value, advantages, etc., ii. 262-3.
- Measurements, ii. 263-4.

REAL, AS A SECURITY, i. 732-3.

- On what this security depends, i. 733-4.
- Must appear on record, *ib.*
- Purchasers exposed to danger of lands having been disposed in real warrantice beyond years of prescription, *ib.*

WARRANTICE—*continued.*

- Conveyance in real warrantice not challengeable under 1696 as security for future debt, ii. 219-20.

WARRANTIES—

- Under contract of bottomry, i. 581-2.
- In contract of affreightment, i. 602, 597.
- Under insurance contract, i. 662-3.
- Defences against insured for breach of, *ib.*
- Difference between warranty and representation, *ib.*
- Express and implied warranties, *ib.*
- Implied warranties, i. 663-4.
- Seaworthiness, *ib.*
- Misrepresentation and concealment, i. 665.
- Deviation, i. 668.
- In fire policy, i. 673.
- Life policy, i. 676.

WARRANTS of imprisonment, ii. 435-6.

- Act of warding, caption, *ib.*
- Border warrants, ii. 449-50.
- Meditatio fugæ* warrant, history of, ii. 448.
- Who may issue it, ii. 450.
- Execution of, ii. 456-7.
- See MEDITATIO FUGÆ.

WARRANTS AND GROUNDS of adjudication, objections to, i. 775-6.

- Not necessary to produce them after twenty years, i. 778-9.

WATER BAILIE of the Clyde, ii. 63-4.

WEIGHING cargo on delivery by shipmaster, i. 599-600.

WHARFAGE DUES a burden on ship, ii. 96-7.

WHARFINGER—

- Goods in hands of, how transferred to buyer, i. 194.
- Delivery to, i. 214.
- Delivery by shipmaster to, *ib.*, 605.
- Negligence of, in unloading, i. 605.
- Lien of, ii. 102-3.

WIDOW'S right of terce, *ib.*, 55-6.

- Aliment to, beyond terce, i. 58.
- Widow's claim for mournings, i. 679.
- A privileged debt, i. 679-80, ii. 148.
- See TERCE.

(MINISTERS') FUND, annuities not attachable, i. 125-6.

- Arrears due to, a preferable debt, ii. 150.

WIFE, *propositura* of, i. 509, 510.

- Ratification of deeds by, i. 137.
- Adjudication on bond by, incompetent, i. 776.

WIND-BILLS, i. 449-50.

WINDING UP of sequestration, ii. 366, 373.

- Discharge of the trustee, ii. 373-4.
- Trustee must have complied with requisites of statute, *ib.*
- Settlement with bankrupt for the reversion, ii. 374.

PARTNERSHIP SUBSISTS FOR, after dissolution, ii. 527-8. See PARTNERSHIP.

WITNESSES to deeds, i. 340-1.

- See WRITINGS.

WIVES AND CHILDREN—

- Claims by, i. 676-7.
- Their legal claims independently of special contract, i. 678-9.
- Jus relictæ*, *ib.*
- Legitim, *ib.*
- Dissolution of marriage within year and day, i. 679.
- Return of tocher, *ib.*
- What deductions husband entitled to, *ib.*
- Mournings to wife, *ib.*
- Where marriage subsists for a year, or is productive of a living child, i. 679-80.
- Bankruptcy of husband, *ib.*
- Dissolution of marriage after husband's insolvency, *ib.*
- Divorce of husband, *ib.*
- Death of wife while husband solvent, i. 680-1.
- Children cannot claim on father's estate for legitim as against creditors, *ib.*

WIVES AND CHILDREN—*continued*.

- May claim as their mother's heirs where she died during husband's solvency, i. 680-1.
- Distinction between claim of aliment of a natural and a legitimate child, *ib*.
- Claims of wife and children under special contract, *ib*.
- Antenuptial contract of marriage, i. 681-2.
- Provisions secured by real security and personal obligation; *ib*.
- Jus crediti*, i. 682-3.
- How to secure against husband's bankruptcy, i. 683-4.
- Provisions to children by antenuptial contract, i. 684.
- Postnuptial contracts, i. 686.
- Claims in consequence of contract of separation, i. 688-9.
- How far provisions onerous in sense of Act 1621, ii. 176, 177.

See PROVISIONS—ALIMENTARY FUNDS.

WOMEN—

- Nomination of a married woman as a trustee, i. 31-2.
- Husband may prevent her acceptance, *ib*.
- Whether the nomination of a woman as trustee falls by her marriage, *ib*.
- Where the nomination is before marriage, and the truster survives that event, *ib*.
- Where a husband and wife are named, *ib*. note.
- RATIFICATION OF DEEDS by married women, i. 137-8.
- Women may be made bankrupt, ii. 156.
- Exceptions, *ib*.
- Married woman living with husband, ii. 157-8.
- Though separated, she cannot be made bankrupt by imprisonment, *ib*.
- Whether women in a state of separation, and carrying on business, may be made bankrupt, *ib*.
- Diligence, ii. 159, 164.

WOOD—

- Right of heir of entail to cut wood, i. 50-1.
- Whether creditors may attach heir's faculty of cutting, i. 51-2.
- Liferenter not entitled to cut except for necessary use of the estate, i. 61-2.
- Timber spontaneously growing again may be cut, *ib*.
- When wood laid out in annual allotments, liferenter may continue the cutting, *ib*.
- Right of apparent heir to cut, i. 94-5.
- SALE OF, how completed, i. 187-8.
- CONTRACT of wood-cutting, whether subject to landlord's hypothec, ii. 27-8.
- Whether conveyance of heir of entail's faculty to cut down trees can, under Act 1621, be challenged by creditors, ii. 178-9.
- If he has made contracts of sale of timber, conveyance of price challengeable, *ib*.
- Completion of right to cut as a security for debt, i. 792-3.

WORKING DAYS, i. 623-4. See DEMURRAGE.

WORKING TOOLS may be excepted from conveyance in *cessio*, ii. 485-6.

WORKMAN—

- Goods in hands of, where employed by seller, not held delivered, i. 193-4.
- If employed by the buyer, transfer complete, *ib*.
- Where goods sold, and notice given with order of delivery, he will be held custodier for buyer, i. 196-7.
- Claims by, under contract of location, on employer's bankruptcy, i. 486-7.

WORKMAN—*continued*.

- Claims against workman by employer, i. 486-7.
- See LOCATION.

WRECK—

- Seamen's claim for wages a debt on, i. 565-6.
- Salvage on, i. 643-4.

WRIT of Extent, ii. 40-1. See EXTENT.

WRITER—

- HYPOTHEC OF, FOR EXPENSES, ii. 34-5.
- Principle of the right, *ib*.
- Does not depend on possession of documents of debt or diligence, requires only notice to adverse party not to pay, *ib*.
- Doctrine in England, *ib*.
- In Scotland, ii. 35-6.
- Agent may have decree in his own name, *ib*.
- Not subject to compensation of debt due by client to adverse party, *ib*.
- Where decree not in his own name, may forbid party against whom decree, to pay client till he is satisfied, *ib*.
- Whether extends over the principal debt decreed for, ii. 36-7.
- Whether it covers advances by others, ii. 37-8.
- Client's power to settle, *ib*.
- LIEN OR RETENTION OF, ON PAPERS, ii. 106-7.
- Extent of the security, *ib*.
- Subjects of it, ii. 107-8.
- Expires with possession, *ib*.
- Town and country agent, *ib*.
- What a termination of possession, *ib*.
- Effect of the security, ii. 108-9.
- Waiver of retention, ii. 109-10.
- RESPONSIBILITY OF, FOR SKILL, i. 489-90.
- Order of ranking, ii. 406-7.

WRITING—

- Obligations and contracts constituted by, i. 339.
- Proof by, after prescription, i. 349-50.

WRITINGS—

- Solemnities of written contracts, i. 340-1.
- Deeds, *ib*.
- Attested deeds, *ib*.
- Rules as to the subscription and attestation of such deeds, *ib*.
- Notarial subscription, *ib*.
- Onus probandi* lies on objector to want of due solemnity, i. 341-2.
- Holograph writings, *ib*.
- Such writings prescribe in twenty years, *ib*.
- Proof of date of holograph writings, *ib*.
- Privileged writings, *ib*.
- Testamentary deeds, *ib*.
- Writings in *re mercatoria*, *ib*.
- What writings are held as such, i. 342-3.
- Privileges of such writings, *ib*.

WRONGOUS IMPRISONMENT on *meditatio fugæ* warrant, damages for, ii. 457-8.

YEAR AND DAY, adjudications within, i. 754-5.

- After, i. 763-4.
- How year and day computed, i. 758.
- Dissolution of marriage within, i. 679-80.
- After, or birth of living child, *ib*.

INDEX OF CASES CITED BY THE AUTHOR.

A <i>versus</i>	B	i. 777	Allan	Calzier	i. 343
Abbotshall		ii. 348	Allan	M'Crae	ii. 391
Abel	Sutton	ii. 527, 534	Allan	Stein	i. 226, 234, 248, 264, 266, 268
Abercrombie	Brodie	ii. 448	Allan	Thomson	ii. 183
Aberdeen	Blair	ii. 273	Allan	Young	i. 668, 701
Aberdeen	Gordon	i. 131	Allardes	Morrison	i. 701
Aberdeen	Gordon	i. 461	Allardice	Allardice	i. 55
Aberdeen	Lord Kenmore	i. 723	Allwood	Hinkell	i. 657
Aberdeen	Paterson	ii. 104	Ambrose	Hopwood	i. 436
Aberdeen	Scott	ii. 70, 79	Anderson		i. 73, ii. 61, 246
Aberdeen	Thomson	ii. 108	Anderson		i. 794
Abraham	Dubois	i. 338	Anderson		ii. 483
Achindachy		i. 38	Anderson	Abercromby	i. 681
Adam	Duthie	i. 720	Anderson	Alexander, etc.	i. 72
Adam	Murray	i. 667	Anderson	Cleveland	i. 454
Adams	Lindsell	i. 458	Anderson	Dempster	i. 33, 300
Adamson	Smith	i. 463	Anderson	Edie	i. 675
Adamson	Wightman	ii. 205	Anderson	Goddard	i. 478, 480
Addison	Gandasequi	i. 536	Anderson	Hayman	i. 388
Addison & Son	Duguid	i. 653	Anderson	Marshall	i. 23
Adney		i. 393	Anderson	M'Dowall	ii. 321
Advocates		ii. 17	Anderson	Nasmyth	i. 744
Advocate, Lord	Duncan	ii. 487	Anderson	Pitcher	i. 456, 603
Affleck	Kirkcudbright	i. 382, ii. 438	Anderson	Pyper & Co.	i. 492
Agnew	Agnew	i. 46, 49	Anderson	Robertson	ii. 425
Agnew	Bell	ii. 137	Anderson	Royal Exchange Assurance i. 657	
Agnew	Macniven	i. 67	Anderson	Smith	ii. 455
Aiken		i. 290	Anderson	Sanderson	i. 507
Aikenhead	Russell	i. 707	Anderson	Sinclair	i. 362
Aitchison		ii. 31	Anderson	Starkey	ii. 168, 394
Aitchison	Binny	i. 72	Anderson	Wood	i. 374, ii. 138
Aitchison	Hopkirk	i. 23	Anderson	Young	i. 40, ii. 385
Aitken	Aitchison	ii. 394	Anderson	Russell	ii. 535
Aitken	Aitken	i. 743	Anderson	Pott	ii. 67
Aitken	Gray	ii. 445, 479	Andrew		ii. 102
Aitken	Rennie	ii. 299	Andrew	Adam	i. 443
Aitkinson	Macbean	i. 489	Andrew	Moorhouse	i. 619
Akhurst	Jackson	ii. 548	Andrew	Ross, etc.	i. 475, 476
Alexander		ii. 187	Ankerville, Lord		i. 43
Alexander		i. 642, 554	Ankerville, Lord	Sanders	ii. 136
Alexander	Alexander	ii. 2	Angerona, The		i. 622
Alexander	Black	i. 299-306	Angus	Angus	ii. 4
Alexander	Dundas	i. 689	Annan	Woodsman	i. 665
Alexander	Lundie	ii. 173	Annand	Chessels	i. 683
Alexander	M'Leay	ii. 60	Annandale	Harris	i. 318
Alison		ii. 482	Annandale	Scott	i. 58
Alison	Auchinlecks	i. 776	Annet	Carstairs	i. 570
Alison	Ballantyne	i. 761	Anson	Bailey	i. 445
Alison	Campbell	ii. 28	Apollo, The		i. 642
Alison	Chalmers	i. 738	Appin		ii. 69
Alison	Dundonald	i. 37, 551	Appleby	Dods	i. 564-5
Alison	Fairholmes	ii. 125	Arbuckle	Cowtan	i. 123
Alison	Johnston	ii. 35, 37	Arbuthnot	Arbuthnot	i. 143, 692
Alison	Proudfoot	i. 72	Arbuthnot	Bisset	i. 236
Allan		i. 682	Arbuthnot	Cockburn	i. 777
Allan	Cameron	i. 726-8			

Arbuthnot	Colquhoun	i. 70	Bain	Sinclair	i. 496
Arbuthnot, Viscount	Morrison	i. 131	Baines	Turnbull	i. 395, 396
Arbuthnot	Paterson	i. 194	Bainbridge	Nelson	i. 654
Archer	Low	ii. 463	Baird		ii. 480
Argyll	Drummore	i. 24	Baird	Aitkin	i. 465
Arkland		ii. 241	Baird	Belch	i. 443
Arkwright	Billenge	i. 789	Baird	Deuchar	ii. 133
Arkwright	Nightingale	i. 108	Baird	Japs	i. 260
Armour	Campbell	ii. 379	Baird	Murray	i. 284
Armour	Gibson	ii. 530	Baird	Murray's Creditors	ii. 12
Armstrong	Edin. and Lond. Ship. Co.	i. 494	Baird	Pagan	i. 463
Arniston	Ballenden	i. 766	Baird	Earl of Rosebery	i. 703
Arnold	Gordon	i. 369	Baird	Tucker & Co.	ii. 357
Arnold	Lyon	ii. 447	Baker	Birch	i. 444
Arnot	Boyter	i. 253	Baker	Charlton	ii. 559
Arnot	Stewart	i. 476	Baker	Langhorn	ii. 130
Arnot	Watt	i. 469	Baldney	Ritchie	i. 567
Arrol	Montgomery	ii. 360	Balfour's Creditors		ii. 238
Arrol	Wight	ii. 394, 399	Balfour's Creditors	Douglas	i. 758
Artaza	Smallpiece	i. 615	Balfour's Creditors	Moncreiff	i. 733
Arthur	Ascog	ii. 11	Balfour's Creditors	Russell	i. 389
Ashley		ii. 241	Balfour's Creditors	Scott	i. 98
Aspinal	Pickford	ii. 109	Ballantyne		i. 726
Astley	Taylor	i. 104, 109	Ballantine	Dunlop	i. 688
Aston	Heaven	i. 492	Ballantyne	Golding	ii. 379
Atherfold	Beard	i. 320	Ballenden, Lord	Monro	i. 766
Atkins	Amber	ii. 111	Ballenden, Lord	Murray	i. 772
Atkins	Barwick	i. 253, 256	Balmerino	Couper	i. 84, 85
Atkinson		ii. 435	Balmerino	L. Couper	i. 93
Atkinson	Elliot	ii. 119	Balnagown, Lord	M'Kenzie	i. 693
Atkinson	Learmonth	ii. 80	Baltic		i. 563
Atkinson	Ritchie	i. 607	Baltimore, The		i. 640
Atkyns	Amber	i. 539	Balvaird	Watson	i. 374
Attorney-General	Parruther	i. 134	Bamford	Baron	i. 274
Attorney-General	Senior	ii. 52	Banbury	Lesset	i. 423
Attorney-General	Case	i. 601	Bancroft	Hall	i. 436
Attree	Anscomb	i. 337	Bangour, Lady	Hamilton	i. 758
Auchie, etc.	Spence	i. 209	Banff	Dewars	i. 96
Auchinbowie	Interdictors	i. 135	Banfill	Leigh	i. 539
Auchinbreck		ii. 405, 414, 425	Bank of Scotland	Bank of England	ii. 220
Auchinbreck	M'Lachlan	i. 69, ii. 132	Bank of Scotland	Fairholme	i. 102
Auchinleck	Dinmore	ii. 148	Bank of Scotland	Fraser's Creditors	i. 381
Auchintoul		i. 750	Bank of Scotland	Hamilton & Co.	i. 433
Auchinvole		ii. 348	Bank of Scotland	Stewart	ii. 210
Auchterlony		ii. 12	Bank of Scotland	Watson	i. 515
Augusta, The		i. 578	Bannatyne	Brown	ii. 427
Auld	Hall & Co.	i. 205	Bannatyne	Malcolm	ii. 95
Auld	Smith	ii. 179	Bannerman		ii. 67
Auriol	Thomas	i. 329	Barbara, The	Chegwyn	i. 152
Austen	Craven	i. 198	Barber	Fox	i. 388
Austin	Drewe	i. 574	Barber	Gingell	i. 414
Austin	Whitehead	ii. 52	Barbour	Kelvie	ii. 81
Ayr, Magistrates of	M'Adam	i. 771	Barclay		i. 443
Ayton	Cheape	ii. 547	Barclay	Adam	i. 46, ii. 578
Ayton	Colville	ii. 91	Barclay	Bayley	i. 436
Ayton	M'Culloch	ii. 317	Barclay	Clark	ii. 122
Ayton	Paterson	i. 699	Barclay	Gemmell	i. 731
			Barclay	Lucas	ii. 526
Back	Longman	i. 116	Barclay	Walmsley	i. 330
Bacon	Chesney	i. 392	Barfoot	Goodal	ii. 530
Baikie	Sinclair	ii. 9	Barham	Mordaunt	ii. 131
Baillie		i. 124	Baring		ii. 529
Baillie	Carmichael	i. 44	Baring	Corrie	i. 506, 537
Baillie	Clerk	i. 97	Baring	Day	i. 639
Baillie	Doig	i. 418	Baring & Co.	Wight	ii. 136
Baillie	Laidlaw	i. 730	Barker		i. 682
Baillie	M'Intosh	ii. 123	Barker	Hodgson	i. 621-2
Baillie	Mondigliani	i. 618	Barnardison	Chapman	i. 552
Baillie	Naismith	ii. 71	Barnes	Frieland	i. 253
Baillie	Sharwood	ii. 507	Barnes	Headley	i. 329-30
Baillie	Watson	i. 743, ii. 322	Barnet		i. 777
Bain	Kippen	i. 667	Barnsby		i. 133

Barr	Creditors	ii. 483	Bertram	Thomson	ii. 300, 345
Barr	Speirs	ii. 523	Bertram	Vere	i. 90
Barret	Dutton	i. 622	Bertram	Gardner	ii. 514
Barrowfield	Witherspoon	ii. 450	Bertram	Sprott	i. 375
Barlow	Broadhurst	i. 337	Bessey	Evans	i. 622
Barron	Rose	i. 345	Beveridge		i. 299
Barrow	Coles	i. 595	Beveridge	Burgess	i. 437
Bartlet	Buchanan	i. 57, 724	Bickerdike	Ballman	i. 450, ii. 298
Barton		i. 283	Billenge	Arkwright	i. 789
Barton	Walliford	i. 606	Binning	Auchinbreck	ii. 405
Barton	Hanson	ii. 542	Binny	Binny	ii. 7
Barwick	Reid	i. 123	Binny	Veaux	i. 483
Bastow	Bennet	i. 390	Birkley	Pressgrave	i. 635
Batchin	Orr	i. 444	Birley	Gladstone	i. 620, ii. 95
Bateman	Joseph	i. 437	Birnie		i. 488
Bathe	Taylor	i. 339, 417	Birnies	Polmaise	i. 90
Bathgate	Bowden	ii. 185	Bisset	Robertson	ii. 280
Batley	Small	i. 91	Bisset	Walker	i. 62
Bayley	Schofield	ii. 152	Bishop	Shillito	i. 257, 258
Bayne		i. 348	Bishop	Ward	ii. 96
Baxter	Bell & Maxwell	ii. 124	Bize	Dickason	ii. 130
Baxter	Watson	i. 736	Black	Black	i. 82
Beadie	Heggie	ii. 294	Black	Cuthbertson	ii. 217
Beale	Thomson	i. 566	Black	Kennedy	ii. 289
Bean	Strachan	ii. 201, 227	Black	Nicholson	ii. 99
Beatson	M'Donald	i. 746	Black	Shand's Creditors	i. 777
Beattie	Lee	ii. 72	Black	Sutherland	i. 281, 302
Beattie	Lambie	i. 699	Black	M'Call & Company	i. 473
Beattie	Graham	ii. 160	Blackburn	Oliver	ii. 176
Beaver, The		i. 563, 639, 642	Blackey	Dickson	i. 619
Beck	Evans	i. 492, 500, 504	Blackhan	Doren	i. 451, 452
Beckford	Hood	i. 115	Blackwood		i. 739, ii. 241-4, 259
Bedford	Balmerino	ii. 117	Blackwood	Hamilton	ii. 181, 267
Bedwell	Yates	ii. 15	Blackwood	Sutherland	ii. 383
Beg		i. 126	Blackwood	Bower	i. 426
Belch		ii. 328	Blackie	Clegg	ii. 160, 168
Belch's Creditors		ii. 177, 241	Blackie	Robertson	ii. 185, 188, 190, 229
Belches	Calderwood	i. 130	Blackie	Wilson	i. 121, 752, 777
Belches	Johnston	ii. 125	Blair		ii. 196, 204
Belches	Stewart	i. 716	Blair	Balfour	i. 351, ii. 330
Bell		ii. 371	Blair	Douglas & Company	ii. 537
Bell	Barclay	ii. 389	Blair	Edin. Mags.	ii. 168, 436, 447
Bell	Gartshore	i. 21, ii. 214	Blair	Graham	ii. 13
Bell	Herdman	i. 375	Blair	Hunter	i. 733
Bell	Humphries	i. 552	Blair	Murrays	ii. 262
Bell	Kymer	i. 615	Blair	Simson	ii. 451, 456
Bell	Lamont	i. 69, 70	Blair	Stewart	ii. 241
Bell	M'Lean	ii. 214	Blair	Wilson	ii. 184
Bell	Puller	i. 621	Blairmiller	Douglas	ii. 504
Bell	Queensberry's Executors	i. 690	Blakey		ii. 304
Bell	Robertson	ii. 449	Blakey	Dimsdale	i. 183
Bell	Sutherland	i. 129	Blamford	Preston	i. 317
Bell	Walker	i. 116	Blane	Morrison	ii. 31
Bell	Earl Winchelsea	i. 35, 91	Blendenhall		i. 639, 643
Bellanden		i. 640	Blesard	Hirst	i. 433
Belle, The		ib.	Bloxam		i. 448
Bellona, The			Bloxam	Morley	i. 194
Belschier	Moffat	i. 55-7	Bloxam	Saunders	i. 176
Benjamin	Porteous	ii. 511	Bloxam		ii. 290
Bennet		ii. 290	Bloxburn		ii. 534
Bennet	Crawfords	i. 769	Bloxham	Pell	i. 158
Bennet	Johnston	ii. 378	Bloxham	Hubbard	i. 107
Bennet	Moita	i. 601	Bloxham	Earl of Rosslyn	i. 464
Bennock	M'Kail	i. 464	Bluett	Osborne	ii. 311
Benson	Schneider	i. 456	Blyth	Baird	i. 493
Bent	Puller	i. 281	Bodenham	Bennet	i. 424
Bentinck	Dorrien	i. 424	Boehm	Garcias	ii. 555
Bergstrom	Mills	i. 565	Bogle	Ballantyne	i. 88
Berry	Anderson	ii. 244	Bogle	Bogle	i. 213, 236
Berry	Bowes	ii. 462, 464	Bogle	Dunmore	i. 667
Berry	White	ii. 304	Bogle	Smith	i. 576
Bertrams	Hodge	ii. 127	Bogle	Adam & Mathie	i. 185, 230, 237
Bertram	Richmond	i. 648	Bohtlingk		

Bohtlingk	Scheider	i. 242	Brough	Jolly	i. 724
Boldero		i. 292	Brough	Jollie	ii. 117
Bolton	Mansfield & Company	ii. 529	Brough	Selby	ii. 222
Bolton	Puller	i. 288-293	Brough	Spankie	ii. 209
Bolton	Bull	i. 104-6	Broughton	Aitchison	i. 191
Bonbonus		ii. 503, 505	Broughton	Dickson	ii. 296
Bo'ness Canal	M'Alpine	ii. 506	Broughton	Gordon	i. 730
Bond	Gibson	ii. 505	Broughton	Manchester Waterworks	ii. 546
Bondrett	Hentigg	i. 607	Broughton	Stewart	i. 525, ii. 12, 90
Boog		i. 126	Brown		i. 62, ii. 353
Boon	Eyre	i. 602	Brown	Earl of Dalhousie	i. 44
Boork	Clarke	i. 118	Brown	Davis	i. 427
Booth	Gunn	ii. 532	Brown	Dow	i. 351
Boothby	Sowden	ii. 400	Brown	Drummond	ii. 153, 226
Boquhan	Cunningham	i. 40-2	Brown	Ewing	ii. 352
Borrodale	Lowe	i. 445	Brown	Gardner	ii. 395
Borthwick	Balfour & Gibson	i. 384	Brown	Gairn	i. 301
Borthwick	Catkin Tenants	i. 794	Brown	Govan	i. 685
Borthwick	M'Gibbon	ii. 455	Brown	Gray & Greig	ii. 352
Borthwick	Wight	ii. 201	Brown	Lanark Magistrates	ii. 456
Bosanquet	Wray	ii. 558	Brown	M'Dougal	i. 539
Bothwells	Earl of Home	i. 140	Brown	M'Gregor	i. 688
Boughton	Boughton	i. 143	Brown	Maffey	i. 453
Boulton	Stubbs	i. 444	Brown	Murray	ii. 229
Boussmaker		i. 325	Brown	Nicolas	ii. 403
Bovil	Moore	i. 106, 108	Brown	Sinclair	ii. 28
Bowcher	Noidstrom	i. 556	Brown	Smith	i. 21
Bowen	Ashley	i. 339	Brown	Storie	ii. 271
Bower	Lady Couper	ii. 181	Brown	Thomson	i. 88
Bowker & Co.	Smith	i. 668	Brown	Turner	i. 427
Bowyer	Bampton	i. 330	Brown	Wemyss, etc.	ii. 66
Boyd		i. 9	Brown	York Buildings Company	i. 697
Boyd	King's Advocate	i. 54	Brown	Wilson	i. 399
Boyd	Hamilton	i. 59	Browning	Kinnear	i. 437
Boyd	Hunter	i. 716	Brownlee		ii. 252
Boyd	Siffkin	i. 469	Bruce	Beat	i. 510
Boyd	Sinclair	i. 794	Bruce	Bruce	i. 44, 704, ii. 376
Boylston	Robertson	i. 287	Bruce	Davenport	ii. 320
Boys	Watson	i. 272	Bruce	Erskine	ii. 1
Brackenridge		i. 743	Bruce	M'Kenzie	i. 464
Bradby	Clark	ii. 202	Bruce	Ross	i. 319-22
Brassey	Dawson	ii. 51	Bruce	Stein	i. 374
Bray	Hawden	i. 441	Bruce	Wark	i. 414
Bray	Hine	ii. 107	Bruce	(Tillicoultry)	i. 44
Bray	Mayne	i. 484	Brugh	Gray	ii. 188, 206
Breadalbane	M'Donald	ii. 390	Brechin	Dundee	ii. 440
Breius	Ferrier	ii. 33	Brunton	Hawkes	i. 106-7
Bremm	Currant	ii. 91	Bryce	Dickson	i. 417
Brent	Hay	ii. 544	Bryson	Monteith & Company	ii. 352
Brereton	Stewart	ii. 142	Bryson		i. 43, ii. 454
Brett	Picard, etc.	i. 417	Bryson	Wylie	ii. 235, 251
Brewster	Clark	i. 153	Bryson	Farquharson	ii. 15
Bridge	Wain	i. 456	Bryson	Farquharson	i. 309
Brisbane	Glasgow Merchants	i. 464	Bryson		i. 292
British Linen Company	Ferrier	ii. 53, 115, 125	Bryson		ii. 308, 352
British Linen Company	Hepburn & Company	i. 435	Bryson	Edgar	i. 345
British Linen Company	Nisbet	i. 380	Bryson	Gray	i. 763, ii. 244
Broadfoot	Leith Bank	ii. 227-8	Bryson	Ferrier	i. 682
Broadwater	Blot	i. 488	Bryson	M'Donald	i. 708
Brock	Brown	ii. 347	Bryson	Muirhead	ii. 538
Brock	Cabell	i. 64	Bryson	Purdon Gray	ii. 425
Brodie	Barry	i. 142	Bryson	Swan	i. 213
Brodie	Campbell	i. 123	Bryson		ii. 178
Brodie	Robertson	i. 610	Bryson	Doul	ii. 427
Brodie	Sheddin	i. 418	Bryson	Sinclair & Doul	ii. 227
Brodie	Steven	ii. 182	Bryson	Tweedale	i. 97
Brodie	Tod	i. 259, 465, 594	Bryson	Hatfield	i. 590
Broomhall	Darsie	i. 124	Bryson	Robertson	i. 565
Bromley	Fraser	i. 444	Bryson	Levi	i. 473, 493
Brook	Middleton	i. 329	Bryson	Turner	i. 673
Brook	Wentworth	ii. 100	Bryson	Fisher	i. 606, 625, 626-9
Brotherston	Barber	i. 655	Bryson		i. 566

Burd's Creditors			ii. 222	Campbell	Douglas	i. 345
Burgess	Clements		i. 498	Campbell.	Drummond	ii. 505
Burghall	Howard		i. 234	Campbell	Dun	i. 75
Burmester	Hodgson		i. 622-4	Campbell	Falkney	ii. 70
Burn	Brown		ii. 88	Campbell	Gallanach	i. 78
Burns			i. 153	Campbell	Galloway	i. 696
Burns	Bruce		ii. 69	Campbell	Gibson	i. 424
Burns	Picken		i. 709	Campbell	Gordon	ii. 478
Burns	Stirling		i. 626	Campbell	Graham	ii. 196, 206
Burnet			i. 752	Campbell	Henderson	i. 522
Burnet	Drummond		i. 722	Campbell	Henry	ii. 168
Burnet	Hardie		i. 560	Campbell	Jones	i. 602
Burnet	Murray		i. 781	Campbell	Kinlochins' Creditors	i. 761
Burrel	Burrel		i. 37, ii. 4	Campbell	Little	ii. 122
Burton			ii. 123	Campbell	M'Gibbon	ii. 196, 202
Busk	Davies		i. 198	Campbell	M'Nair	ii. 302, 321
Busk	Royal Exchange Assurance		i. 664	Campbell	Montgomery	ii. 454
Butcher	Easto		ii. 227	Campbell	Monzie	ii. 386
Butler	Allnut		i. 602	Campbell	Rankin	i. 87-9
Butler	Woolcot		ii. 103	Campbell	Rose	i. 693
Butt			ii. 370	Campbell	Scotland & Jack	i. 701, 748, 763,
Butter	Riddell		ii. 418			ii. 9, 425
Butterworth	Robinson		i. 116	Campbell	Simson	ii. 394
Butts	Swan		i. 337	Campbell	Somervil	i. 687
Buxton	Beddall		i. 336	Campbell	Smith	ii. 108
Buxton	Snee		i. 574	Campbell	Speirs	i. 779
Byres	Reid		i. 681	Campbell	Watson	ii. 314
Byrne	Pattinson		i. 618	Campbell	Stein	i. 552
				Campbell		i. 209
				Campbell	Wightman	i. 44
				Cannan	Bowles	i. 118
				Cannan	Greig	i. 762
				Cantley	Robertson	i. 325
				Caprington	Geddie	i. 321
				Carfrae		i. 750
				Carlen	Drury	ii. 524
				Carlotta, The		i. 641
				Carlowrie	Mersington	ii. 192
				Carlton	Strang	i. 658
				Carlyle	Dunlop	ii. 550-1
				Carlyle	Easter Ogle	i. 5
				Carlyle	Lowther	ii. 242
				Carlyle	Matheson	ii. 139
				Carlyle	Lyon	ii. 403
				Carmichael		ii. 300
				Carmichael	Carmichael	ii. 81, 122
				Carmichael	Lady Castlehill	i. 681
				Carmichael	Johnson	ii. 58
				Carnaby	Mossman	ii. 69-70
				Carnegie	Duncan	ii. 445
				Carnegie		ii. 7
				Carnegie	Carnegie	ii. 4
				Carnegie	Lord Cromburn	i. 23
				Carnegie	Durham	i. 693
				Carrick	Napier	i. 532
				Carrick	Harper	i. 442-4
				Carrick & Company	Martin	ii. 455
				Carron Company	Berry	ii. 295
				Carruthers	Johnston	ii. 162
				Carruthers	Johnson	i. 58
				Carse	Carse	i. 55
				Carse	Halyburton	i. 38
				Carstairs	Bates	i. 273
				Carstairs	Paton	i. 290
				Carstairs	Stein	i. 447
				Cartwright		i. 329
				Cathcart, Lord	Shaw	i. 134
				Cary	Kearsley	i. 51
				Cary	Longman	i. 118
				Cassie	White	i. 118
					Fleming	i. 555, 576
						i. 299

Cassillis, Earl		i. 750	Clements		Mayborn	i. 563
Cassillis, Earl	Dunlop	i. 73	Clementi.		Golding	i. 119
Casswell		i. 682	Clementi.		Walker	i. 118
Catenach		ii. 244	Clerk		Creditors	ii. 474
Cathcart	Holland	i. 146, 345	Clerk		Gordon	i. 690
Cathcart	Mitchell	ii. 32	Clerk		Gray	i. 503
Catley	Wintringham	i. 605, 493	Clerk		Johnson	ii. 445
Catrane's Creditors		i. 750	Clerk		Shepherd	i. 426
Catrane's Creditors	Baird	i. 174	Clerk		Stewart	ii. 180.
Cauvin	Robertson	ii. 553	Clerk		Gordon	i. 129
Caves	Spence	i. 375	Clerk		Ewing	ii. 324
Chalmers	Basilly	ii. 110	Cleuch		Lesslie	i. 93
Chalmers	Craig	ii. 206	Close		Waterhouse	ii. 103
Chalmers	Lyon's Creditors	i. 681	Claverhill		Ladylands	i. 361
Chalmers	Mason	i. 516	Clowes			ii. 563
Chalmers	M'Auly	i. 273	Clugas		Penaluna	i. 325
Chalmers	Ogilvy	i. 362	Clunie, etc.		Ogilvie	i. 693
Chalmers	Redcastle's Creditors	i. 730	Clunie, etc.		Sinclair	ii. 4
Chalmers	Magistrates of Tain	ii. 437	Clydesdale		Dundonald	i. 92, 708
Chancellor	Chancellor	i. 96	Coates		Perry	i. 338
Chandler	Grieves	i. 563	Coalston		Stewart	ii. 379
Chaplain	Drummond	ii. 185	Cochran			ii. 59
Chapman	Darby	ii. 119	Cochran		Bryson	i. 455
Charles	Marsden	i. 427	Cochran		Forbes	ii. 154
Charteris	Nicholson	i. 333	Cochran		Retberg	i. 623
Charteris		i. 625	Cochrane, Lord		Surethurst	i. 108
Chase	Westmore	ii. 99	Cock		Taylor	i. 615
Chatto	Marshall	i. 382, 489, ii. 435	Cockburn			i. 121, 700
Cheap		i. 193	Cockburn			ii. 409, 411
Cheap	Cramond	ii. 511	Cockburn		Cockburn	i. 128, 738
Chenowith	Hay	ii. 163	Cockburn		Clerkington	ii. 463
Chesman	Nainby	i. 321	Cockburn		Gibson	i. 415
Chilton	Whiffin	ii. 421	Cockburn		Grants	i. 326
Chinnery	Blackburn	i. 570	Cockburn		Inglis	i. 400
Chion		i. 279	Cockburn		Richardson	i. 504
Chisholm	Fenton	i. 499	Cockburn		Samson	i. 69
Chisholm	Frazer	ii. 88, 107	Cockpen's Creditors			ii. 263
Chisholm	M'Donald	i. 50	Cockshot		Bennet	ii. 399
Chisholm		ii. 483-4	Codrington		Johnston	i. 706
Chrichton	Gibson	i. 425	Coggs		Bernard	i. 496, 499
Christie	British Linen Company	ii. 201	Cohen		Hinckley	i. 602-3
Christie	Fairholmes	i. 262, 309, 314, 316	Colbrooke			ii. 342
Christie	Fonsick	i. 418	Colbrooke		Douglas	i. 440-1
Christie	Griggs	i. 491-2	Coleman		Walker	i. 113
Christie	Lewis	ii. 94	Collet		Balmerinoch	ii. 56
Christie	M'Pherson	ii. 31, 32	Collins		Blantarn	i. 318
Christie	North British Insurance	i. 671	Collins		Butler	i. 437
Christie	Straiton	ii. 379	Collins		Forbes	i. 274
Christie	Fairholmes	i. 295	Collins		Marquis	i. 183, 248, 300
Christison	Kerr	i. 88	Collins		Martin	ii. 113, 247, 254
Christy		ii. 6	Colles		Emmet	i. 415
Christy	Rose	i. 584	Colloot		Haigh	i. 452-3, 727
Christy	Rowe	i. 614, 618	Colquhoun			ii. 253
Churnside	Currie	ii. 157	Colquhoun		Findlay	i. 518
Clapperton	M'Lachlan	ii. 36	Colt		Colt	ii. 240
Clark	Buchanan	ii. 122	Coltart		Bank of Scotland	ii. 364
Clark	Clark	ii. 60	Colville			i. 50
Clark	Gray	i. 497	Colville			ii. 390
Clark	Stewart	i. 375	Commercial Bank		Hannah	i. 438
Clark	Waddell	i. 716	Commercial Bank		Pollock	ii. 519
Clarke	Earnshaw	i. 488	Commercial Bank		Callender	i. 386
Clarke	Hutchins	i. 473	Compton		Bedford	ii. 227
Clarkson	Edgar	i. 371	Connel		M'Lelland	i. 421
Clay	Willan	i. 504	Coming			ii. 23
Clayton's case		ii. 529	Constable		Cloberie	i. 602
Clayton		i. 292	Constable		Brewster	i. 118
Clayton	Hunt	i. 493	Constantia, The			i. 594
Clegg	Levy	i. 338	Cook		Clayworth	i. 317
Cleghorn	Yorkston	i. 352, 361	Cook		Ludlow	i. 476-7
Clelland	Hamilton	i. 734	Cookey		Atkinson	i. 652
Clelland		ii. 161	Coombe			ii. 23
Clements	Commeline	ii. 353	Coombe		Miles	i. 329

Coope	Eyre	ii. 511	Crichton	Hamilton	i. 57
Cooper . . . . .	. . . . .	ii. 164	Crichton	Perie	i. 699
Cooper	Barton	i. 488	Crichton	Jack	i. 390
Cooper	Myreton	ii. 258	Crisp	Anderson	i. 339
Cooper	Pepys	ii. 305	Crofts	Waterhouse	i. 492
Coore	Callaway	i. 433	Croll	Robertson	ii. 394
Copden	Bolton	i. 503	Cromarty . . . . .	. . . . .	ii. 251
Copenhagen . . . . .	. . . . .	i. 581, 618, 633	Cromwell	Hynson	i. 438
Copland	Gordon	i. 76	Crooks	Tawse	ii. 501
Copland	Stein	ii. 88, 89	Crooks	Tawse	ii. 548
Corban	Down	i. 596	Cross	Glode	i. 272
Corbet	Gray	i. 389	Cross	Smith	i. 440
Corier, The . . . . .	. . . . .	i. 621	Cross	Moir	ii. 70
Corrie	Barbour	i. 416	Cross . . . . .	. . . . .	ii. 302
Corrie	Calders	ii. 501	Crossby . . . . .	. . . . .	ii. 291
Corrie	Calder	ii. 547	Crossby	Ham	i. 427
Corsan	Crawford	ii. 303	Crose	Smith	i. 446
Corse . . . . .	. . . . .	ii. 2, 547	Cruickshanks	Mitchell	i. 435
Cossar	Marjoribanks	i. 464	Cruickshanks	Watt	ii. 145
Cothay	Tute	i. 475	Crutchley	Clarence	i. 428
Coulter	Martin	i. 444, 545	Crutchley	Mann	i. 388
Courteen	Touse	i. 509	Cruttenden	Rattray	ii. 390
Coutts . . . . .	. . . . .	i. 144	Crutwell	Lye	ii. 535
Coutts	Crawford	i. 91	Cullen	Butler	i. 606
Coutts	Halgreen	ii. 263	Cullen	Philp	i. 326
Covington	Roberts	i. 635	Cult . . . . .	. . . . .	i. 766, ii. 180
Cowan	Aitchison	i. 399	Cumming	Brown	i. 594, 238
Cowan	Mansfield	ii. 197	Cumming	Forrester	ii. 119, 130
Cowan	Marshall	i. 401	Cumming	Johnston	i. 728
Cowan	Perry	ii. 29, 30	Cumming	King's Advocate	i. 54, 55, 57
Cowan	Spence	i. 258	Cumming	Roebuck	i. 458
Cowan	Hurry	i. 446	Cumming	Simson	i. 348
Cowel	Simson	ii. 91, 109	Cunningham . . . . .	. . . . .	ii. 317
Cowie	Halsall	i. 417	Cunningham	Cunningham	ii. 136
Cowie	Brown	i. 89	Cunningham	Gainer	i. 142
Cowie	Dunlop	ii. 420	Cunningham	Grieve	i. 78
Cowper	Joyce	ii. 165	Cunningham	Hamilton	i. 73
Cowper	Stewart	i. 701	Cunningham	Home	ii. 69
Cox	May	i. 642	Cunningham	Marshall	ii. 239
Cox	Harden	i. 594	Cunningham	Reid	i. 778
Craig	Grant	i. 130, 344	Cunningham	Tasker	i. 670
Craig	Wilson	ii. 425	Cunningham	Whiteford	i. 144, 129
Craigs	Maltmen of Glasgow	i. 92	Cunningham	M'Kirdy	i. 705
Craigie	Gardner	ii. 79	Cunningham	Wilson & Company	ii. 132
Craigleith, Lord	Prestongrange	i. 56	Curling	Long	i. 614, 620
Cramond	Bain	ii. 227-8	Currie	Colquhoun	i. 489
Cranby	Hilary	ii. 400	Currie	Hannay	ii. 256, 544
Cranch	Kirkman	ii. 122	Curtis	Chippendale	ii. 112, 423
Cranston	M'Dowall	i. 371	Curtis	Perry	i. 153
Cranstoun, Lord	Scott	i. 65	Cust	Garbit & Company	ii. 81
Cranstoun, Lord	Scott	i. 69	Customs	Dundas	i. 639, 641
Cranstoun, Lord	Scott	i. 693, 696	Cuthbert	Paterson	i. 47
Craven	Ryder	i. 219, 590	Cuthbertson	Barr	i. 730-1
Crawford	Brechin	i. 85	Cuthbertson	Lyon	i. 374
Crawford	Corsan	ii. 300	Cuthbertson	Thomson	i. 54
Crawford	Currie	ii. 348	Cuthil	Jeffrey	i. 75, ii. 34
Crawford	Haig	ii. 296	Cutter	Powell	i. 456, 563
Crawford	Hepburn	i. 38	. . . . .	. . . . .	. . . . .
Crawford	Hunter	ii. 267	. . . . .	. . . . .	. . . . .
Crawford	Hutton	ii. 148	Da Costa	Newman	i. 634
Crawford	Maxwell, etc.	i. 73, 76	Da Costa	Poins	i. 318
Crawford	Milligan	ii. 528	Dalhousie	Gilmour	ii. 4, 7
Crawford	Mitchell	i. 266	Dalhousie	Wilson	i. 76
Crawford	Robertson	i. 427	Dalglish	Sorley	ii. 530
Crawford	Stewart	i. 97, ii. 32	Dallas	Leishman	i. 30, ii. 386
Crawford	Bertram	i. 691-4	Dallas	Paul	i. 98, 138, 140
Crawshay	Collins	ii. 535	Dalrymple . . . . .	. . . . .	i. 101, ii. 4
Crawshay	Maule	ii. 521-3	Dalrymple . . . . .	. . . . .	i. 123
Crichton . . . . .	. . . . .	ii. 72	Dalrymple	Cuthbertson	ii. 426
Crichton . . . . .	. . . . .	ii. 479	Dalrymple	Legal	ii. 134
Crichton	Borthwick	ii. 67	Dalrymple	Ross	ii. 69
Crichton	Crichton	i. 35-7	Dalziel	Dalziel	i. 34

Dalzell	Mair	i. 646, 648	Dixon	Baldwin	i. 216, 241, 253
Darbell	Bruce	ii. 429	Dixon	Eddington	ii. 351
Darbishire	Parker	i. 432, 441-2	Dixon	Ewart	i. 158
Darby	Love	ii. 487	Dixon	Lowther	i. 722
Darling	Hay	i. 88	Doddington	Hallet	ii. 544
Darling	Watson	i. 31	Dodsley	M'Farquhar	i. 111
Daubigny	Duval	i. 520	Doe	Beavan	i. 71
Davidson		i. 488	Doe	Carter	ib.
Davidson		ii. 483	Doe	Clark	ib.
Davidson	Brown	ii. 162, 163	Doe	Davulon	ii. 553
Davidson	Davidson	i. 90, 140	Dolland		i. 107
Davidson	Falconer	ii. 320	Dollar	Ross & Company	ii. 373
Davidson	Gwynne	i. 588, 590, 602	Dommet	Bedford	i. 125
Davidson	Kyd	ii. 4, 6	Don	Watt	i. 425, 428
Davidson	Murray	ii. 60, 70	Donaldson	Creditors	ii. 473
Davidson	Robertson	i. 424	Donaldson	Murray	i. 350
Davie	Denny	i. 722	Donaldson	Walker	i. 341
Davis	Bowcher	ii. 91, 111, 113	Dooley	Dickson	i. 794, ii. 7
Davis	Hardacre	i. 329	Dougal's Creditors		ii. 16, 117
Davis	Mason	i. 321	Dougal	Gordon	i. 724, ii. 17
Davis	Reynolds	i. 590	Dougal	Kemble	i. 615
Davis	Willan	i. 504	Dougan	Smith	i. 489
Davis	Williams	i. 339	Doughty		ii. 90
Dawson	Anderson	ii. 388	Douglas		i. 64, 69, 730
Dean	Ayr Magistrates	i. 388, ii. 438	Douglas		ii. 16, 295, 475
Dean	Keate	i. 484	Douglas	Baillie	ii. 445
Dean	Irvine Magistrates	i. 721	Douglas	Carlyle	i. 65, 69
De Berrenger	Whible	i. 119	Douglas	Chalmers	i. 716
De Bost	Beresford	i. 318	Douglas	Douglas	i. 90
De Gaillion	L'Aigle	i. 531	Douglas	Douglas' Creditors	i. 47
De Gaminde	Pigou	i. 648	Douglas	Dunmore	i. 421
De Guelder	Piester	i. 578, 581	Douglas	Erskine	i. 414
Deize <i>ex parte</i>		ii. 101-3	Douglas	Grierson	i. 349, 351
De Haviland	Bowerbank	i. 692-4	Douglas	Hay's Creditors	i. 64
Dempster	Lady Kinloch	ii. 219	Douglas	Mason	ii. 69-70
Denham	Stewart	i. 43	Douglas	Pringle	i. 707
Denholm	Baillie	i. 49	Douglas	Scott	ii. 145-6, 354
Denniston	Campbell	i. 715	Douglas	Sommerville	ii. 131
Denniston	Harkness	i. 494	Douglas	Stewart	i. 40
Denniston	Speirs	i. 719	Douglas	Watson	ii. 314
Denniston	Lillie	i. 663, 665	Douglas, Heron, & Co.	Alexander	i. 440
Denniston	M'Farlane	i. 716	Douglas	Bank of England	ii. 415
Deponthieu	Baril	ii. 376	Douglas	Brown	ii. 141
De Roveray	M'Kenzie	i. 761	Douglas	Gordon	ii. 527
De Silvale	Kendall	i. 619	Douglas	Grant's Trustees	i. 418
De Tasted	Baring	i. 430, 432	Douglas	Hair	ii. 517
Devaynes	Noble	ii. 528	Douglas	Lothian	ii. 527
Dewar	French	i. 755	Douglas	Maxwell	ii. 213
Dewar	Minto, etc.	i. 74	Douglas	Palmer	ii. 69
Dewdney		ii. 291	Douglas	Richardson	i. 418, ii. 266
Dick	Cuming & Company	i. 130	Douglas	Riddoch	i. 375, 734
Dick	Dick	i. 125	Douglas	Gordon & Company	i. 392
Dick	Donald	ii. 262	Down	Fromont	i. 500
Dick	Ferguson	i. 30, 35	Downie		i. 689
Dick	Goodall & Company	ii. 68	Downie	Campbell	i. 690
Dick	Lands	ii. 32	Drew	Paterson	i. 38
Dick	Morison	ii. 479	Drummond	Campbell	ii. 222
Dick	Bowes	i. 436	Drummond	Drummond	i. 421, 431
Dickie	Hall	ii. 72	Drummond	Kennedy	ii. 187
Dickie	Thomson	i. 401, ii. 67	Drummond	M'Kenzie	i. 30, 34, 36
Dickson		i. 747, ii. 163	Drummond	Ramsay	i. 720-1
Dickson	Braidfute	i. 683	Drinkwater	Godwin	i. 539, ii. 90, 111
Dickson	Dickson	ii. 6	Drinkwater	London Assurance	i. 672
Dickson	Douglas	i. 63	Driscoll	Bovil	i. 670
Dickson	Evans	ii. 122	Driscoll	Passmore	i. 670
Dickson	Hunter	i. 688	Dry	Boswell	ii. 511
Dickson	Rae's Creditors	ii. 268, 402	Drysdale	Creditors	ii. 389, 479
Dickson	Trotter	ii. 17	Du Bois	Ludart	i. 568
Dickson	Mitchell	ii. 213	Duck	Maxwell	ii. 427
Dickson	Kincaid	i. 463	Dudgeon	More	i. 192
Dillon	Campbell	i. 70	Dudley	Smith	i. 491
Dingwall	M'Combie	i. 304	Dudley	Ward	i. 788

Duff	Bell	ii. 187	Edwards	Adam	ii. 122
Duff	Chapman	i. 700-1	Edwards	Child	i. 564-5
Duff	Forbes	i. 310	Edwards	Physicians of Glasgow	ii. 445-6
Duggan	Wight	i. 32	Egerton	Forbes	ii. 77, 79
Duhamel	Pickering	i. 421	Elford	Teed	i. 436
Dumas	Joliffe	i. 279, 281-2-4	Elgin, Earl of	Nisbet	i. 679
Dunnage	Joliffe	i. 605	Elgin, Earl of	Wellwood	i. 66, 70
Dumfries Presbytery	Joliffe	ii. 468	Elbank	Adamson	ii. 175
Dunbar	Joliffe	ii. 143	Eliza, The		i. 560, 566
Dunbar	Abercromby	ii. 219	Ellenborough		i. 118
Dunbar	Brodie	ii. 6	Elliot	Buccleuch	i. 72-3, 76
Dunbar	Dundee	i. 361	Elliot	Elliot	i. 39, 42-4, ii. 7, 181
Dunbar	Grant	ii. 189, 198	Elliot	Pott	i. 40, 67
Dunbar	Rimington	ii. 530	Elliot	Scott	ii. 160
Dunbar	Sutherland	i. 719	Elliot	Wilson	i. 668, 261
Duncan	Earl of Aberdeen	i. 722	Elliot, The		i. 643
Duncan	Lowndes	ii. 506	Ellis	Connel	i. 362
Duncan	Sloss	i. 682, ii. 176	Ellis	Gallindo	i. 454
Duncan	Thomson	i. 326	Ellis	Hamlen	i. 485
Dundas	Belch	ii. 328	Ellis	Hunt	i. 216, 241-2-8-9
Dundas	Denniston	i. 720	Ellis	Mortimer	i. 258
Dundas	M'Leod	i. 401	Ellis	Turner	i. 555
Dundas	Roll	ii. 258	Elphinston	Hume	ii. 17
Dundas	Smith	ii. 204	Elphinston	Keith	i. 693
Dundee, The		i. 611	Elsworth	Woolmore	i. 558
Dundonald		ii. 251	Elwes	Man	i. 788
Dunfermline	Her Son	i. 55-6	Emanuel, The		i. 322
Dunlop's Creditors		i. 780	English	Darley	i. 454
Dunlop's Cessio		ii. 464, 473-6	Erskine	Carnegie	i. 687
Dunlop's Creditors	Brown	i. 752, 776-7	Erskine	Erskine	i. 141
Dunlop	Allan	i. 669	Erskine	Manderston	i. 365
Dunlop	Cruickshanks	i. 309, 314-6, 262, 295	Erskine	Lord Lauderdale	i. 692
Dunlop	Geils	ii. 351	Esdaille	Ockenheim	ii. 107
Dunlop	Hamilton & Company	i. 433	Esdaille	Sowerby	i. 444
Dunlop	Jop	ii. 68	Evan's Creditors	Dryden	ii. 272
Dunlop	M'Kellar	i. 478	Evan	Martlet	i. 212
Dunlop	Scott	i. 219	Ewing	Williams	i. 577
Dunlop	Scott Moncreiff	ii. 369	Ewing	Drummond	ii. 4
Dunlop	Speir	i. 692, ii. 549	Ewing	Jameson	ii. 160-1
Dunmore	Allan	i. 662	Ewing	Lawrie	ii. 317
Dunmore	Young	i. 346	Ewing	Miller	i. 496, 499
Dunn	Dunns	i. 83	Eyemouth's Creditors	Russell	ii. 384-9
Durham		ii. 446	Exon		i. 436
Durham	Blackwood	i. 318			
Durham	Glasswell	ii. 448	Faichney	Faichney	i. 85-6
Durham	Graham	i. 733	Fair	Cranston	i. 416, 431
Durham	Henderson, etc.	i. 76	Fair	M'Iver	ii. 124
Durward	Wilson	ii. 196	Fairbairn	Scott	ii. 481
Durie		ii. 353	Fairholms		ii. 560
Durie	Coutts	ii. 376	Fairholms		ii. 158
Durie	Ramsay	i. 693	Fairholms	Marjoribanks	ii. 543
Dwyer	Eddie	i. 675	Fairlie	Nielson, etc.	i. 75
Dykes	Dykes	i. 685	Fairlie	Christie	i. 651
Dykes	Watson	i. 391	Fairweather	Alison	i. 417
			Falconer		i. 687
Eaken	Thom	i. 566	Falconer	Moncreiff	i. 685
Easdale	Sowerby	i. 437	Falconer	Weston	ii. 376
Easterfearn		i. 780	Falconer		i. 794
East India Company	Hensley	i. 516	Falkner	Wright	i. 151
Eaton		i. 112	Fallahill	Ritchie	i. 654, 655
Eccles	Merchieston	ii. 209	Fanny		i. 781
Edderline		i. 779-80, ii. 390, 424	Farmer	Elmira	i. 583
Ede & Bond	Finlay, etc.	i. 518	Farnier	Davies	i. 553, 574
Eddie	Davidson	ii. 507	Farnworth	Davies	i. 567
Edgar	Whitehead	ii. 246	Farquhar	Packwood	i. 498
Edgebury	Stephens	i. 107	Farquharson	Webster	i. 70
Eddie & Laird		i. 780, ii. 419	Farquharson	Cuming	ii. 388
Edinburgh	Ley	ii. 85	Farries	Keay	ii. 28
Edinburgh	Wylie	ii. 538	Farries	Elder & Scott	ii. 497
Edmonston	Edmonston	i. 45, 89, 90	Favourite, The	Stein	ii. 343
					i. 557, 562-4

Fawkes	i. 107	Forman	ii. 478
Fearon	Bowers i. 234	Forman	Homfray ii. 524
Featherstonhaugh	Fenwick ii. 521	Forman	Sheriff i. 316
Fendar	Patterson ii. 438	Forresters	i. 126, 727
Fenn	Harrison i. 509, 516	Forrester	ii. 313
Fenton	Gouadry i. 436	Forrester	Sir W. Forbes ii. 515
Fenton	Pearson i. 246	Forrester	Turner ii. 322
Fentum	Pocock i. 424	Forrester	Walker i. 381
Ferguson	i. 54, 61	Forshaw	Chabert i. 665
Ferguson	Belch i. 437-8, 443, 444	Forsyth	Kilpatrick i. 299
Ferguson	Bethune i. 420	Forsyth	Reviere i. 107
Ferguson	M'George i. 54	Forward	Pittard i. 495, 499
Ferguson	More ii. 131	Foster	Frampton ii. 584
Ferguson	Robertson i. 134	Foster	Thackery i. 320
Ferral	Shaen i. 328	Fotheringham	Sommerville i. 250
Ferrier	Newton ii. 203	Foulis	Foulis i. 89
Ferrier	Sandeman i. 648, 658	Fowler	M'Taggart i. 185, 230
Ferrier	Pennycuik ii. 346	Fowler	Paget i. 163
Fiddes	Fyfe ii. 58	Foxcroft	ii. 232
Fieze	Wray i. 242-5, 251, ii. 112	Foy	Bell i. 646
Fife, Earl of	i. 341	Fragano	Long i. 219
Fife, Earl of	Duff i. 692	Francis and Eliza	i. 640
Fife, Earl of	Gordon i. 719	Franklin	Hosier ii. 93
Findlater, C.	Earl of Seafield i. 56	Fraser, Lady	i. 783
Findlay	Birkmire i. 91	Fraser	i. 66, ii. 565, 373, 481
Finlaw	ii. 175	Fraser	ii. 476
Finlay	Aitchison ii. 162	Fraser	Black & Knox i. 315
Finlay	Bertram & Company ii. 280	Fraser	Ewart i. 352, 699
Finlay	Morgan i. 737	Fraser	Fraser ii. 4
Finlay	Sim ii. 108	Fraser	Hopkins i. 569
Finlayson	Finlayson i. 128, ii. 240	Fraser	M'Donald i. 102
Firbank	Bell i. 337	Fraser	M'Gilvray i. 54
Fisher	Miller ii. 12	Fraser	M'Turk i. 378
Fisher	Pringle ii. 4	Fraser	Marsh i. 570
Fisher	Samuda i. 463-4	Fraser	Middleton i. 60
Fisher	Sime ii. 519	Fraser	Munro ii. 160
Fisher	Stewart i. 381	Freeland	Finlayson ii. 399, 400
Fisher	Campbell's Creditors i. 365	Freeman	East India Company i. 583
Fishmongers Company	Maltby i. 381	Freer	Richardson i. 426, 428
Fitzgerald	Pole i. 655	French	Andrade ii. 556
Fitzherbert	Mather i. 537	French	Backhouse i. 552, ii. 544
Fitzjames	i. 456	French	Fenn ii. 119
Flarty	Odlum i. 123	French	Galloway i. 362
Fleet	Strang i. 374	French	Patton i. 338, 651
Fleming	i. 728	Friends, The	i. 564-5, 616, 618, 639
Fleming	Scott i. 419	Frier	Richardson ii. 18
Fleming	Thomson i. 378	Frog	Creditors i. 54
Fleming	Wilson i. 377-8	Fry	Hill i. 432
Fletcher	Inglis i. 658	Fullerton	Magistrates of Ayr ii. 441
Flynn	Field i. 189	Fulton	Forbes ii. 289
Foggo	Scott ii. 18	Fulton	Johnson i. 345
Forbes	i. 758	Fulton	Lead ii. 219
Forbes	i. 777	Furlong	M'Nair ii. 314
Forbes	Aberdeen ii. 460		
Forbes	Brebner ii. 201		
Forbes	Magistrates of Canongate ii. 442	Galbraith	Lesly i. 130, 344
Forbes	Craig's Creditors i. 351	Galdie	Gray ii. 548, 553
Forbes	Duncan i. 76	Gale	Lawrie i. 611
Forbes	Forbes i. 81, 90, ii. 195	Gall	Murdoch ii. 127
Forbes	Forrester ii. 558	Galway	Mathew ii. 504
Forbes	Innes ii. 427	Galloway	Bruce ii. 371
Forbes	Knox i. 682	Galloway	Galloway ii. 122
Forbes	M'Intosh i. 690	Galloway	M'Hutcheon i. 76
Forbes	M'Nab i. 393	Galloway	Stewart i. 727
Forbes	Main & Company i. 267	Gammion	Schmoll i. 424, 436
Forbes	Milne & Company i. 554	Garden	ii. 302, 303
Forbes	Russell ii. 427	Garden	M'Coll ii. 436
Forbes	Steel i. 499	Garden	Stirling ii. 176
Forbes	York Buildings Company i. 776	Gardner's Sequestration	ii. 347
Fordyce	ii. 503	Gardner	Gray i. 470
Fordyce	Magistrates of Aberdeen ii. 423	Gardner	Skinner i. 331
Fores	Johnes i. 318	Gardner	Spalding ii. 6

Gardener	Davidson	i. 705	Glen	Pearson	i. 359
Gardiner	Gray	i. 463	Glen	Porterfield	ii. 347
Garforth	Fearon	i. 121	Glencairn	Graham	i. 708
Garnett	Woodcock	i. 436	Glendinning	Montgomery	i. 396
Garrat	Callum	i. 284	Glendinning	Montgomery	ii. 88
Garside	Trent, etc. Navigation Co.	i. 483	Glendinning	Montgomery	ii. 70
Garthland	M'Dowall	i. 693	Glyn	Hertel	i. 391
Gartshore		ii. 244-5	Goddard	British Linen Co.	ii. 314, 329
Gartshore	Cockburn	ii. 145, 181	Godfrey	Furzo	i. 278
Gassiot		ii. 483	Godfrey	Turnbull	ii. 532
Gault	M'Auley	ii. 545	Godin	London Assurance Co.	ii. 109
Gavin	Kirkpatrick	i. 30	Godsall	Boldero	i. 675
Gay	Arbuckle	i. 574	Goff	Clinkard	i. 596
Geddes	Mowat	ii. 292	Golden Star		i. 562
Geddes	Smith's Creditors	ii. 222	Goldie	M'Donald	i. 489
Geddes	Younger	i. 728	Goldin	Manning	i. 494
Gee	Pritchard	i. 112	Goldschmidt	Lyon	ii. 129
Gellar		ii. 510	Goldschmidt	M'Nicol	i. 452-3
Gellatly	Ewart	ii. 190	Goldsmith	Bland	i. 440
George, The		i. 566, 580	Good	Elliot	i. 319
George	Clagget	ii. 116	Good	Smith	ii. 427
George Home, The		i. 560	Goodall	Dolley	i. 433, 450
George	Wackerbach	i. 110	Goodall	Skelton	i. 190, 229
Gernon	Royal Exchange Assurance	i. 657	Gooden	Murray	i. 499, 500
Gewtress	Roberts	ii. 570	Goodman	Chase	i. 388
Gibb	Livingston	i. 301, ii. 175	Goodsir		ii. 400
Gibble		i. 153	Goodson	Forbes	i. 339
Gibbon	Hundez	i. 618	Goodwin	Brown	ii. 347
Gibbon	Mendiz	i. 619	Gordon		i. 144, ii. 18, 31, 371
Gibson	Bray	i. 288	Gordon	Allan	i. 55
Gibson	Campbell	i. 414	Gordon	Blackburn	i. 124
Gibson	Coggan	i. 445	Gordon	Bogle	i. 418, 420
Gibson	Dickie	i. 318, 321	Gordon	Brodie	i. 715
Gibson	Forrester	i. 419	Gordon	Broughton's Creditors	i. 730
Gibson	Henderson	i. 299	Gordon	Crawford	i. 72
Gibson	Inglis	i. 605	Gordon	Cheyne	i. 301, 304
Gibson	Lockhart	ii. 305	Gordon	Dunipace	i. 44
Gibson	M'Bain	i. 142	Gordon	East India Company	i. 270
Gibson	M'Donald	ii. 391, 396	Gordon	Lord Fife	i. 716
Gibson	Goldie	ii. 69	Gordon	Earl of Galloway	i. 129
Gifford		i. 396-7	Gordon	Gardner	i. 267
Gilbert		i. 87	Gordon	Gordon	i. 51, 83
Gilbert	Sykes	i. 318	Gordon	Gordon	i. 50
Gilchrist	Thomson	i. 283	Gordon	Gordon	i. 44
Gilchrist	Wylie	i. 438	Gordon	Grant	i. 25
Giles	Perkins	ii. 113	Gordon	Harper	i. 37
Giles	Wilcox	i. 116	Gordon	Hughes	i. 457
Gilfillan	Monkhouse	ii. 137	Gordon	Inglis	i. 679
Gillan	Simpkin	i. 619	Gordon	Innes	i. 67, ii. 68, 70
Gillespie & Company		ii. 353	Gordon	M'Culloch	i. 45
Gillespie	Douglas	i. 667	Gordon	M'Intosh	i. 342
Gillespie	Hamilton	ii. 562	Gordon	M'Pherson	ii. 240
Gillespie	Marshall	i. 89	Gordon	Maitland	i. 701
Gillet	Mawman	i. 486	Gordon	Milne	ii. 142
Gillons	Burgess	i. 691	Gordon	Robertson	i. 70, 457
Gillon	Muirhead	i. 72	Gordon	Ross	i. 706
Gilman	Robinson	i. 509	Gordon	Skene	i. 301
Gilmour, Little	Little Gilmour	i. 98	Gordon	Stewart	i. 679
Girdes	Donison	i. 605	Gordon	Tyrie	i. 375
Girdwood	Fleming	ii. 364	Gordon	Willis	ii. 456
Gladston	Birley	ii. 95, 103	Gorham	Thomson	ii. 532
Gladston	Hadwen	i. 261-3	Gorman	Hedderwick	ii. 453, 456
Glaistor	Hewer	ii. 35	Goupy	Harden	i. 426, 432-3
Glasfuird	Laing	i. 328	Gourlay	Dumbreck	i. 38
Glasgow University	Miller	i. 384	Gourlay	Straiton	ii. 322
Glass	Macintosh	ii. 398	Gouthwaite	Duckworth	ii. 541
Glass	Pentland	ii. 484	Gowans	Phin	i. 242
Glass	Weir	ii. 147	Grace	Smith	ii. 511, 534
Glassop	Colman	ii. 514	Græme		ii. 80
Gleadon	Tinkler	i. 567-8	Graham	Bruce	ii. 67
Glen	Binnie	ii. 179	Graham	Clackmannan	i. 739
Glen	Dundas	i. 322	Graham	Fraser	ii. 244-5

Graham	Frier	i. 695	Haig	Forbes	i. 22
Graham	Gillespie	i. 300, 416	Haigh	De la Cour	ii. 23
Graham	Graham	i. 92-3, 461	Haigh	Smith	i. 659
Graham	Graham's Heirs	i. 701	Haille	Struthers	i. 239, 594
Graham	Hope	ii. 531-2	Halden	De Maria	ii. 454
Graham	Earl of Hopetoun	i. 128, ii. 6	Haldane	Palmer	i. 123
Graham	Hyslop	i. 716, 767	Haldane	Stewart	ii. 243
Graham	M'Nab's Trustee	i. 692	Hale <i>ex parte</i>	Goodson	ii. 123
Graham	M'Queen, etc.	i. 766	Halket	Halyburton	i. 574
Graham	Stonebyres	i. 349	Haliburton	Northesk	ii. 463
Graham	Straiton	i. 352, 699	Halton	Goodson	i. 317
Granard, Earl	Dunken	i. 112	Haly	Thomson	i. 552
Grant	Anderson	ii. 311	Halyburton	Auld	i. 140
Grant	Chalmers	ii. 415	Hall	Scott	i. 123
Grant	Cunningham	i. 315	Hall	Brand	ii. 369-71
Grant	Davidson	ii. 527	Hall	Broomhall	i. 427
Grant	Donaldson	ii. 383	Hall	Odey	ii. 245
Grant	Duncan	i. 318	Hall	M'Aulay	ii. 35
Grant	Forbes	ii. 462	Hall	Molyneux	ii. 147
Grant	Grant	ii. 206	Hall	Thomson	i. 651
Grant	Grant	i. 382	Hall	Auld	ii. 85
Grant	Grant	i. 776, ii. 176	Hall	Scott	i. 194-8
Grant	Hawkes	i. 351, ii. 229	Hall	Scott	ii. 556
Grant	M'Leay	i. 425	Hallows	Barrow	i. 128
Grant	Mills	i. 489	Hamilton	Blackwood	i. 42, 50, ii. 253
Grant	Robertson	ii. 91	Hamilton	Boys	ii. 241
Grant	Sherris	ii. 107	Hamilton	Bryson	i. 254
Grant	Smith	ii. 27	Hamilton	Carlisle	i. 763
Grant	Strachan	i. 189	Hamilton	Calder	i. 778, ii. 178
Grant	Sutherland	i. 361	Hamilton	De Gares	ii. 58
Gratitudine	Buchanan	i. 361, 709	Hamilton	Forrester	i. 394
Gratney's Creditors	Callendar	i. 578	Hamilton	Fraser	i. 689
Gray	Chiesly	ii. 199	Hamilton	Fullarton	i. 318
Gray	Ferguson	i. 701	Hamilton	Hamilton	i. 94, 95, 310
Gray	Fowler	ii. 80	Hamilton	Hurry	ii. 197
Gray	Hamilton	ii. 179	Hamilton	Kinnear	i. 416
Gray	Hope	i. 719	Hamilton	M'Culloch	ii. 145
Gray	M'Caul	i. 707, ii. 241	Hamilton	Macdowall	i. 67
Gray	Ross	ii. 12	Hamilton	Marshall	i. 696
Gray	Tenants	i. 721	Hamilton	Monteith	i. 416
Green	Deakin	i. 425, ii. 505	Hamilton	Roger	i. 360
Green	Farmer	ii. 91, 100-3	Hamilton	Scott Waring	i. 70
Greenaway	Ford	i. 682	Hamilton	Sharp	i. 130
Greenhill	Seton	i. 680	Hamilton	Waring	i. 318
Greenyards	Muir	ii. 251	Hamilton	Wilson	ii. 108
Grey	Ramsay	i. 61	Hamilton	Wood	i. 574
Grierson	M'Farlane	i. 47	Hamington	Du Chattel	i. 122
Grierson	Pringle	ii. 4, 6	Hammet	Yea	i. 329
Grieve	Young	i. 345	Hammond	Anderson	i. 190, 211
Grieve	Sinclair	i. 346	Hammond	Barclay	ii. 112
Groat	Mendham	i. 668	Hammond	Dufresne	i. 452
Groning	Dubois	i. 693	Hamper	Porteous	i. 476
Groome	Sinclair	i. 464	Handyside	Corbyn & Lee	ii. 511
Grove	Sharp	i. 682	Handyside	Barclay's Creditors	ii. 353
Gun	Rutton	i. 394, ii. 115, 125-30	Hannay	Stothert	ii. 72
Gurney	Pirie & Company	i. 777	Hannay	Meyer	ii. 263
Gurr	Bury	ii. 112	Hanson	Corbyn & Lee	ii. 255
Guthrie	Campbell	i. 271	Hanson	Barclay's Creditors	i. 329
Haase, The	Parry	i. 752	Harcourt, The	Woodrooffe	i. 196, ii. 95
Hadden	Whitmore	i. 642	Hardie	Geddes	i. 560
Haddock	Clark	i. 106	Hardy	Ogilvie	i. 693
Haddow	Buchanan	i. 445	Hare	Hoare	i. 436
Haddow	Hadgedorn	ii. 68, 70	Harle	Anderson	i. 421
Hadgedorn	Haig	i. 591	Harlop	Clarke	i. 476
Hadley	Haase, The	i. 607	Harman	Fishar	i. 277
Haig	Hadden	i. 565, 620	Harman	Gandolph	i. 194, 195
	Haddock	ii. 115	Harman		i. 624
	Haddow				ii. 231
	Hadgedorn				i. 622
	Hadley				
	Haig				

Harman	M'Alister	i. 509	Heriot	Farquharson	ii. 389, 391, 394
Harman	Mant	i. 624	Heriot	Forbes	ii. 66
Harmer	Plane	i. 109	Herries	Lidderdales	i. 397
Harper	Faulds	ii. 102	Heron	Dickson	ii. 442
Harriot	Cunningham	ii. 20	Heron	Heron	ii. 137
Harris	Benson	i. 442	Hesketh	Blanchard	ii. 514
Harris	Boston	i. 329, 330	Heskuyson	Woodbridge	ii. 421
Harris	Watson	i. 560	Hesseltines	Arrol & Company	i. 476
Harrison		ii. 370	Hepburn	Bell	ii. 123, 199
Harrison	Hannel	i. 328	Hepburn	Bruce	i. 777
Harrison	Jackson	ii. 503	Hepburn	Children	i. 44
Harrower	Coupers	i. 760	Hepburn	Hepburn	i. 90, 92
Hart	Glassford	i. 452	Hepburn	Kinnear	i. 565, 573
Hart	Nasmith	i. 780	Hepburn	Richardson	ii. 28, 32
Hartley	Hitchcock	ii. 90	Hepburn	Strathmaven	ii. 176
Harvey	Liddiard	ii. 88	Hepburn	Lady Tarras	i. 30
Haswell		ii. 435	Hepburn	Campbell	ii. 262
Haswell	Hunt	i. 246	Heylin	Adamson	i. 444
Haswell	Hunt	i. 256	Heyman	Neale	i. 458
Hastie	Arthur	i. 213	Heywood		ii. 88
Haslon	Chapman	ii. 320	Heywood	Waring	ii. 87
Hawes	Humble	i. 469	Hibbert	Mann	i. 384
Hawes	Watson	i. 194, 590	Hibbert	Pigou	i. 597, 602
Hawkins	Cardy	i. 426	Hibbert	Rolleston	i. 155
Hawkins	Penfold	ii. 203	Hibbert	Shee	i. 469
Hawkins	Rutt	i. 493	Higgins	Callendar	i. 32
Hay		i. 306, ii. 263	Hill	Hill	i. 40
Hay	Brown	i. 38	Hill	Buchanan	i. 193
Hay	Cuming	i. 138	Hill	Burns	i. 35, 37
Hay	Fairbairn	i. 158	Hill	Dunbar	i. 346
Hay's Creditors	Fleming	i. 795, 776-7	Hill	Gilroy	i. 691
Hay	Hay	i. 284, 287	Hill	Gray	i. 316
Hay	Jameson	ii. 183	Hill	Idle	i. 624
Hay	Keil	i. 132	Hill	Hood's Trustee	i. 36
Hay	Keith	ii. 32	Hill	Hunter	i. 31
Hay	Leonard	i. 299	Hill	Lewis	i. 425
Hay	Marshall	ii. 16, 25, 55, 56, 57	Hill	Menzies' Creditors	i. 452
Hay	Panton	ii. 262	Hill	Merchant Hospital	i. 24
Hay	Sinclair	ii. 208, 215, 536	Hill	Paten	i. 338, 651
Hay	Stewart	ii. 18	Hill	Sibbald & Company	i. 665
Hay & Wood		i. 73	Hill	Thomson	i. 106, 120
Haycroft	Creasy	i. 389	Hinchinbrock		i. 640
Haywood	Rogers	i. 667	Hinde	Whitehouse	i. 180, 473
Hayward	Scougal	i. 469	Hinton	Donaldson	i. 114
Head	Egerton	ii. 23	Hissleside		ii. 15
Head	Sewell	i. 436	Hitchiner	Stewart	ii. 124
Hearle	Greenbank	i. 145	Hoare	Dawes	ii. 511, 543
Heathcot	Paignon	i. 316	Hodge	Frazer	i. 60
Heddel	Duncan	i. 130	Hodge	Storry	i. 400
Heddlestone	Goldie	i. 82	Hodgson	Anderson	ii. 12
Henderson		i. 421	Hodgson	Davies	i. 459, 469
Henderson		i. 48	Hodgson	Loy	i. 241
Henderson	Henderson	i. 40	Hodgson	Temple	i. 326
Henderson	Children	i. 686	Hodgson	Bushby	i. 442
Henderson	Campbell	i. 21, 723, 738	Hodgkinson		ii. 506
Henderson	Dalrymple	i. 716	Hogg		i. 123, ii. 4
Henderson	Duthie	i. 438, 442, 444	Hogg	Hog	ii. 376
Henderson	Gibson	i. 299	Hogg	Kennedy	i. 475
Henderson	Graham	i. 401	Hogg	Kirby	i. 118
Henderson	Hay	i. 417	Hogg	M'Lellan	ii. 60, 74
Henderson	Henderson	i. 44	Hogg	Morton	i. 193
Henderson	Irvine Magistrates	ii. 437	Hogg	Muir & Company	ii. 22
Henderson	Maxwell	i. 699	Hogg	M'Farlan	ii. 49, 150
Henderson	Stewart	ii. 6	Hollingsworth	Dunbar	ii. 352
Henderson	Wild	ii. 534	Holman	Johnson	i. 317, 326
Henderson	Malcolm	i. 67	Holmes	Kerrison	i. 418
Henderson	Fettes	i. 667	Holroyd	Gwynne	i. 256
Henry	Lee	i. 436	Holst	Pownal	i. 242, 243
Henry	Sutherland	i. 693	Holyland		i. 134
Herbertson	Rattray	i. 401	Holywell's Creditors		ii. 483-4
Herd	Beveridge	i. 560	Home's Creditors		i. 777
Heriot	Bird	i. 315	Home	Donaldson	i. 352

Home	Hepburn	i. 700	Hunter	Palmer	ii. 377
Hood	Cochrane	i. 536	Hunter	Princep	i. 616
Hood & Company	M'Kirdy	ii. 447	Huntley	Hume	i. 793, 794
Hooper . . . . .	. . . . .	ii. 23	Hurry	Mangles	i. 187, 229
Hooper	Lusby	ii. 545	Hurry	Royal Exchange Assurance	i. 661
Hope . . . . .	. . . . .	ii. 413	Hussey	Christie	i. 574, ii. 93, 97, 106
Hope	Cust	ii. 503-6	Hutcheson	Gibson	ii. 388
Hope	Foulis	i. 374, 401	Hutton	Bray	ii. 92, 94
Hope	Grosser	ii. 468	Hyde	Trent and Mersey Navigation Company	i. 494, 499
Hope	Waugh	ii. 16	Hynd	Scott	i. 701
Hopetoun . . . . .	. . . . .	i. 66	Hyndman . . . . .	. . . . .	ii. 484
Hopetoun	Copland	i. 689	Hyslop	Hyslops	i. 787
Hopetoun	Jarden	i. 689	Hyslop	Maxwell	i. 685
Hopkins	Appleby	i. 464	Hyslop	Queensberry	i. 690
Hopley	Dufresney	i. 445			
Horatio, The . . . . .	. . . . .	i. 642			
Horn	Baker	i. 271-3	Idle	Royal Exchange Assurance	i. 656
Horn	Kay	ii. 134	Immanuel, The . . . . .	. . . . .	i. 322
Hornblower	Bolton	i. 104	Inglis	Bell	ii. 81
Horncastle	Farmer	ii. 91	Inglis	Boswell	ii. 173, 184
Horne	Redpath	i. 457	Inglis	Bruce & Company	ii. 113
Horford	Wilson	i. 445	Inglis	Dempster	ii. 263
Horsburgh	Bethune	i. 420	Inglis	Goldie	ii. 268, 402
Horsburgh	Davidson	ii. 140	Inglis	Hamilton	i. 91
Horsburgh	Morton	ii. 32	Inglis	Inglis	i. 90
Hotchkis	Dundee Bank	i. 279	Inglis	M'Kie	i. 438
Hotchkis	Royal Bank	ii. 204	Inglis	Menzies	ii. 213
Hotchkis	Thomson	ii. 108	Inglis	Renny	i. 696
Hotham	East India Company	i. 617	Inglis	Royal Bank	i. 248, 263, 266, 268
Houghton . . . . .	. . . . .	i. 153	Inglis	Usherwood	i. 185
Houghton	Matthews	i. 459, 517, 539, ii. 90, 112, 128	Inglis	Earl of Fife	i. 716
Houlton . . . . .	. . . . .	ii. 529	Innes	Craig	ii. 22
Houston . . . . .	. . . . .	i. 66	Innes	Duff	i. 727
Houston	Macmillan	ii. 474	Irvine . . . . .	. . . . .	i. 444
Houston	N. Stewart	i. 94	Irvine . . . . .	. . . . .	i. 90
Houston	Robertson	ii. 129	Irvine	Aberdeen	i. 46, 778
Houston	Speirs	i. 391, 394	Irvine	Lawson	ii. 416
Houston	Stewart	ii. 209	Irvine	Maxwell	ii. 146, 243
Houston	Yuill	i. 420	Irvine	Tait	i. 92
Howard	Baillie	i. 516	Irvine	Valentine	i. 74
Howe	Bowes	i. 437, 440	Irvine	Annandale	i. 28
Howie	Lovel	i. 493	Irving	Cliffe	ii. 353
Hubbard	Jackson	i. 338, 651	Irving	Copland	i. 375, 376
Huddart	Grimshaw	i. 106	Irving	Gordon	i. 692
Huddleston	Bristoe	i. 339	Irving . . . . .	. . . . .	i. 558, 620
Huffan	Ellis	i. 436	Isabella, The	Kirkwall	ii. 479
Hughes . . . . .	. . . . .	ii. 342	Isbister	Clark	i. 492
Hughes	Kearney	ii. 91	Israel	Mountain	i. 504
Hughes	King	i. 337	Izell		
Huie	Dale	i. 118-9			
Hume	Seaton	i. 693	Jacard	French	ii. 506
Hume	Smith	ii. 175	Jack	Jacks	i. 96
Hume	Taylor	i. 72	Jackson . . . . .	. . . . .	ii. 304
Humphries	Cavallo	i. 258	Jackson	Charnock	i. 634
Humphry	Partridge	ii. 103	Jackson	Drummond	i. 794
Hunter's Creditors . . . . .	. . . . .	ii. 188	Jackson	Duchaire	i. 390
Hunter . . . . .	. . . . .	ii. 310, 313	Jackson	Fairbank	i. 420
Hunter . . . . .	. . . . .	ii. 563	Jackson	Hudson	i. 424
Hunter	Austin & Company	ii. 104	Jackson	Rogers	i. 501
Hunter	Barkley	ii. 99	Jackson	Sedgwick	ii. 538
Hunter	Beale	i. 240	Jackson	Simson	ii. 389
Hunter	Brown	i. 679	Jackson	Tollet	i. 491
Hunter	Carson	i. 388-9	Jackson	Vernon	i. 570
Hunter	Cochran	ii. 137	Jacky	Butler	ii. 507
Hunter	Douglas	i. 57	Jacob, The . . . . .	. . . . .	i. 579
Hunter	Fry	i. 597, 613	Jacob	Hart	i. 417
Hunter	Hamilton	ii. 12, 13	Jaffrey	Boag	i. 343, 478
Hunter	Hunter	i. 778	Jamieson . . . . .	. . . . .	i. 414
Hunter	Lees	ii. 71	Jamieson	Digges	ii. 389
Hunter	Potts	ii. 376-8	Jamieson	Ferrier	ii. 203
Hunter	M'Gowan & Company	i. 609			

Jamieson	Gillespie	i. 432	Kay	Blair	i. 556
Jamieson	Houston	i. 124	Kay	Fleming	ii. 290
Jamieson	Leckie	ii. 69, 71	Kay	Pollock	ii. 533
Jamieson	Rannie	i. 580	Kay	Sinsson	i. 530
Jamieson	Spottiswood	ii. 78	Kaye	Bolton	ii. 388
Jamieson	Swinton	i. 436, 444	Kaye	Coates	ii. 372
James, The		i. 580	Keene	Harris	i. 118
Jane	Matilda	i. 566	Keir	Calderwood	i. 776
Jankouska	Anderson	i. 56	Keir	Hepburn	ii. 57
Janson	Thomas	i. 435	Keir	Menzies	ii. 16, 70
Jap	Baird	i. 260	Keir	Willan	i. 504
Jardin	M'Farlan	ii. 542	Keith	Grant	i. 737
Jarvieston		i. 701-2	Keith	Keith	i. 682
Jeffrey	Aiken	i. 35	Keith	Maxwell	i. 33, 724, ii. 223
Jeffrey	Blair	i. 704	Keith	Sinclair	i. 721
Jeffrey	Campbells	i. 687	Kelhead, Lady	Wallace	i. 793
Jeffrey	Crichton	ii. 307	Kellman's Creditors		ii. 483
Jenkins	Blizzard	ii. 530, 531	Kelting	Jay	i. 615
Jeune	Ward	i. 423	Kellies		ii. 487
John, The		i. 575, 580	Kellie, Earl of	Crawford	ii. 295
Johnston		i. 54, ii. 80, 458	Kemp's Creditors		ii. 456, 461
Johnston		i. 75	Kemp	Allan	ii. 529, 531
Johnston	Annandale	ii. 7	Kemp	Watt	i. 44
Johnston	Balfour	i. 745	Kennedy		i. 777, ii. 475
Johnston	Benson	i. 607	Kennedy	Allan	i. 54
Johnston	Barnet, etc.	ii. 206-7	Kennedy	Arbuthnot	i. 92
Johnston	Berry	i. 140	Kennedy	Cunningham	i. 302
Johnston	Broderick	i. 566	Kennedy	Kennedy	ii. 6
Johnston	Carson	ii. 399	Kennedy	M'Dougal	i. 349
Johnston	Collins	i. 422	Kennedy	M'Kinnon	i. 382, 489
Johnston	Duncan	ii. 96	Kennedy	Nash	i. 414
Johnston	Dobie	ii. 2	Kennedy	Weir	i. 130
Johnston	Grievies	i. 584	Kensington	Inglis	i. 338, 649
Johnston	Haining	i. 328	Kent	Lowen	i. 329
Johnston	Hog	i. 438	Kerr		ii. 183
Johnston	Jedwin	ii. 65	Kerr	Elliot	i. 273
Johnston	Johnston	ii. 320	Kerr	Gordon	i. 369
Johnston	Johnson	i. 699	Kerr	Kerr	i. 44
Johnston	Kennion	i. 426	Kerr	Knows	ii. 13
Johnston	Medlicot	i. 317	Kerr	M'Dowal	ii. 360
Johnston	Napier	i. 137	Kerr	Primrose	i. 752
Johnston	Nisbet	ii. 168	Kerr	Scott	i. 766
Johnston	Paterson	i. 140	Kerr	Wauchope	i. 91, 142, 143-4, 145
Johnston	Robertson	i. 734	Kerr	Graham	ii. 389
Johnston	Scott	i. 518, ii. 124	Kerse's Creditors		i. 756
Johnston	Shedden	i. 661	Kershaw	Cox	i. 417, 425
Johnston	Shippin	i. 583	Kershaw	Mathews	ii. 524
Johnston	Warden	ii. 219	Kerrison	Cole	i. 155
Johnston	York Buildings Company	ii. 36	Kernot	Cooke	i. 454
Johnston	Fairholm	ii. 388-9	Kewley	Norman	ii. 439
Johnston	Baillie	i. 475	Keyser	Ryan	i. 651
Johnston	Findlay & Company	i. 518	Kibble	Suse	i. 230
Johnston	Philips	i. 425, ii. 504	Kildonan's Creditors	Stewart & Speirs	i. 736
Jollet	Reitveldt	ii. 376	Kiell	Douglas	i. 701
Jolly	Rathbone	i. 520	Kilcadron	Johnston's Tenants	i. 63
Jolly	Young	i. 614	Kilgour		i. 124
Jones		i. 329	Kilhead	Finlayson	ii. 527, 534
Jones	Radford	i. 444	Kilkerran	Irving	ii. 80, 85
Jones	Barclay	ii. 371	Kincaid	Cooper	ii. 160
Jones	Boyce	i. 492	Kincaid		i. 129
Jones	Davidson	i. 330	Kincaid	Murray	i. 253
Jones	Pearl	ii. 90, 99	Kinder	Stirling	i. 345
Jones	Randal	i. 320	King	Taylor	ii. 524
Jones	Simson	i. 337	King		i. 752
Jordain	Lashbrook	i. 338	King		ii. 290
Jordanhill		i. 66	King	Arkwright	i. 108
Joseph, The		i. 639	King	Barnet	ii. 49
Jouet	Maidment	ii. 455	King	Bickley	ii. 43
Jourdaine	Le Fevre	ii. 112-3	King	Boon	ii. 50
Joyce	Williamson	i. 581	King	Bowling	ii. 48
Junner	Cadell & Company	ii. 360	King	British Linen Company	ii. 53, 69
Justice-Clerk	Hamilton	i. 453	King	Bulley	ii. 43

King	Copland	ii. 55	Lamont	Boswell	i. 597, 617
King	Cotton	ii. 52	Lamont	Lamont's Creditors	i. 725, 735, 775, 778
King	Cross	ii. 50	Lancaster Society		ii. 151
King	Crump	ii. 51	Landales	Carmichael	i. 743, 773-4
King	Curtis	ii. 50	Lane	Cotton	i. 497
King	Earl	ii. 51	Lang	Creditors	ii. 480
King	Else	i. 108	Lang	Duke of Douglas	i. 61
King	Fowler	ii. 52	Langdale	Masson	i. 672
King	Harvey	ii. 43	Langdale	Trimmer	i. 441
King	Johnson	ii. 53	Langhorne		ii. 327
King	Kerr	i. 394	Lashley	Hog	i. 437-9, 444-52
King	Lambton	ii. 52	Langton's Creditors		ii. 135
King	Lee	ii. 53	La Neuville	Nourse	i. 464
King	Lindsay	ii. 46, 48	Latour	Bland	i. 119
King	Lushington	ii. 49	Lavabre	Wilson	i. 669
King	M'Farlan's Creditors	ii. 13	Law	Dieze	ii. 447
King	Mallet	ii. 43	Law	Dewar	ii. 475
King	Mainwaring	ii. 48	Law	Hollingsworth	i. 599, 664
King	Metcalf	i. 109	Law	White	ii. 448
King	Milton	ii. 46	Lawrence	Smith	i. 113
King	Sanderson	ii. 42, 551	Lawrie		ii. 246
King	Watson	ii. 52	Lawrie	Angus	i. 597, 617
King	Wheeler	i. 106, 108	Lawrie	Drummond	i. 86, 733
King	Williams	ii. 46	Lawrie	Hay	ii. 16
King		i. 759, 767	Lawrie	Jamieson	i. 623-4
Kingsgrange		i. 278	Lawrie	Perry Ogilvie	ii. 19
Kinghorn, Earl		i. 752, 756	Lawrie	Stewart	i. 367
Kinloch	Blair	ii. 153, 226	Lawson	M'Dougall	i. 706
Kinloch	Campbell	i. 667	Lawson	Mathew	i. 424
Kinloch	Craig	i. 244, ii. 87, 90	Lawson	Maxwell	ii. 148
Kinloch	Duguid	i. 665	Lawton	Salmon	i. 787-8
Kinloch	Fullarton's Creditors	i. 73	Laxton	Peat	i. 453
Kinloch	Mercers	i. 693	Lea	Landale	ii. 394
Kinminity's Creditors		i. 709	Leach	Buchanan	i. 414
Kinnaird, Lord	Hunter	i. 46	Leck	Maestaer	i. 487
Kinnear	Craig	i. 572	Le Compt		i. 360
Kinnear	Cuningham	ii. 541	Ledingham	M'Kenzie	i. 362
Kinnoway	Davie	i. 401	Lee <i>ex parte</i>		ii. 290
Kirby	Smith	i. 676	Lee	Cass	i. 329
Kirkaldy Magistrates		ii. 440	Lee	Donald	ii. 82
Kirk & Grieve	Bennet	ii. 130	Leeds	Wright	i. 183, 216
Kirkham	Master	i. 388	Leer	Yates	i. 622
Kirkland	Russel & Company	ii. 346	Leers <i>ex parte</i>		ii. 306
Kirkman	Shawcross	ii. 103, 105	Leeson	Holt	i. 502, 503
Kirkpatrick		ii. 482	Leftley	Mills	i. 438
Knight	Plymouth	i. 395	Legge	Thorpe	i. 450-2
Knill	Williams	i. 417	Leigh	Banner	i. 336
Knowles	Horsfall	i. 190, 194, 210	Leith	Lord Banff	i. 709
Koster	Eason	ii. 130	Leith	Livingston	ii. 389, 390
Kruzer	Wilcox	ii. 88, 109	Leith	Stewart	i. 63
Kufh	Weston	i. 440	Le Mesurier	Vaughan	i. 651-2
Kyle	Creditors	ii. 474	Lempriere	Paisley	ii. 14
Kymer	Suwercreop	i. 536	Lempriere	Perry	ii. 88
			Le Niemen		i. 640
			Le Neve	Edinburgh and London Ship- ping Company	i. 627-8-9
L'Actif		i. 642	Lennox		ii. 480
La Belle Coq.		i. 640	Lennox	Campbell	i. 371
Lady Forbes		i. 56	Lennox	Grant	ii. 311
Laidlaw	Hamilton	i. 419, 420	Lesslie	Lesslies	i. 89, ii. 183
Laidlaw	Wylde	i. 123	Lesslie	Orme	i. 66
Laing	Fidgeon	i. 463, 470	Lesslie	Miller	i. 461
Laing	Glover	i. 602	Lesslie	Mollison	i. 349-50
Laing	Strathmore	ii. 59	Lesslie	M'Indoe's Trustees	i. 723
Laing	Watson	ii. 451-3	Lesslie	Linn	ii. 115
Laird	Grindlay	i. 76	Lessly	Gray	i. 365
Laird	Kirkwood	i. 82-3, 85	Lessly	Irvine	i. 742
Lamb	Duncan	ii. 485	Lessly	Robertson	i. 414
Lambert	Liddiard	i. 670	Leven	Montgomery	i. 89
Lambert	Robinson	ii. 97	Levit	Wilson	i. 539
Lambton & Company	Marshall	i. 421	Levy	Barnard	ii. 115
Lamington, Lady	Her Son	i. 56			
Lamoy	Werry	i. 623			

Levy	Costerton	i. 580	Lumsden	Gordon	ii. 506
Lewis	Rucker	i. 659-61	Lundie	Robertson	ii. 445
Liardes	Johnson	i. 108	Lundie	Sinclair	ii. 668
Lickbarrow	Mason	i. 213, 234-5-6, 594-5	Lutwedge	Gray	ii. 617
Liddard	Lopez	i. 584, 616, 623	Lyburn	Warrington	ii. 337
Liddel	Dick's Creditors	i. 141	Lyel	Christie	ii. 394
Liddel	Sir W. Forbes	i. 386	Lyle	Greig	ii. 61
Liddel	Kerr	i. 649	Lyon	Easterogle	i. 686, 752, 777, ii. 183
Lidderdale	Naismith	ii. 107	Lyon	M'Klew	i. 360
Lidderdale	Duke of Montrose	i. 123	Lyon	Mills	i. 597-8
Lillie	M'Donald	i. 489	Lyon	Saundies	i. 436
Lillie	M'Kissock	ii. 122-6	Lynch	Dalzell	i. 675
Lillie	Riddell	i. 54	Lynch	Hamilton	i. 667
Litt	Cowley	i. 222			
Limland	Stephens	i. 563			
Lindo	Unsworth	i. 442			
Lindsay's Creditors		i. 93, ii. 172	Maanss	Henderson	ii. 116
Lindsay	Dott	i. 54-5	M'Adam	Fogo	ii. 108
Lindsay	Lindsay	i. 87	M'Adam	M'Illwraith	ii. 159, 160
Lindsay	Campbell	i. 572	M'Adam	M'William	i. 452
Lingard	Messiter	i. 272-4	M'Alman's Creditors		ii. 480, 483
Lingham	Biggs	i. 273-6	M'Alpin's Creditors	Parsons	i. 452
Linning	Douglas	ii. 109	Macao	Officers of State	i. 101
Lisk		i. 124	Macara	Watson	i. 417
Lithgow	Armstrong	ii. 412	M'Arthur	Gibson	ii. 177
Little & Company	Muir	i. 415	M'Auly	Bell	i. 681
Littlejohn	Allan	i. 438, 452	M'Aulay	Renny	ii. 417
Livingston		ii. 353	M'Ausland	Dick	i. 496, 501
Livingston	Burn	i. 299	M'Callum	M'Callum	ii. 453
Livingston	Glenagies	ii. 132	M'Callum	Tasker	ii. 473
Livingston	Goodall	i. 86	M'Cartney	M'Credie	i. 258
Livingston	Gordon	ii. 510	M'Caul	Cowan & Roy	ii. 90
Livingston	Lord Napier	i. 45, 716	M'Caul	M'Caul	i. 708
Livesay	Hood	i. 288	M'Caul	Ramsay	ii. 96
Livett	Hobbs	i. 497, 501	M'Caw	M'Caws	i. 96
Loch	Dick	i. 132	M'Christian	Monteith	ii. 184
Loch	Nairn	i. 372	M'Combie	Davies	i. 517, 520, ii. 88, 112
Lockhart	Dundas	ii. 176	M'Cormick	M'Cubbin	ii. 535
Lockhart	Paterson	ii. 149	M'Cracken	Pearson	i. 85
Lockhart	Semple	i. 370	M'Credie		ii. 136
Lockhart	Wingate	i. 35	M'Cubbin	Creditors	ii. 480
Lochiel's Trustee	Cameron	i. 138	M'Cubbin	Ferguson	i. 301
Logan	Campbell	i. 89	M'Culloch		i. 750
Logan	M'Coul	ii. 68	M'Culloch	Maitland	i. 57
Logy	Durham	ii. 511, 539	M'Culloch	Maxwell	ii. 123
Long	Duff	i. 146	M'Culloch	Patison & Company	ii. 104
Long	Moor	i. 413, 416	M'Donald		ii. 460
Longman	Gallini	i. 483	M'Donald	Creditors	ii. 473
Longman	Winchester	i. 118	M'Donald	Hutchison	i. 473
Lord Nelson		i. 643	M'Donald	M'Intosh	ii. 474
Lorymer	Smith	i. 470	M'Donald	Wingate	ii. 72
Lothian	Ross	i. 56	M'Donald	Rankin	i. 416
Loudon	Adam	i. 78	M'Donald	M'Leod	i. 354, ii. 71
Loudon and Glasgow	Ross	ii. 425	M'Donell	Ettles	i. 442
Love	Kemp	i. 262	M'Dougal		ii. 301
Love's Creditors	Murray	ii. 4	M'Dougal	M'Dougal's Creditors	i. 56
Low	Knowles	i. 72	M'Dougal	Foyer	i. 424, 425
Low	Walker	i. 734	M'Dougal	M'Dougal	ii. 177
Low	Wedgwood	ii. 136	M'Dougal	Maxwell	i. 401
Lowe	Campbell	i. 417	M'Dowall	Cannan	ii. 487
Lowe	Peers	i. 321	M'Dowall	Carmichael	i. 302
Lowe	Waller	i. 330	M'Dowall	Jameson	ii. 33
Lowes	Mazzaredo	i. 330	M'Dowall	M'Dowall	i. 31, 692-4, ii. 78, 80, 246
Lowther	M'Lain	i. 679	M'Dowall	Moliere	ii. 475
Lowthian	Aglianby	i. 656	M'Dowall	Rutherford	i. 714
Lowrie	Earl of Dundee	ii. 153	M'Dowall	Crawford	i. 53
Lloyd	Paterson's Creditors	ii. 261	M'Dowall	Russell	i. 86
Lloyd	Paterson's Heir	ii. 262	M'Dowall	Cadell	i. 279
Lloyd	Woodal	ii. 454	Mace	Ewing & Company	i. 209
Lucas	Dorien	i. 206, ii. 88, 115	M'Eachern	Thomson	ii. 4, 385
Luke	Lyde	i. 617-8	M'Ewan	Young	ii. 75
Lumley	Palmer	i. 423			

M'Farlan.	.	.	ii. 339, 353	M'Kinlay	.	Ewing	.	i. 374, 401
M'Farlane	.	Grieve	i. 341, 345	M'Kinneil's Creditors	.	Goldie	.	i. 752, 776, 780
M'Farlane	.	Price	i. 106	M'Kissock	.	Murphie	.	ii. 485
M'Fee	.	M'Gilvray	ii. 352	Macklin	.	Richardson	.	i. 113
M'Funn & Sons	.		ii. 351	Macknight	.	Bertram & Company	i. 296, 698	
M'Geachy	.	Mellis	ii. 75	Mackrelli	.	Simond	.	i. 618
M'Ghie	.	M'Dowall	ii. 553	M'Kye	.	Nabony	.	ii. 28
M'Gill	.	Hutchison	ii. 17	M'Lachlan	.		ii. 142	
M'Gillivray	.		ii. 251	M'Lachlan	.	Bennet	i. 770, ii. 339	
M'Givan	.	Blackburn	i. 552, ii. 544	M'Lachlan	.	Campbell	.	i. 683
M'Glashan	.	Athole	ii. 149	M'Lachlan	.	Tait	.	i. 22
M'Gowan	.	M'Kellar	i. 427	M'Laine	.		ii. 445	
M'Gown	.		ii. 303	M'Laine	.		ii. 474	
M'Gregor	.	M'Nab	ii. 474, 476	M'Laine	.	M'Laine	.	i. 44
M'Guffock	.	Edgar	i. 776	M'Lagan's Creditors	.	M'Lagan	.	ii. 200
Machel	.		i. 570, 572	M'Lagan	.	M'Farlane	.	i. 393
M'Hutcheon	.	Welsh	ii. 202	M'Laren	.	Bisset	.	ii. 122
M'Ilwham	.	Kerr	i. 316	M'Laren	.	Orr	.	ii. 475
M'Indoe	.	Frame	i. 420	M'Glashan	.	Duke of Athole	.	ii. 34
M'Intosh	.	Dawson	ii. 160	M'Latchie	.	Morrison	.	ii. 485
M'Intosh	.	Haydon	i. 417	M'Lea	.	M'Lehose	.	ii. 328
M'Intosh	.	Farquharson	i. 315	M'Lean	.		ii. 563	
M'Intosh	.	Inglis & Weir	i. 716	M'Lean	.	Duke of Argyll	.	i. 716
M'Intosh	.	M'Donell	i. 699	M'Lean	.	Auchinvole	.	ii. 38
M'Intosh	.	M'Intosh	i. 53, 55	M'Lean	.	Grant	i. 489, 490	
M'Intyre	.	Masterton	i. 726	M'Lean	.	Primrose	.	ii. 209
M'Intyre	.	Tweedie	i. 343	M'Lean	.	Robertson	.	ii. 346-8
M'Iver	.	Humble	ii. 530	M'Lean	.	Sword	.	i. 326
M'Iver	.	Richardson	i. 389	M'Leay	.	Rose	.	ii. 137
Mack	.	Jenkinson	ii. 394-9	M'Leish	.	Rennie	.	i. 58
M'Kay	.	Campbell	ii. 461	M'Lellan	.		i. 730	
M'Kay	.	M'Kay's Representatives	i. 765	M'Lellan	.	Fleming	.	ii. 81
M'Kay	.	Robertson	i. 88	M'Lellan	.	M'Rae	.	i. 743
M'Kay	.	Sinclair	i. 706	M'Leod	.	Crichton	.	ii. 14
M'Kell	.		ii. 348	M'Leod	.	Stewart	.	i. 51
M'Kell	.	Jamieson	ii. 180	M'Leod	.	Thomson	.	ii. 33
M'Kell	.	M'Lurg	ii. 388-9	M'Lerie	.	Glen	.	ii. 178
M'Kellar	.		ii. 303	M'Lesly	.		ii. 445	
M'Kellar	.	Balmain	ii. 247	M'Lure	.	Baird	.	ii. 140
M'Kellar	.	Campbell	i. 361-2	M'Lure	.	Paterson	.	i. 326
M'Kellar	.	Henderson	ii. 506	M'Math	.	Baron	.	i. 130
M'Kellar	.	Templeton	ii. 304, 321	M'Math	.	M'Kellar	ii. 74, 141, 160, 194, 203	
M'Kenzie	.		i. 44-5, 706	M'Millan	.	Drake	.	i. 254
M'Kenzie	.	Creditors	ii. 473-4	M'Millan	.	Hamilton	.	i. 396
M'Kenzie	.	His Children	i. 686	M'Millan	.	Sloan	.	i. 361
M'Kenzie	.	Blair	ii. 447	M'Minn	.		ii. 353	
M'Kenzie	.	Craigie	i. 352	M'Morland	.	Maxwell	.	i. 362
M'Kenzie	.	Forrester	ii. 487	M'Morren	.	Newcastle Fire Insur.	i. 597, 662	
M'Kenzie	.	Fletcher	ii. 153	M'Nair	.		ii. 461	
M'Kenzie	.	Gilchrist	i. 352, 699	M'Nair	.	Coulter	.	i. 659
M'Kenzie	.	Jones & Company	i. 395	M'Nair	.	Fleming	.	ii. 558
M'Kenzie	.	Learmonth	i. 75	M'Nair	.	Henderson	.	i. 426
M'Kenzie	.	Liddell	i. 763	M'Nair	.	Miller	.	i. 155
M'Kenzie	.	M'Kenzie	i. 24, 371, ii. 177	M'Nair	.	M'Nair	.	i. 37
M'Kenzie	.	M'Leod	i. 719	M'Nair	.	M'Nair & Company	.	i. 723
M'Kenzie	.	Monro	i. 687	M'Naught	.		ii. 569	
M'Kenzie	.	Morrison	i. 125	M'Naught	.		ii. 480	
M'Kenzie	.	Newall	ii. 88	M'Neil	.	Blair	.	i. 419
M'Kenzie	.	Park	i. 345	M'Neil	.	Buchanan	.	i. 778
M'Kenzie	.	Redcastle	ii. 385	M'Neil	.	Falconer	.	ii. 122
M'Kenzie	.	Ross	ii. 36, 131	M'Neil	.	Livingston	.	ii. 178
M'Kenzie	.	Ross & Ogilvie	i. 757	M'Neil	.	Trustees	.	i. 685
M'Kenzie	.	Scott	ii. 459	M'Neil	.	M'Neil	.	i. 696
M'Kenzie	.	Urquhart	i. 452	M'Neil	.	Mathie	.	i. 705
M'Kenzie	.	Watson	i. 281	M'Neil	.	Saddler	i. 752, 776, 779, 780	
M'Kenzie	.	Watson, etc.	i. 302	M'Nicol	.		ii. 9	
M'Kenzie	.	York Buildings Company	i. 38	M'Nicol	.	Russell	.	ii. 9
M'Kenzie	.	M'Kenzie	i. 51	M'Pherson	.	Tod	.	ii. 238, 251
M'Kie	.	Agnew	ii. 179	M'Queen	.	Nairne	.	i. 719
M'Kie	.	Harvey & Company	ii. 485	M'Rankin	.	Shaw	.	i. 375
M'Kie	.	M'Kie	i. 94	M'Ritchie	.		i. 25	
M'Kie	.	M'Kinneil	ii. 88	M'Rorie	.	M'Whirter	.	i. 346

M'Taggart		ii. 303, 314	Mathieson		Anderson	ii. 115
M'Tavish		i. 686	Mathieson		Smith	ii. 207
M'Tavish	M'Lachlan	i. 69, 793	Maving		Tod	i. 502-3
M'Tavish	Mathison	ii. 302	Maxwell			i. 751
M'Tavish	Pedie	ii. 36	Maxwell			i. 47
M'Tier	Ferguson	ii. 481	Maxwell		Blair	i. 319
M'Turk	Hunter	i. 708	Maxwell		Brown	i. 670, 777-8
M'Turk	Marshall	i. 776	Maxwell		Corrie	i. 88
M'Vicar	Baillie	ii. 350	Maxwell		Drummond	ii. 219
M'Vicar	Gordon	ii. 138	Maxwell		Gibb	ii. 160
M'Whinnie	Burton	i. 780	Maxwell		Grieve	i. 54
M'Whirter		ii. 78	Maxwell		Heron's Trustees	i. 369-71
Madden	Kempster	ii. 88	Maxwell		Maxwell	i. 38
Maddison		i. 293	Maxwell		Nicolson	i. 92
Madonna, The		i. 562, 621	Maxwell		Russell	ii. 244
Magalhaem	Busher	i. 589, 602	Maxwell		Todridge	i. 488
Main	Maxwell	i. 194, 309	Maxwell		Wardroper	i. 574
Main	Glenshie	ii. 511	Maxwell		Maxwell	i. 779
Maitland	Baillie	i. 351	May		Malcolm	ii. 63, 72
Maitland	Gight	i. 222	May		Smith	ii. 533
Maitland	Hoffman	ii. 377	May		Wingate	i. 498
Maitland	Maitland	i. 85-6	Meal		Thoms	i. 328
Maitland	Neilson	i. 345	Meikle		Meikle	i. 128
Majendie	Carruthers	i. 685	Meikle		Skelly	i. 498
Malcolm	Bannatyne	i. 490	Meldrum			ii. 490
Malcolm	Bardner	i. 67	Mellis		Royal Bank	ii. 355
Malone		ii. 483	Mellish		Simpson	i. 430
Mann	Walls	ii. 160, 173, 195	Melrose		Kerr	i. 733
Mann	Reid	ii. 216	Melvil		Arnot	i. 130
Mann	Shepherd	ii. 290	Melville		Hayden	i. 390
Mann	Skiffner	i. 517	Menetone		Athawes	i. 486
Mansfield	Brown	ii. 388	Menzies			ii. 145, 168
Mansfield	Cairns	ii. 209	Menzies			ii. 481
Mansfield	Smith, Wight, & Gray	ii. 65	Menzies		Campbell	i. 733
Manson	Angus	ii. 196	Menzies		Denham	i. 700
Manton	Manton	i. 107	Menzies		Gillespie's Creditors	i. 59
Manton	Moore	i. 188	Menzies		M'Harg	ii. 145
Maria, The		i. 639	Menzies		Menzies	ii. 4
Marquis	Ritchie	i. 483	Menzies		Kerr	i. 569-72
Marr	Spence, etc.	i. 651	Mercer		Dalgarno	ii. 175
Marsden	Reid	i. 338, 649	Merchieston		Charteris	ii. 206
Marsh	Martindale	i. 228-9	Merle		Wells	i. 390
Marsh	Chambers	ii. 112, 122	Merry		Howie	i. 84
Marsh	Pedder	i. 615	Mestaer		Gillespie	i. 155
Marshall	Children	ii. 184	Metcalfe		Pulvertoft	ii. 143
Marshall	Dunlop	ii. 272	Meyer		Everth	i. 470
Marshall	Marshall	ii. 521-3	Meyers		Sharpe	ii. 511
Marshall	Pencaitland	i. 767	Meymot			i. 123
Marshall	Provan & Company	ii. 228	Middleton		Strathmore	ii. 123
Marshall	Rutton	ii. 157	Middleton		Fowles	i. 497
Marshall	Yeaman	ii. 379	Midwinter, etc.		Hamilton	i. 114
Martin	Creditors	ii. 484	Mill		Harris & Company	i. 530
Martin	Paterson	i. 726	Mill		Paul	ii. 122
Martini	Coles	i. 520	Mill		Straton	ii. 484
Mashiter	Buller	i. 619	Mill		Wright	ii. 36
Mason's Creditors		ii. 450	Mills		Albion Company	i. 649
Mason	Henderson	i. 583	Mills		Ball	i. 244
Mason	Hunt	i. 423	Millar			ii. 327
Mason	Pritchard	i. 390	Miller		Brand	ii. 151
Mason	Thom	i. 489	Miller		Brown	i. 730
Massey	Banner	i. 395	Miller		Cathcart	i. 45
Massey	Smith	ii. 146, 243	Miller		Douglas	i. 425-6
Master	Miller	i. 416	Miller		Fletcher	i. 655
Masterman	Cowrie	i. 329	Miller		L. Gwydir	i. 699
Masterton	Hutton	i. 400	Miller		Miller	i. 457
Matchless, The		i. 506	Miller		Taylor	i. 115
Mather		i. 331	Milligan			ii. 79
Mather	Mathie	i. 389	Milligan		Barnhill	i. 62, 552
Matherston	Stockdale	i. 118	Milne			ii. 137
Matthew	Boyce	i. 491	Milne		Harris & Company	i. 515
Matthews	Griffiths	i. 329	Milne		Miller	i. 473
Mathieson		ii. 477	Milne		Nicolson	ii. 411

Milne	Prest	i. 423	Morrison	Boswell	i. 479
Minerva, The		i. 560	Morrison	Dundas	ii. 364
Minet	Forrester	ii. 128	Morrison	Hamilton	i. 564
Minto	Dewar	i. 78	Morrison	Hunter	ii. 124
Mitchell		ii. 369	Morrison	Pattullo	i. 69, 70
Mitchell	Adam	i. 736	Morrison	Orchardton	i. 793
Mitchell	Barnet, etc.	i. 517	Morrison	Ramsay	i. 716
Mitchell	Bisset	i. 464	Morrison	Watt	ii. 377
Mitchell	Cuddy	ii. 60	Mortimer	Hay	ii. 260
Mitchell	Ferguson	i. 307	Morton	Montgomery	i. 78
Mitchell	Finlay	ii. 200, 207	Morton	Gilchrist	i. 351
Mitchell	Lapage	i. 314, 459, ii. 526	Morton	Lochleven	i. 315
Mitchell	Oldfield	ii. 35	Morton	Sommerville	ii. 79
Mitchell	Reynolds	i. 321	Morton	Lord Yester	i. 24
Mitchell	Scaiffe	ii. 96	Morton	Young	i. 128
Mitchell	Tarbutt	ii. 151	Moubray	Spence	ii. 175
Mitchell	Watson	i. 84, ii. 168	Moubray	Niblie	ii. 314
Moffat	Moffat	i. 483	Mountainhall		i. 86
Moir	Mudie	i. 91	Mousewell		i. 688
Mollison	Clark	i. 123	Mousewell		ii. 180
Molloch	Creditors	ii. 475	Muclow	Mangles	i. 188
Monach		ii. 371	Mudie	Dickson	ii. 389
Monach		ii. 516	Muilman	D'Eguino	i. 432, 441
Moncreiff	Guthrie	ii. 150	Muir	Creditors	ii. 480
Moncreiff		ii. 192	Muir	M'Adam	i. 779
Moncreiff	Colvil	ii. 107	Muir	M'Kenzie	i. 699
Moncreiff	Innes	i. 776	Muir	Wallace	i. 341-5
Moncreiff	Moncreiff	i. 693	Muir	Wilson	i. 75
Moncreiff	Moncreiff's Creditors	i. 794	Muir	Barchard	i. 648
Moncreiff	Tenants of Newton	i. 55	Muir	Drummond	ii. 27
Monro		ii. 238	Muirhead	Chalmers	i. 345
Monro	Bain	i. 374	Muirhead	Corrie	ii. 64
Monro	Cowan & Co.	ii. 152, 524, 537	Muirhead	Town of Haddington	i. 693
Monro	Frazer	ii. 389	Muirhead	Muirhead	i. 708
Monro	Gordon's Creditors	ii. 139	Muirhead	Paterson	i. 54
Monro	M'Kenzie	i. 763	Muller	Moss	i. 271-4
Monro	M'Millan	ii. 462	Mulloy	Becker	i. 617
Monro	Miller's Creditors	i. 76	Munn	Baker	i. 504
Monro	Monro	i. 415, ii. 6, 122	Murchie	M'Farlane	i. 416
Monro	Baillie	i. 40, 56-7	Murdoch		ii. 80
Montier		ii. 185, 188	Murdoch	Cheslie	i. 757
Monteith	Blackie	ii. 131	Murdoch	Hunter	i. 362
Monteith	Cross	i. 662	Murdoch	Lee & Company	i. 354, 416
Monteith	Douglas	i. 281, 302, ii. 211	Murison	Gibson	i. 668
Monteith	Monteith	i. 60	Murray		ii. 4
Montgomery	Craig	i. 626	Murray		i. 284
Montgomery	Forrester	ii. 523	Murray	Creditors	ii. 475-9
Montgomery	Fergushall	ii. 72	Murray		i. 47
Montgomery	Foulis	i. 145	Murray	Benbow	i. 113
Montgomery	Sibbald	i. 126	Murray	Blair	ii. 402
Montgomery	Wauchope	i. 695	Murray	Borthwick's Trustees	i. 88
Montrose, Earl of	Scott	i. 461	Murray	Drummond	ii. 186
Moodie		ii. 468	Murray	Cathcart	ii. 6, 8
Moodie	Stewart	i. 685	Murray	Chalmers	ii. 117, 122
Moore	Clementson	i. 526	Murray	Dalrymple	i. 683
Moorsom	Bell	i. 622	Murray	Fleming	i. 35
Moorsom	Graves	i. 619	Murray	Grosset	i. 448
Moorsom	Kymer	i. 615	Murray	Earl of March	i. 727-8
Mordaunt	Innes	i. 67	Murray	M'Farquhar	i. 116
More	Allan	ii. 208	Murray	Murray	i. 91, 98, 138, ii. 4
More	Bonthorn	i. 736	Murray	Orchardton	i. 369
More	Dudgeon & Brodie	i. 186	Murray	Gilmuir's Creditors	ii. 241
More	Finnison	i. 401	Murray	Phillips	ii. 308-10
More	Paxton	ii. 215	Murray	Rae's Creditors	ii. 256
Morgan		ii. 90	Mushet	Harvey	i. 362
Morgan	Davison	i. 436	Mutford	Walcot	i. 427
Morris	Bishop of Durham	i. 35	Mutrie		i. 793
Morris	Cleasby	ii. 128	Myers	Edge	i. 392, ii. 526
Morris	Kelly	i. 119	Myles	Lyal	i. 400
Morrison		ii. 487			
Morrison	Allardes	ii. 143			
Morrison	Balfour	i. 378	Nairn	Cranston	ii. 422-3

Nairn	Drummond	i. 351, ii. 329	Ogilvy	Ogilvy	i. 40, 708, 747-8, 793
Nairn	Sir W. Forbes	ii. 514	O'Keefe	Dunn	i. 445
Nairn	Sir W. Gray	i. 50	Oldham	Bewick	i. 674
Napier		ii. 81	Oliver	Smith	ii. 103
Napier		i. 686	Oliver		ii. 327
Napier	Carson	i. 438	Oliphant		i. 753, ii. 65
Napier	Gordon	ii. 178	Oliphant	Currie	i. 69
Napier	Kissock	ii. 28	Oliphant	Douglas	ii. 460
Napier	Schneider	i. 431	Oliphant	Irvine	ii. 135
Napier	Wood	i. 658	Oliphant	Monorgan	i. 345
Nathan	Giles	ii. 90	Openheim	Russell	i. 244, ii. 103, 105
Naylor	Mangles	ii. 103	O'Reilly & Company	Jameson's Creditors	i. 509
Neil	Cottingham	ii. 376	Orford	Cole	i. 336
Neal	Ervine	i. 653	Orkney	Vinfra	i. 315
Neilson		i. 331, 679, ii. 185, 188, 536	Orme		ii. 137
Neilson	Bruce	i. 319	Ormerod	Tait	ii. 35
Neilson	Hay	ii. 418	Ormiston	Greig	i. 86
Neilson	M'Dowall	ii. 543	Ormiston	Hamilton	i. 349
Neilson	Rae	ii. 547	Ormiston	Hill	i. 743, 745
Neilson	Stewart	ii. 474	Orr	Maginnes	i. 451
Nelson	Gordon	i. 737	Osgood	Groning	i. 616
Nelson, The		i. 643	Oswald	Gibson	ii. 572
Nelson	M'Intosh	i. 611	Ouchterlony	M'Kenzie	ii. 240
Nelson	Rae	ii. 2	Ouchterlony	Easterby	ii. 131
Neptune, The		i. 561, 566	Oursell		i. 281-3
Neptune the Second		i. 626-9	Ouston	Hebden	i. 551
Newbigging	Haywood	ii. 421	Outram	Dryden	i. 725
Newbigging	Dalglish	ii. 422	Owen	Gooch	i. 539
Newcastle Fire Insurance	M'Morran	i. 673	Owenson	Moore	i. 193
New Draper		i. 155	Oxenheim	Gibbs	i. 150
Newland	His Father's Creditors	i. 55			
Newlands	M'Kenzie	ii. 345, 108	Padon	Bank of Scotland	i. 441
Newman	Waters	i. 639	Paddy		ii. 311
Newsome	Coles	ii. 513, 533	Pagan	Campbell	ii. 396
Newsome	Thornton	i. 246, 520	Pagan	Eaton	i. 35
New Phoenix		i. 566	Pagan	Wylie	i. 415
Newton	Anderson	ii. 240	Paisley Bank	Gillon	i. 510
Newton	Colloghan & Company	ii. 16	Palmer		ii. 529
Nicol	Christie	ii. 550, 564	Palmer	Bonnar	i. 688
Nicol	Doig & Baxter	i. 367	Palmer	Gooch	i. 576
Nichols	Clent	ii. 88	Palmer	M'Conochie	i. 59
Nicholson	Gouthit	i. 444	Palmer	Bennet	ii. 456
Nicholson	Mounsey	i. 556	Park	Craig	i. 782
Nicholson	Willan	i. 504	Park	Elleason	i. 281, 291
Nisbet		i. 44	Park	Gibb	i. 57
Nisbet		i. 75, ii. 34	Park	M'Kenzie	i. 341, 345
Nisbet	Robertson	i. 325	Park	Maxwell	i. 375, 777
Nisbet	Stewart	i. 315	Park	Bennet	ii. 461-4
Nisbet	Stirling	i. 752	Parker		ii. 563
Nisbet	Williamson	ii. 179	Parker	Beasley	ii. 130
Nisbet	Cullen	i. 330	Parker	Carter	ii. 115
Niven	M'Farlane	i. 50, 75	Parker	Gordon	i. 436
Niven	Pitcairn	i. 787, 789	Parker	Palmer	i. 465
Noble		ii. 487	Parker	Potts	i. 598
Noble	Adams	i. 219, 263	Parker	Smith	i. 648, ii. 129
Norfolk		ii. 511, 534	Parker	Mags. of New Galloway	ii. 437-9
Northey	Field	i. 242	Parkinson	Lee	i. 464
Nowlan		ii. 327	Parish	Khones	ii. 376
Nutt	Verney	ii. 439	Parr	Elleason	i. 329, 734
			Parsons	Scott	i. 655
Ockenden		ii. 90, 102, 104	Pary	Yelton	i. 623
Ockley	Grierson	i. 401	Pat. Coop. Company		ii. 303
Ogilvie		ii. 376	Paterson		ii. 302, 313, 372
Ogilvie	Crombie	ii. 271	Paterson		ii. 118, 214
Ogilvie	Fullarton's Creditors	i. 73	Paterson	Anderson	ii. 244
Ogilvie	Guar	i. 70	Paterson	Balfour	i. 56
Ogilvie	Mercer	i. 84, ii. 190	Paterson	Bruce	i. 768
Ogilvie	Moss	i. 416, 421	Paterson	Calder	i. 387
Ogilvie	Reid	i. 94	Paterson	Cowan	ii. 66
Ogilvie	Wingate	ii. 33, 52	Paterson	Gandasequi	i. 536
Ogilvy	Brown	i. 569, 572	Paterson	Harwood	ii. 427

Paterson	Johnston	i. 82	Pitt	Smith	i. 317
Paterson	Kelly	i. 737	Pittencrieff		ii. 348
Paterson	Murray	ii. 132	Pitmeddan	Gordon	ii. 12
Paterson	Ord	i. 60	Place	Donnison	ii. 451-3
Paterson	Ritchie	i. 655	Place	M'Nabb	i. 730
Paterson	Ross	i. 776	Playfair	Hotchkis	i. 329
Paterson	Spreul	i. 145	Plenderleath	Earl of Tweddale	i. 689
Paterson	Tash	i. 520	Plummer		ii. 240
Paterson	Wright	i. 342	Plummer	Wildman	i. 633, 634
Paton	Barclay	ii. 222	Pollock	Fairholm	i. 88
Patten	Thomson	i. 239, 240	Pollock	Fulton	ii. 448
Pattison	Cunningham	ii. 313	Pollock	Kirk-session of Leith	ii. 226
Paul	Mathie	ii. 345	Pollock	Paterson	i. 525
Peacock	Lauder	i. 68	Pollock	Paton	i. 699
Peacock	Peacock	ii. 503, 521	Pollock	Pollocks	i. 54, 370-1, ii. 173, 184
Peacock	Rhodes	i. 425	Poole		i. 788
Pearce	M'Donnell	i. 602	Polquhairn	Corrie	i. 762
Pearson	Crichton	ii. 112, 131	Polstead	Scott	i. 401-2
Pease		i. 293	Pope	Curl	i. 112
Peddie		i. 742, 763, ii. 246	Porteous	Naesmith	i. 775, 777
Pedie	Berry	ii. 289	Porterfield	Cook	i. 92
Pedie	Grant	ii. 65, 158	Port-Glasgow, etc.	Crosses	i. 574
Pedley		ii. 327	Porthouse	Parker	i. 444
Peebles	Scott	ii. 40	Pothonier	Dawson	ii. 22, 91
Peebles	Watson	i. 723	Potts	Parker	i. 664
Peel	Price	i. 589	Powell	Duff	i. 415
Peele <i>ex parte</i>		ii. 400	Power	Whitmore	i. 634-5
Penman	Brown	i. 704-5	Powers	Walker	i. 119
Pennycook	Thomson	i. 90	Powrie	Johnson	i. 140
Penrose	Wilkes	i. 614	Pratt	Fleet	ii. 450
Penson & Company		ii. 30	Pratt	Willey	i. 329
Pentland	Paterson	ii. 339	Preston's Children	His Creditors	i. 686
Perceval	Phipps	i. 112	Preston	Dundonald	i. 25-6, 27, 302
Perrot	Ballard	ii. 327	Preston	Erskine	ii. 418
Perry	Bouchier	i. 339	Prestonhall	Fraserdale	i. 727
Peter	Monro	ii. 148	Price		ii. 529
Peter	Speirs	ii. 389	Price	Mitchell	i. 436
Peterborough	Milne	i. 72	Prideaux	Collier	i. 434
Petit	Benson	i. 423	Priest	Parrot	i. 318
Petrie		ii. 88	Primrose	Crawford	i. 60, 681
Pettigrew	Wilson	ii. 513	Primrose	Duie	i. 141
Peutress	Thorold	ii. 376	Primrose	Primrose	i. 82
Phelps	Auldjo	i. 607	Prince	Pallet	i. 214, 257, 264, 309
Philip	Melville	i. 392	Pringle		i. 42, 331
Philip	Earl of Rothes	i. 46	Pringle	Gribton	i. 299
Philips	Rodie	i. 620, ii. 95	Pringle	Biggar	i. 319, 331
Philips	Shaw	ii. 50	Pringle	M'Lagan	i. 73
Phillips	Barber	ii. 500	Pringle	Neilson	ii. 482, 485
Phillip	Dreas	ii. 370	Pringle	Pringle	i. 39, 90, ii. 7
Philp	Milne	i. 419	Pringle	Richardson	i. 54
Philpot	Hoare	i. 76	Pringle	Scott	i. 50, ii. 31
Phipson	Kneller	i. 445	Proudfoot	Lindsay	ii. 504
Picard	Creditors	ii. 474	Pruessing	Ing	i. 337
Pickering	Barclay	i. 606	Pugh	Duke of Leeds	i. 455
Pickering	Busk	i. 520	Puller	Staniforth	i. 620
Pickering	Smith, etc.	ii. 222	Pultney	Keymer	i. 520
Pickford	Maxwell	ii. 91	Purves	Strachan	i. 723
Pidcock	Bishop	i. 390			
Pirie <i>ex parte</i>		ii. 563			
Pierce	Limond	i. 755	Quantoek	England	ii. 291
Pierson	Baxter	i. 186	Queen, The	Bishop of Aberdeen	ii. 120
Pierson	Dunlop	i. 422-3	Queen, The	Quash	ii. 50
Pillans	Pitt	i. 615	Queensberry		i. 66
Pillans	Van Mierop	i. 331, 422	Queensberry	Tenants	i. 44
Pilmure's Creditors		i. 707	Queensberry		ii. 7
Pinders	Wilks	ii. 527	Queensberry	Duke of Buccleuch	i. 66-7
Pinkel, Lady		i. 124	Queensberry	Shebbeare	i. 113
Pinkerton	Marshall	ii. 202	Queensberry	Tait	i. 760, 779, 696
Pitblado	Main	i. 401	Queensberry	Creditors	ii. 480
Pitcairn	Brown	ii. 359	Queensberry	Wemyss	i. 66
Pitcairn's Creditors	Foggo	i. 329	Queensferry		ii. 480
Pitcairn, etc.	Adair	ii. 71			

Raby	Ryland	ii. 506	Riccarton	Gibson	ii. 188
Rabone	Williams	i. 285, 537	Riddsdale	Shedden	i. 338, 651
Racehorse, The		i. 619	Rich	Coe	i. 536, 569, 574
Rae	Bellamy	i. 397	Rich	Topping	i. 329
Rae	Glass	i. 38	Richard	Lindsay	i. 65
Rae	Neilson	ii. 547	Richards	Milsington	i. 436
Ragg	Forbes	i. 84	Richardson	Goss	i. 183, 214
Raffles, Gov.		i. 639	Richardson	Haddington	ii. 380
Raith	Woolmet	i. 222	Richardson	Sinclair	i. 87
Raitt	Mitchell	ii. 93	Richmond	Dalrymple	ii. 161
Raitt	Raitt	i. 85	Richmond	Pelican Assurance Com- pany	ii. 204
Ralston	Robb	i. 463		Ridge	i. 434
Ramsay		ii. 250	Rickford		i. 54
Ramsay	Brownlee	ii. 8	Riddels	Dalton	i. 678
Ramsay	Goldie	i. 701	Riddels	Niblie	i. 724, ii. 222
Ramsay	Grierson	ii. 70	Riddels	Richardson	i. 89
Ramsay	M'Kenzie	ii. 48	Riddell		ii. 178
Ramsay	Maxwell	i. 130	Riddoch	Haig	ii. 149
Ramsay	Wilson	i. 299	Ridley	Taylor	i. 426, ii. 504
Ramsay	Pyronon	i. 341	Ridley		i. 56
Ramstrom	Bell	i. 338	Rig	Ditchell	i. 555, 589, 602
Randall	Lynch	i. 619	Rinquist	Wright	i. 339, 649
Randall	Lynch	i. 621	Rippiner		ii. 317
Randle	Fuller	ii. 35	Ritchie	Creditors	ii. 480
Rankin		ii. 352	Ritchie	Atkinson	i. 602
Rankin	Adair	i. 351	Ritchie	Magistrates of Canongate	ii. 442
Rankin	Gardner	ii. 396			i. 124
Rankin	Gairdner	i. 37	Robb		ii. 303, 314, 594
Rankin	Murray	i. 389, 390	Robb	Raeburn	i. 724
Rankin	Rankin	i. 127, 776	Robb	Thorold	ii. 69
Rann	Hughes	i. 331	Roberts		ii. 240, 246
Ray	Bellamy	ii. 454	Robertson		ii. 184, 507
Read		ii. 420	Robertson	Adams	i. 209
Read	Bontram	i. 656	Robertson	Annan	i. 416, 427
Reay, Lord	Anderson	i. 128	Robertson	Duke of Athole	i. 54, 744
Redcastle		i. 727	Robertson	Bank of Scotland	ii. 306
Redhead	Cater	i. 150	Robertson	Brown	i. 635
Redpath	White	i. 63	Robertson	Fleming	i. 82
Rees	Warwick	i. 316	Robertson	French	i. 456
Reid	Cameron	ii. 34	Robertson	Halkerston	ii. 17
Reid	Campbell	i. 90, ii. 6	Robertson	Handyside	i. 687
Reid	Coates	i. 448	Robertson	Jardine	ii. 33, 52
Reid	Darby	i. 655	Robertson	Kensington	i. 426
Reid	Donaldson	ii. 482, 485	Robertson	Laird	i. 669
Reid	Dupper	ii. 35	Robertson	Lennox	ii. 195
Reid	Forrester	i. 54	Robertson	Liddel	ii. 163
Reid	Fullarton	i. 24	Robertson	M'Caig	i. 83
Reid	Harvie	i. 667	Robertson	M'Kinlay	i. 374
Reid	Hollingshed	ii. 511	Robertson	Macvean	i. 98
Reid	Kelso	ii. 481	Robertson	Mason	i. 54
Reid	M'Donald	i. 326	Robertson	Ogilvie	ii. 196
Reid	Maxwell	i. 376, 734, ii. 427	Robertson	Ogle	i. 483
Reid	Napier	ii. 138	Robertson	Oswald	i. 129
Reid	Officers of State	i. 751	Robertson	Robertson's Creditors	i. 778
Reid	Reid	ii. 184	Robertson	Routledge	i. 338
Reid	Scott	i. 321	Robertson	Spalding	i. 69
Reid	Shaw	i. 689	Robertson	Tournay	i. 338
Reid	Steele	i. 464	Robertson	Udnies	i. 267, 295
Reid	Whitson & Company	i. 687	Robertson	Watson	i. 776
Rennie	Playfair	ii. 37	Robertson	More	i. 186, 248
Rennet	Thomson	i. 118	Robertson	Ogilvy	i. 400
Rex	St. Paul's Inhabitants, Bedford	i. 336	Robertson	Bisset	i. 416
	Castle Morton Inhabit- ants	i. 339	Robertson	Stewart & Smith	i. 654
Rex	Stewart	ii. 38	Robin	Drummond	i. 22
Rex	Treble	i. 417	Robins	Gibson	i. 438, 452
Reynolds	Syme	i. 443	Robinet	The Exeter	i. 563, 566
Rhadamanthe, The		i. 578	Robinson	Bland	i. 331
Rhodes	Gent	i. 437	Robinson	Coupar	ii. 379
Rhones	Parish	i. 723, 725	Robinson	Earl of Fife	ii. 244
Riccart	Riccarts	i. 98	Robinson	Touray	i. 651
				Turpin	i. 605

Robison	Calze	ii. 370	Rule	Hume	i. 794
Robison	Stuart	ii. 302	Rule	Purdie	i. 21, ii. 179
Robson	Bennett	i. 435	Ruscoe's Creditors		i. 39
Robson	Burnet	i. 441	Rushworth	Hadfield	ii. 103, 105
Robson	Wilson	i. 646	Russell	Breadalbane	i. 64, ii. 216
Roche	Campbell	i. 436	Russell	Fairie	i. 420
Rocher	Busher	i. 576-7	Russell	Greig & Pedie	ii. 36
Rochead	Scott	ii. 379	Russell	Hankey	i. 395
Roderick	Hovil	i. 338	Russell	Langstaffe	i. 415, 444
Roebuck	Stirling	i. 107	Russell	Simes	ii. 80, 84
Roffey		ii. 291	Russell	M'Leod	ii. 392, 494
Rogers	M'Carthy	i. 649	Russell	M'Nab	ii. 555
Rogers	Forrester	i. 566	Russell	Ross	i. 47, 301
Rogers	James	ii. 311	Russell	Russell	i. 97, 320
Rogers	Stephens	i. 445	Rust	Cooper	ii. 228
Rogers	Stevens	i. 450-1	Rutherford		i. 780
Rolleston	Hibbert	i. 155, ii. 88	Rutherford	Feuars of Bowden	i. 345
Rolleston	Smith	i. 155	Rutherford	Marquis of Perth	ii. 440
Rorison	Shaw	ii. 32	Rutherford	Scott	i. 375
Roscoe	Hardie	i. 433, 445	Rutherford	Stewart	ii. 136
Rose	Rose	ii. 400, 417	Ryal	Rolle	i. 270
Rosebery, Earl of		ii. 227	Ryder	Ross	ii. 9
Rosebery, Earl of	Baird	i. 46			
Rosebery, Earl of	Geddes	ii. 302-4			
Rosebery, Earl of	M'Guire & Cowie	i. 34	Saddlers' Company	Badcock	i. 675
Rosehill's Creditors		ii. 137	Sadler	M'Lean	i. 349
Rosher	Kieran	i. 444	Salmon	Padon	ii. 555
Rose	Fraser	i. 57	Salmon	Tod's Trustees	ii. 328
Ross <i>ex parte</i>		ii. 151	Salt	Field	i. 253, 522
Ross' Creditors		i. 630, 731-2	Salter	Knox	i. 192
Ross	Balnagown	i. 760	Salton	Club	ii. 31
Ross	Bradshaw	i. 676	Salton	Park	i. 134
Ross	Chalmers	ii. 162	Samson	M'Cubbin	ii. 56, 61
Ross	Craigie	i. 375	Samuel	Howarth	i. 378
Ross	Glassford	i. 564-5	San Bernardo		i. 640
Ross, Cockburn	Govs. of Heriot's Hospital	i. 24	Sandeman	Kemp's Creditors	i. 267, 309, 314
Ross	Monteith	ii. 34	Sandeman	Stewart	i. 228
Ross	Rose	i. 516	Sanderson	Bowes	i. 436
Ross	Ross	i. 128, ii. 6	Sanderson	Busher	i. 602
Ross	Russell	i. 33, 47	Sanderson	Judge	i. 436
Ross	Salton	i. 348	Sanderson	Symmonds	i. 339
Ross	Shaw	i. 349	Sandilands		i. 421
Ross	Taylor & Company	i. 465	Sandilands	Marsh	ii. 506
Ross	French	i. 726	Sandilands	Niddry	i. 127
Roths	Lesly	i. 341	Sands	Scott	i. 562
Roths	Burrell	i. 674	Sarah, The		i. 639
Routledge	Monro	i. 136	Sarjeant		i. 290-1
Row	Alexander	i. 91	Sarsfield	Witherly	i. 413
Rowan	Colvil	i. 721	Saunders	Hewit	ii. 148
Rowan	Lang	i. 376	Saunders	Kibble	ii. 321
Rowand	Campbell	i. 723	Saunders	Renfrew Bank	ii. 290, 357
Rowand		i. 43	Saunderson	Busher	i. 589
Rowe's Creditors	Osburn	i. 464	Saville	Blanchard	ii. 103
Rowe	Williams	i. 436	Saville	Campion	ii. 94
Rowe	Young	i. 436	Saville	Robertson	ii. 511, 541
Rowe	Willis	i. 116	Sawers	Tradestown Victualling Society	ii. 531-2
Rowarth		ii. 511			
Rowlandson	Horne	i. 504	Sawtell	Loudon	i. 338, 651
Rowley		i. 66	Sayers		i. 280, 287
Roxburgh Feus		i. 61	Sayers	Bennet	ii. 525
Roxburgh	Archibald	i. 74, 75	Schilinger	Blackerby	i. 121
Roxburgh	Duchess	i. 56, 61	Schinniman	Creditors	ii. 480
Roxburgh	Hall	i. 716	Schondler	Wace	i. 676, ii. 178
Roxburgh	Kerr	i. 44	Scobie	Creditors	ii. 483
Roxburgh	Robertson	i. 70	Scotland	Bairdner	ii. 418
Roxburgh	Wauchope	i. 90, 91	Scotland	Wilson	i. 595
Royal Bank	Fairholm	ii. 509	Scotston	Drummond	i. 83, 85
Royal Bank	Kennedy	ii. 185	Scott's Creditors		i. 54
Royal Bank	Stein	ii. 287, 306, 377	Scott Moncrieff	Innes	ii. 257, 261
Royal Exchange Company	Idle	i. 583	Scott	Lord Belhaven	i. 705
Ruck	Hatfield	i. 222	Scott	Bruce	ii. 189
Rucker	Hiller	i. 452	Scott	Burnet	i. 706

Scott	Campbell	ii. 108	Shoemakers of Canongate	ii. 157, 387
Scott	Carmichael	ii. 455	Shoolbred	i. 667
Scott	Charteris	ii. 213	Shotts Iron Company	ii. 519
Scott	Coutts	ii. 135	Shorswood	i. 89
Scott	Drumlanrig	ii. 16	Short	i. 498
Scott	Fisher	ii. 72	Shortreed	ii. 443
Scott	Gray	i. 420	Siffken	i. 501
Scott	Hall & Bisset	ii. 556	Sill	ii. 376-8
Scott	Kerr	ii. 175	Sime	ii. 3, 547
Scott	Kilmarnock Bank	i. 425	Sime	i. 391
Scott	Langton's Creditors	ii. 138	Sime	i. 64
Scott	Lifford	i. 440-1	Simpson	i. 73
Scott	Lothian	ii. 107	Simpson	i. 709
Scott	Low	i. 298-9	Simson	i. 188
Scott	M'Donald	ii. 483	Sinclair	i. 783
Scott	M'Kenzie	i. 394	Sinclair	i. 54
Scott	Montgomery	i. 302	Sinclair	ii. 2
Scott	Napier	ii. 519	Sinclair	ii. 175
Scott	Paterson	ii. 320	Sinclair	i. 794
Scott	Pettit	i. 183, 216, 248	Sinclair	i. 38
Scott	Russell	ii. 390	Sinclair	i. 21, 44, 302, 709, 762
Scott	Sandilands	i. 397, ii. 454	Sinclair	i. 763, 773
Scott	Straitons	i. 63	Sinclair	i. 249, 250
Scott	Surman	i. 261	Skene	i. 63
Scott	Young	i. 44	Skene	ii. 175, 179
Scott	Sea Insurance Company	i. 648	Skene	i. 91
Scougall & Company	Douglas	i. 663	Skibo	ii. 263
Scougall	Gilchrist	i. 326	Skiffen	i. 245
Scoullar	Campbell & Company	ii. 61	Skinner	ii. 107, 109
Scrimshire	Alderstone	i. 284	Skinner	ii. 97
Scrymgeour	Lyon	ii. 226-7	Slade	ii. 351
Scudamore	Lechmere	ii. 451-5	Slipper	ii. 556
Sea Insurance Company		ii. 519	Sloan	ii. 483
Sea Insurance Company	Gavin	i. 671	Sloss	ii. 38
Sebags	Abithol	i. 424, 436	Slubey	i. 183, 211
Seaton	Carmichael	i. 465	Small	ii. 475
Selkrig	Bolton	ii. 572	Small	ii. 231
Selkrig	Davis	ii. 377-9	Smeiton	i. 370
Selkrig	Murray	ii. 180	Smellie & Company	ii. 447
Selkrig	Selkrig	i. 228	Smith	i. 377
Selkrig	Pitcairn	i. 648, ii. 115	Smith	i. 727-8, ii. 474-9
Seller	Work	i. 545	Smith	ii. 329
Selway	Holloway	i. 493	Smith	i. 453
Semple	Givan	i. 299	Smith	i. 667
Semple	Semple	i. 88, 700-1	Smith	ii. 371
Serjeant		ii. 113	Smith	ii. 380
Service	Hamilton	ii. 453-4	Smith	i. 336
Seton	Acheson's Creditors	i. 136	Smith	i. 428
Seton	Glass	i. 742	Smith	i. 544
Seton	Scott	ii. 257	Smith	ii. 359
Seton	Seton's Creditors	i. 55, 685	Smith	i. 253
Senat	Porter	i. 658	Smith	ii. 68, 215
Shadforth	Higgin	i. 613	Smith	ii. 528
Shank		ii. 93	Smith	ii. 355
Shanks	Ceres Kirk-session	i. 54	Smith	i. 544
Sharp	Creditors	ii. 477	Smith	i. 36, 53
Sharp	Turner	ii. 476	Smith	i. 704
Shaw		ii. 246	Smith	i. 23-4
Shaw	Croft	i. 444	Smith	i. 44
Shaw	Gray	i. 82, 88, 89	Smith	ii. 65, 158
Shaw	Vann	ii. 436	Smith	i. 377
Sheddan	Gibson	i. 679, ii. 148	Smith	ii. 427
Sheddan	Goodrich	i. 143	Smith	ii. 198
Sheddan & Company	Logan & Company	i. 669	Smith	i. 38
Shree	Clarkson	ii. 128	Smith	i. 690
Shepherd	De Bernales	i. 590, 614	Smith	i. 606
Shepherd	Campbell & Company	i. 422	Smith	ii. 4, 6
Shepley	Davis	i. 198	Smith	ii. 195, 267-8
Sheriff	Creditors	ii. 473	Smith	ii. 511
Sheriff	Steel	ii. 369	Smith	i. 618, ii. 359
Sheriff	Wilks	i. 426	Smith	i. 438
Shirra & Mains	Harvie & Company	i. 479	Smollet	i. 710

Smollet	Smollet's Creditors	i. 46, 49	Stevenson	Tweddale	i. 383
Smyth	Gemmil	ii. 35	Stewarts	i. 25, ii. 371, 241	
Snaith	Mingay	i. 338	Stewart	Vans Agnew	i. 46, 49
Snee	Anderson	ii. 389	Stewart	Brown	ii. 72
Snee	Prescott	i. 226	Stewart	Bell	ii. 30-2
Snell	Maryatt	i. 589	Stewart	Bisset	ii. 122
Smellome		i. 781	Stewart	Campbell	i. 374
Snodgrass		ii. 474	Stewart	Dunbar	ii. 140
Snodgrass	Buchanan	i. 36	Stewart	Dunlop	i. 537, 667
Snodgrass	Beat's Creditors	ii. 159	Stewart	Edinburgh Magistrates	ii. 441
Snodgrass	Bett	ii. 387	Stewart	Ewing	ii. 14, 19
Snook	Davidson	ii. 116	Stewart	Sir W. Forbes	ii. 203
Soddergreen	Flight	ii. 95	Stewart	Earl of Fife	i. 719
Solomons	Nissen	i. 235, 238	Stewart	Fraser	i. 399
Solomons	Ross	ii. 376	Stewart	Galloway	i. 318, ii. 138
Sommervail	Redfairn	ii. 264	Stewart	Gedd	i. 400
Sommerville	Father's Creditors	ii. 459	Stewart	Hall	i. 573, 575
Somervel		i. 348	Stewart	Hay	i. 135
Southesk	Broomhall	i. 401	Stewart	Home	i. 44, 726
Southesk	Huntly	i. 302	Stewart	Johnston	i. 608
Southey	Sherwood	i. 113	Stewart	Kennet	i. 444
Souper	Smith	ii. 71	Stewart	Lamont	ii. 160-1
Sparkler, The		i. 640	Stewart	Lindsay	i. 744
Spalding	Farquharson	i. 97	Stewart	M'Glashan	ii. 475
Spears	Hartley	ii. 103	Stewart	Maxwell	ii. 416-7
Spear	Travers	i. 206	Stewart	Miller	i. 121
Spedding	Hodgson	ii. 162	Stewart	Morrison	i. 665
Spence	Alcorn	ii. 79	Stewart	Russell	i. 415
Spence	Bruce	i. 745	Stewart	Sandeman	i. 20
Spence	Carfrae	i. 299	Stewart	Scott	i. 391
Spence	Dick	ii. 181, 183	Stewart	Stewart	i. 140, 794, ii. 122
Spence	Eadie	ii. 303	Stewart	Tucker	i. 123
Spence	Philip & Law	ii. 371	Stewart	Weatherby	i. 565
Speirs	Dunlop	ii. 201, 204	Stewart	Whiteford	i. 299, 315
Speirs	Royal Bank	i. 387	Stewart	Wilkins	i. 464
Spottiswood	Robertson	ii. 209	Stewart	Wright	i. 440-1
Sproat	Mathews	i. 423	Stirling Presbytery		ii. 468
Spratt	Brown	i. 604	Stirling	Cameron	ii. 261
Spruel	Spruel	i. 32	Stirling	Duncan & Company	i. 539
Stair, Earl of	Trustees	i. 36	Stirling	Duncanson	i. 440
Stalker	Ayton	ii. 71	Stirling	Stein	ii. 367
Stalker	Carmichael	i. 321	Stirling	Johnson	i. 26
Stamford Society		ii. 151	Stirling	Panter	i. 693
Stanfield	Brown	ii. 178	Stirling	Walker	i. 69
Stark	Highgate Company	ii. 546	Stirling	Goddard	i. 665
Steele	Creditors	ii. 480	Stoddard	Rutherford	i. 30-1
Steele	Steel	i. 45, 141	Stokes	La Riviere	i. 240, 244
Stein	Calder	i. 426	Stonard	Dunkin	i. 194
Stein	Hutcheson	i. 242, 256, 268	Stone	Lidderdale	i. 123
Stein	Newnham, Everet, & Co.	i. 730, ii. 218, 277	Stonehewer	Inglis	ii. 12
Stein	Royal Bank	ii. 195	Stormont	Earl of Annandale's Crs.	i. 43
Stein	Stenhouse	i. 604	Stormont	Farquharson	ii. 493
Stenhouse	Innes & Black	i. 730	Stormont	Robertson	ii. 6, 142
Stephen	Coster	ii. 97	Stoveld	Hughes	i. 190, 196, 229
Stephen	York Buildings Company	ii. 111	Stover	Gordon	i. 618
Stephenson	Stephenson	i. 418	Stowe	Thistle Bank	ii. 231
Stevens	Douglas	i. 668	Strachan's Heirs		i. 707
Stevens	Levy	ii. 480	Strachan	Creditors	ii. 241
Stevens	Lynch	i. 445	Strachan	Aberdeen	ii. 117
Stevens	Fleming	ii. 274	Strachan	Farquharson	i. 342
Stevenson		i. 43	Strachan	Graham	i. 327
Stevenson	Blakelock	ii. 107	Strachan	Knox	i. 183
Stevenson	Campbell	ii. 266	Strachan	Paton	i. 478
Stevenson	Chisholm	i. 399	Strachan	Strachan's Creditors	i. 684, 686, 752, 776
Stevenson	Craigmillar	i. 792	Stracey	Jameson	ii. 17
Stevenson	Dalrymple	i. 464	Stracey	Halse	ii. 52
Stevenson	Likly	i. 605, ii. 103	Straiton		i. 483
Stevenson	M'Culloch	ii. 32	Straiton	Bell	i. 758
Stevenson	M'Nair	ii. 517	Straiton	Craigmillar	i. 319
Stevenson	Manson	ii. 436	Strang	M'Intosh	ii. 75, 76, 198
Stevenson	Stewart	i. 438	Strang	M'Laren	ii. 169

Strange	Lee	i. 392, ii. 526	Taylor	Little	i. 427
Strathmore	Clydesdale	i. 144	Taylor	Mills	i. 334, ii. 421
Strathmore	Laing	ii. 461	Taylor	Plumer	i. 285, 295-6
Street	Home	i. 284	Taylor	Veitch	i. 95
Street	Earl of Northesk	i. 758	Telfer	Muir	i. 399
Street	Mason	ii. 173, 184, 487	Telford	James & Company	i. 428
Strelly	Winson	i. 552	Templer	Graham's Trustees	i. 36
Strichen's Creditors		ii. 137	Tenant		i. 106, 124
Stringer	Murray	i. 153	Tenant	Spruel	i. 135
Strothers	Reid	ii. 376	Tennison	Vaughan	i. 455
Struck	Tenant	i. 621	Thackray	Blacket	i. 452
Struthers	Lang	i. 489, 490, 723	Thackthwaite	Cook	i. 190, 271
Stuart	Crawley	i. 493	Thames, The		i. 626, 657
Stuart	Leslie	i. 143	Thereza, The		i. 615
Stuart	Murray	i. 759	Thistle Bank	Leny	ii. 173, 215
Sturdy	Henderson	i. 337	Thistlewood		i. 358
Sumner	Brady	ii. 370	Thoir's Creditors	Middleton	ii. 176
Sutherland	Creditors	ii. 479	Thom	Creditors	ii. 479, 481
Sutherland	Cowper	ii. 108	Thomas	Clarke	i. 612, 620
Sutherland	Morrison	i. 130	Thomson		i. 22, ii. 475, 483, 314
Sutherland	Watson	ii. 383	Thomson	Bank of Scotland	i. 380
Swan	Steel	ii. 504, 559	Thomson	Bisset	i. 599, 658
Swan	Steele & Wood	i. 426	Thomson	Broom	ii. 291
Swayne	Fife Bank	ii. 80	Thomson	Brown	i. 588
Swayne	Wallinger	ii. 291	Thomson	Clark	i. 590
Sweet	Pyms	ii. 88-90	Thomson	Collins	i. 566
Swinton		i. 125	Thomson	Douglas, Heron & Co.	i. 33, 300-1-2
Swinton	Sir W. Forbes	ii. 197, 211	Thomson	Dove	i. 123
Swinton	Gawler	ii. 7, 8	Thomson	Elderson	ii. 246
Swinton	Duke of Roxburghe	i. 60	Thomson	Giles	i. 291
Sword		ii. 314	Thomson	Inglis	i. 613
Sword	Blair	i. 414	Thomson	Lacey	ii. 99
Sword	Howden	i. 578	Thomson	Liddel	ii. 507
Sword	Milloy	i. 475	Thomson	Mackaile	i. 321
Sword	Sinclairs	i. 314	Thomson	M'Culloch	i. 55-8
Sydsenf	Tod	i. 76	Thomson	Millie	i. 566
Syeds	Hay	i. 605	Thomson	Reddie	i. 566
Syers	Bridge	i. 653	Thomson	Reid	i. 68
Syme	Anderson	ii. 72	Thomson	Simpson	i. 24, ii. 65
Syme	Balfour	ii. 501	Thomson	Smith	ii. 11
Syme	Dewar	i. 50	Thomson	Stanhope	i. 112
Syme	Ferguson	i. 440	Thomson	Stevenson	i. 129, 131
Syme	Ran. Dickson	i. 45	Thomson	Tabor	ii. 370
Syme	Steel	ii. 487	Thomson	Thomson	i. 55
Syme	Anderson	ii. 63	Thomson	Whitmore	i. 658
Symmons	Keating	i. 391	Thomson	M'Ruer	i. 444
Symmons	Want	i. 389	Thornnton	Kempster	i. 313
			Thyme	Protheroe	i. 339
Taafe	Moffat	ii. 35	Tidmarsh	Grover	i. 417
Tait		i. 720	Tillicoultry	Rollo	ii. 59
Tait	Levi	i. 598	Tindal	Brown	i. 443, 450
Tait	Kay	ii. 86	Tinkler	Walpole	i. 569, 153
Tait	Maitland	i. 61	Tinson	Francis	i. 427
Tait	M'Ghie	ii. 536	Tod <i>ex parte</i>		ii. 306
Tailzeour	Tailzeour	i. 85	Tod		i. 448, 580
Tamplin	Diggins	ii. 123, 204	Tod	Robinson	i. 509
Tapley	Martens	i. 614	Tod	Wemyss	i. 678
Tarleton	Staniforth	i. 673	Tod & Company	Rattray	i. 208, 210, 236
Tarpersie's Creditors	Kinfawns	ii. 226, 175	Tod	Skene	i. 70
Tasker	Mercer	i. 399, ii. 451-5	Tofts, Ranking of		ii. 137
Tassel	Lewis	i. 435	Tonson	Collins	i. 115
Tate	Meek	ii. 94-6	Tooke	Hollingworth	i. 227, 248, 279, 283-4
Tatnall	Reid	ii. 339			
Taylor		ii. 327	Topham	Braddick	i. 418
Taylor		ii. 160	Touteng	Hubbard	i. 620
Taylor	Bayne & Wilsons	i. 118	Toward	Sellers	i. 134
Taylor	Bethune	i. 70	Townly	Perry Ogilvie	ii. 463
Taylor	Lord Braco	i. 767, 771-2	Treasury, Lords of the	M'Nair	ii. 552
Taylor	Curtis	i. 635	Trecothick	Edwin	i. 436
Taylor	Sir W. Forbes	ii. 78	Trelawny, The		i. 639
Taylor	Hogg	i. 618	Trent & Mersey Navigation Wood		i. 606

Watt	Ritchie	i. 651	Wilkins	Casey	ii. 205
Watt	Morris	i. 598	Wilkins	Carmichael	ii. 35, 88, 93, 97
Watters		i. 425	Wilkinson	Coverdale	i. 544
Watts	Brooks	ii. 546	Wilkinson	Frasier	i. 566
Watt	Greenfield	i. 38	Wilkinson	Frazer	ii. 511
Wauchope		ii. 487	Wilkinson	King	i. 299
Wauchope	Gall & Ross	ii. 29	Wilkinson	Monies	i. 456, 692
Wauchope	Goldie	ii. 143	Wilks	Atkinson	i. 336
Wauchope	Hamilton	i. 141	Wiltshire	Sims	i. 516
Wauchope	Wauchope	i. 129	Will	Urquhart	ii. 445
Wagh	Carver	ii. 511, 534	Willet	Chalmers	ii. 506, 509
Waynell	Reid	i. 325	Williams		ii. 526
Weatherall	Gearing	i. 71	Williams	Cranston	i. 707
Webb	Thomson	i. 603	Williams	Inglis & Company	ii. 515, 556
Webber	Maddocks	i. 417	Williams	Keats	ii. 513, 531-2
Webster	Donaldson	i. 793	Williams	Smith	i. 435
Webster	Seekamp	i. 572	Williamson	Godwin	ii. 343
Wedderburn	Bell	i. 598, 664	Williamson	White	i. 498, 501
Wedderburn	M'Kenzie	ii. 4	Williamson	Lowe	ii. 311, 314
Wedderburn	Monorgan	i. 321	Willis	Poole	i. 676
Wedgewood	Cato	ii. 142	Willoch	Auchterlony	i. 91
Welby	Welby	i. 143	Willocks	Callender	i. 315
Weldon	Gould	ii. 157	Winch	Fenn	i. 329
Wells	Masterman	ii. 504	Wilson		i. 121, 444
Wellwood	Preston	i. 45	Wilson	Balfour	ii. 88
Wellwood	Wellwood	i. 45, 53, 70	Wilson	Bennet	i. 614, 618
Welsh	Begbie	ii. 444	Wilson	Campbell	ii. 262-3
Welsh	Hole	ii. 35	Wilson	Crichton	ii. 115, 129
Welsh	M'Veagh	i. 382	Wilson	Cunningham	ii. 64
Weir	Aberdeen	i. 651, 664	Wilson	Day	ii. 227
Westerdell	Dale	i. 155, 568	Wilson	Deans	i. 626
Westnisbet	Morrison	i. 124	Wilson	Dickson	i. 611
Wetherell		ii. 23	Wilson	Dunfermline	i. 362
Whally		ii. 394	Wilson	Magistrates of Edinburgh	ii. 484
Whaley	Norton	i. 318	Wilson	Elliott	i. 668
Wheatly		ii. 563	Wilson	Fairholm	ii. 376
Whitaker		i. 358	Wilson	Falconer	i. 122
Whitbread		ii. 23	Wilson	Fraser	i. 726
Whitcomb	Whiting	i. 420	Wilson	Freeman	i. 500, 504
White		ii. 248	Wilson	Glen	i. 54
White	Ballantyne	i. 457	Wilson	Greenwood	ii. 527
White	Baring	ii. 97	Wilson	Hart	i. 414
White	Brown	ii. 278	Wilson	Heather	ii. 11, 91, 103
White	Christie	ii. 149	Wilson	Henderson	i. 144-5
White	Geroch	i. 113, 118-9	Wilson	Honeyman	i. 362
White	Tullis	ii. 56-7, 61	Wilson	Keymer	ii. 90
White	Wilks	i. 190	Wilson	M'Lellan	ii. 79
White	Cooper	ii. 321	Wilson	M'Taggart	ii. 90
Whitehead		i. 358	Wilson	M'Vicar	ii. 389
Whitehead	Lidderdale	ii. 178	Wilson	Millar	i. 655
Whitehead	Straiton	i. 488	Wilson	Riddell	i. 490
Whitehead	Vaughan	ii. 88, 90, 112, 115	Wilson	Rutherford	i. 349, 351
Whitehouse	Frost	i. 196-7	Wilson	Smart	ii. 4, 70
Whitefield	Le Despenser	i. 497-8	Wilson	Spankie	ii. 30
Whitelaw	Stein	ii. 357	Wilson	Snody	i. 382
Whitson	Ramsay & Company	ii. 246	Wilson	Threshie	ii. 502
Whittingham	Wooler	i. 116	Wilson	Tod	ii. 534
Whyte	Butler	ii. 163	Wilson	Tours	i. 349
Whyte	Driver	i. 134	Wilson	Vysan	i. 337, 432
Whyte	Watson	ii. 389	Wilson	Wilkie	i. 427
Wigan	Fowler	ii. 546	Wilson	Wilson	ii. 6
Wiggins	Ingleton	i. 563	Wilson	Wordie	i. 660
Wight		ii. 72	Wiseman	Vandeput	i. 226
Wight, The		i. 640	Wish	Small	ii. 511
Wight	Inglis	ii. 1	Withers	Lyss	i. 194
Wightman	Graham	i. 315	Withers & Company	Cowan	ii. 540
Wildman		ii. 305	Wittersheim	Carlisle	i. 418
Wilkie		ii. 339	Wolfe	Sommers	ii. 95-9
Wilkie	Geddes	i. 598, 664	Wood	Brown	i. 445
Wilkie	Gray	ii. 541	Wood	Fairly	i. 687
Wilkie	M'Culloch & Company	i. 110	Wood	Gordon	i. 365
Wilkins	Aikin	i. 116-7	Wood	Kello	i. 348

Wood	Zimmers	i. 106-7-8	Yallop <i>ex parte</i>	Willan	i. 153, 158
Wood	Reid	ii. 177	Yate	Willan	i. 504
Wood	Weir	i. 574	Yates	Mignell	ii. 95
Wood	Worsley	i. 674	Yates	Railton	ii. 94-5
Woodhead	Nairn	i. 299	Yeats	Pim	i. 457, 465
Woodhouse	Shipley	i. 321	Yeoman	Elliot, etc.	i. 64-5
Woodrop-Sims		i. 626-7	York Buildings Company		i. 776
Woolsley	Crawford	i. 431	York Buildings Company	Fordyce	ii. 146
Wordie	Samson	i. 54	York Buildings Company	M'Kenzie	ii. 247, 250
Wordsworth	Pettigrew	i. 319	Young <i>ex parte</i>		ii. 544
Workman	Crawford	i. 300	Young	Axtill	ii. 511
Worseley	De Mattos	ii. 227, 231	Young	Buchanan	ii. 19
Wright	Anderson	ii. 69	Young	Brander	i. 568
Wright	Butchart	i. 299	Young	Campbell	ii. 2, 547
Wright	Campbell	i. 212	Young	Dun	i. 260
Wright	Cunningham	ii. 71	Young	Grieve	ii. 162
Wright	Findlater	ii. 214	Young	Imlach	i. 325
Wright	Gemmil	ii. 450-3	Young	Johnson	ii. 196
Wright	Graham	i. 399	Young	Kirk	ii. 187
Wright	Lawes	i. 196, 219	Young	Robertson	i. 681
Wright	M'Gregor	i. 699	Young	Scotts	i. 85
Wright	Murray	i. 782-3	Young	Stein's Creditors	i. 205
Wright	Russell	ii. 526	Young	Stein's Trustees	ii. 88
Wright	Shawcross	i. 441	Young & Company		i. 668
Wright	Snell	ii. 106	Yuille	Lawrie	ii. 26
Wright	Taylor	ii. 445			
Wright	Wright	i. 38, 418			
Wrightson	Pullen	ii. 534	Zagury	Furnell	i. 180, 461
Wyat	Hertford	i. 537	Zink	Walker	i. 283, 290-1
Wylie	Duncan	i. 301	Zwinger	Samuda	i. 208

INDEX OF CASES CITED BY THE EDITOR.

A B <i>versus</i>	Berry	ii. 303	Allan	Lake	i. 469
A B	C D	ii. 456	Allan	Morrison	ii. 302
A B	Sloan	i. 124	Allan	Sawers	ii. 107
Abbott	Mitchell	i. 271	Alman	Skene	i. 322
Aberdeen, King's Coll. of	Hay	i. 29, 730	Allan & Company	Liddell	ii. 364
Aberdeen & Smith	Paterson	ii. 102	Allan & Company	Thomson	ii. 289, 290
Aberdeen Railway Company	Blaikie	i. 38	Allan & Sons	Broadfoot	ii. 127
Aberdeen, Tailors of	Coutts	i. 26, 28	Allday	Great Western Railway Co.	i. 512
Aberdeen Town & County	Clark	ii. 503	Allen	Bennet	i. 405
Bank			Allen	Pink	i. 466
Abernethy	Hutchinson	i. 113	Allen	Smith	ii. 99
Acebal	Levy	i. 405, 461	Alsop	Coit	i. 531
Ackermann	Humphrey	i. 195, 222	Alston	Campbell & Company	i. 653
Acraman	Morrice	i. 191	Alves	Alves	i. 55
Adam	Anderson	ii. 70	Alves	Hodgson	i. 338
Adam	Grieve	i. 31	Amicable Assurance Co.	Bolland	i. 677
Adam	MacLachlan	ii. 330	Amos	Temperley	i. 544
Adam	Sutherland	ii. 31	Ancher	Bank of England	i. 529
Adam	Wyllie	ii. 352	Anderson		ii. 246, 295
Adams	Bankart	ii. 507	Anderson	Anderson	ii. 454
Addie	Western Bank	i. 262, 467	Anderson	Buchanan	i. 270, 272
Addison	Gandasequi	i. 286, 541	Anderson	Buck & Holmes	i. 424, 508
Addy	Grix	i. 404	Anderson	Cation	i. 130
Adlard	Booth	i. 487	Anderson	Fleming	i. 91
Advocate-General	Oswald	i. 111	Anderson	Ford	i. 187
Advocate-General	Inverness, Magistrates of	ii. 446	Anderson	Guild	ii. 311
Advocate-General	Swinton	i. 24	Anderson	Hayman	i. 409
Advocate, Lord	Sinclair's Trustees	i. 691	Anderson	Hillies	i. 538
Advocate, Lord	Stevenson	ii. 9	Anderson	MacCall & Company	i. 187, 198
African Steamship Co.	Swanzy	i. 609	Anderson	MacIntosh	ii. 301
Agricola, The		i. 610	Anderson	Monteith	ii. 291, 305, 310
Aiken	Greenhill	ii. 364	Anderson	Thomson	ii. 311
Ailsa, Marquis of	Jeffray	i. 31	Anderson	Walker	ii. 211
Ainslie	Henderson's Trustees	i. 38	Anderson	Law	i. 578
Aitchison & Company	Barnside's Trustees	ii. 508	Andrews	Lawrie	i. 731
Aitken	Callender	ii. 307	Andrews	Smith	i. 410
Aitken	Stock	ii. 285, 311	Angus	Angus	i. 85
Aitken's Trustees	Shanks	ii. 522, 524, 535	Anstey	Marden	i. 408
Alder	Boyle	i. 535	Anstruther	Anstruther	i. 98, ii. 244
Aldridge	Great Western Railway Co.	i. 505	Antermomy Coal Company	Wingate	ii. 503
Aldridge	Johnson	i. 191	Antrobus	Wickens	i. 535
Alewyn	Prior	i. 470	Appleby	Meyers	i. 473, 487
Alexander		ii. 334	Appleton	Burks	i. 541
Alexander	Badenach	i. 375	Arbuthnot	Paterson or Bisset's Crs.	i. 194
Alexander	Barclay	ii. 294	Arbuthnott	Arbuthnott's Trustees	i. 56
Alexander	Bennet	i. 142	Archer	Baynes	i. 405
Alexander	Boyd	i. 320	Argentina, The		i. 594
Alexander	Gardner	i. 472	Armadillo, The		i. 581
Alexander	Monteith	ii. 125	Armistead	Fuller	i. 500
Alexander	Scott	i. 362	Armstrong	Edinburgh and Leith	
Alexander	Thomson	i. 130		Shipping Company	i. 605
Alexander	Vane	i. 534	Armstrong	Wilson	i. 417
Alexander	Worman	i. 314	Arnott	Hardie	ii. 356
Alexander, The		i. 578	Arnott	Watt	i. 465
Allan	Allan & Company	ii. 428	Arrat	Wilson	i. 315
Allan	Gripper	i. 218	Aspinall	Pickford	ii. 97

Athya	Rowell & Company	i. 465, ii. 22	Bartlett	Pentland	i. 528
Atkinson	Bell	i. 189	Bartram	Farebrother	i. 254
Atkinson	Mackreth	ii. 506	Bartram	Payne	i. 276
Atkinson	Walls	ii. 359	Barwick	English Joint-stock Bank	i. 469, 514
Atkyns	Amber	ii. 125	Barry	Crosskey	i. 468
Attorney-General	Dakin	ii. 59, 462	Bateman	Green	i. 239
Attorney-General	Great Northern Railway Co.	i. 318	Bateman	Phillips	i. 405
Attorney-General	Riddell	i. 510	Bates & Company	Cameron & Company	i. 493, 494
Attwood	Small	i. 263, 467	Battley	Small	i. 144
Auld	Aikman	i. 351	Baugh	Murray	i. 46
Austen	Craven	i. 198, 200	Baxter	Pearson	i. 233
Austen	Manchester Railway Co.	i. 483	Baxton	Baughan	ii. 87
Australasia, Bank of	Flower	ii. 526, 529	Bayley	Gouldsmith	i. 289
Avery	Cheslin	i. 790	Bayley	Swan	ii. 464
Aytoun	Dundee Bank	ii. 524, 530	Beale	South Devon Railway Co.	i. 505
Bages	Lawrie	ii. 403	Beauchamp	Parry	i. 523
Baglehole	Walters	i. 468	Beaufort, Duke of	Bates	i. 791
Bagshaw	Seymour	i. 468	Beck	Rebow	i. 789, 790
Bailey	Culverwell	i. 405	Beckham	Drake	i. 527, 540
Baillie	Clark	i. 55	Beddle	Bond	i. 199
Baillie	Fraser	i. 68	Begbie	Boyd	i. 787, ii. 2, 31
Baillie	Grant	ii. 2	Behn	Burness	i. 455
Baillie	Lockhart	ii. 9	Behrens	Great Northern Rail. Co.	i. 505
Baillie	Nasmyth	i. 125	Belcher	Capper	ii. 95
Baillie	Young	ii. 360	Belfast, etc. Railway Co.	Keys	i. 496
Baines	Ewing	i. 508, 511, 524, 544, 648	Bell	Caddell	ii. 56
Baines	Swainson	i. 522	Bell	Carstairs	ii. 356
Baird	Mitchell	i. 26	Bell	Forrest	ii. 324
Baird's Trustees	Mitchell	i. 728, 730	Bell	Gordon	ii. 271
Baker	Langhorn	i. 395, 408, 541	Bell	Halliday	i. 58
Baker	Scottish Sea Insur. Co.	i. 664	Bell	Kymer	i. 544
Bald	Scott	ii. 262	Bell	Mudie	ii. 285
Balderston	Richardson	ii. 332	Bell	Sterry & Company	ii. 441
Balfour	Baxter	i. 214	Bellis	MacGregor	ii. 288
Balfour	Cook	ii. 320	Belschier	Moffat	i. 56
Balfour	Moncrieff	i. 734	Bennett	Fraser	ii. 137
Balfour	Pedie	ii. 286	Bennie	Mack	ii. 428
Balfour's Trustees	Edinburgh and Northern Railway Company	i. 507	Benson	Chapman	i. 581
Bampton	Paulin	i. 408	Benson	Duncan	i. 578
Banks	Scott	i. 434	Bentall	Burn	i. 194, 231
Bankier	Robertson	i. 414	Benton	Craig	i. 271
Banks	Gibson	ii. 535	Bermion	Woodbridge	i. 664
Bannerman	Creditors	ii. 480	Berndtson	Strang	i. 215, 232
Barber	Gingell	i. 512	Bernstein	Baxendale	i. 505
Barber	Meyerstein	i. 213, 511, 524	Berry	Wallace	ii. 322
Barbour	Williamson	ii. 197	Betts	Gibbins	i. 184
Barbour	Alexander	i. 776	Betts	Menzies	i. 107
Barclay	Barclay	i. 694	Beveridge	Beveridge	ii. 509, 524
Barclay	Corrie	i. 306, 511, 524, 527	Beveridge	Wilson	ii. 271, 345
Baring	Dix	ii. 527	Beverley	Lincoln Gas-Light and Coke Company	i. 289
Baring	Greenwood	i. 528	Bickerdike	Bollman	i. 439
Barker	James	i. 477, 531	Bickerton	Burrell	i. 543
Barklie	Scott	ii. 500	Biddle	Bond	i. 533
Barnes	Freeland	i. 195	Bill	Bament	i. 194, 403
Barnet	Duncan	ii. 79	Billen	Hyde	i. 513
Barns	Allan & Company	ii. 28	Bingham	Ringham	i. 314
Barr	Edinburgh and Glasgow Railway Company	i. 348	Birchfield	Moore	i. 417
Barr	Wotherspoon	ii. 38	Bird	Boulter	i. 404
Barrell	Trussell	i. 408	Bird	Brown	i. 245, 512
Barrett	National Bank	ii. 22	Birkley	Gammon	i. 410
Barron	Coles	i. 221	Birkmyr	Presgrave	i. 631
Barrow	Graham	ii. 338	Bishop	Darnell	i. 403, 409
Barstow	Hutchison	ii. 326	Bishop	Elliott	i. 789
Barstow	Mowbray	ii. 56, 339	Bishop	Jersey, Countess of	ii. 507
Barstow	Stewart	i. 55	Bishop	Mersey Navigation Company	i. 494, 605
Bartlett	Holmes	i. 206	Bishop	Shillito	i. 200
			Black	Nicholson	ii. 302
			Black	Brown	i. 83
				Cassels	i. 241

Black	Dixon	ii. 289	Brack	Hogg	i. 92
Black	Incorporation of Bakers, and Rowan	i. 197, 199, 200, 212, 218, 230	Brandao	Barnett	ii. 91, 114
Black	Kennedy	ii. 319	Brandon	Stephens	ii. 296
Black	Lorimer	i. 31	Brandt	Bowlby	i. 221
Black	Melrose & Company	ii. 356, 358	Breadalbane's Trs., M. of	Buckingham, Duke of	i. 143
Black	Scott	ii. 70	Breadalbane's Trs., M. of	Chandos, Marquis of	i. 98
Black	Watson	i. 144	Brechin	Taylor	ii. 447
Black's Trustees	Miller	i. 37	Bremner	Mabon	ii. 428
Blackadder	Milne	i. 348	Brenan	Currint	ii. 92
Blackburn	Scholes	i. 528	Brett	Beckwith	ii. 512
Blackburn	Smith	i. 466	Brettel	Williams	ii. 506
Blackwood	Forbes	i. 407	Bridges	Ewing	ii. 79
Blackwood	Milne	i. 410	Bridges	Fordyce	ii. 9
Blades	Free	i. 543	Briggs		i. 467
Blaikie	Farquharson	ii. 8, 9	Brind	Dale	i. 497
Blaikie Brothers	Aberdeen Railway Co.	ii. 502	Bristol and Exeter Ry. Co.	Collins	i. 494
Blair		ii. 285	Bristow	Whitmore	i. 469, ii. 98
Blair	Allen	i. 323	British Guarantee Co.	Western Bank	i. 381
Blair	Bromley	i. 468, ii. 506	British Linen Company	Alexander	ii. 539
Blair	Murray	i. 696	British Linen Company	Monteith	i. 387
Blair	Paterson	i. 38	British Linen Company	Thomson	i. 377, 386
Blair	Russell	ii. 503	Broad	Thomas	i. 535
Blake	Bates	i. 58	Broadwater	Blot	i. 488
Blake	Great Western Rail. Co.	i. 497	Broadwood	Granara	ii. 99
Blakemore	Bristol and Exeter Rail- way Company	i. 468	Brock		i. 83
Blantyre, Lord	Dunn	i. 23, 24	Brock	Cabbell	ii. 339
Blincow's Trustee	Allan & Co.	ii. 205, 290, 400	Brock	Hamilton	i. 62
Blythe	Waterworks	i. 483	Brook	Kemp	ii. 436
Boak	Megget	i. 187, 188, 192	Brock	Newlands	i. 449
Boardman	Sill	ii. 91	Brocklebank	Sugrue	i. 510
Bock	Gorissen	ii. 103	Brodie		ii. 247
Boddington	Castelli	ii. 131	Brodie	Brodie	i. 93, 141
Bodenham	Purchas	ii. 529	Brodie	St. Paul	i. 405
Boettcher	Carron Company	i. 627	Brodie	Wilson	ii. 118
Bohtlingk	Inglis	i. 232, 243	Brooks	Elkins	i. 414
Bolton	Lancashire and York- shire Railway Com- pany	i. 219, 231, 255	Broomfield	Paterson	i. 47
Bon-Accord Marine Ins. Co.	Souter's Trustees	i. 38	Broun's Trustees	Brown	i. 693
Bonaparte, The		i. 579	Brown	Amyott	ii. 9
Bonar	Liddell	ii. 364	Brown	Annandale	i. 107
Bond	Buchanan	ii. 519	Brown	Bedwell & Yates	ii. 218
Bones	Morrison	ii. 79	Brown	Blaikie	ii. 419, 436
Bonnar	Liddle	ii. 292	Brown	Burt	i. 38, ii. 317, 318
Bontine	Graham	i. 51, 762	Brown	Fleming	i. 127, 272, ii. 334
Bonzi	Stewart	i. 521	Brown	Hare	i. 221
Boone	Eyre	i. 455	Brown	Henderson	i. 709
Borrows & Company	Colquhoun	i. 73	Brown	Johnson	i. 623
Borthwick	Advocate, Lord	i. 353	Brown	MacCallum	ii. 291, 292, 293
Borthwick	Bremner	ii. 115	Brown	MacGregor	i. 46
Borthwick	Scottish Widows' Fund	i. 677	Brown	Macintyre	ii. 400
Bostock	Jardine	i. 544	Brown	Mackie	i. 489
Boswell	Ayrshire Banking Co.	ii. 415	Brown	Michie	i. 337
Boswell	Miller	ii. 123	Brown	Nairne	i. 535
Bottomley	Fisher	i. 527, 540	Brown	Rollo	i. 485
Bottomley	Nuttall	i. 537	Brown	Savage	i. 539
Boulton	Jones	i. 314, 543	Brown	Somerville	ii. 100, 102
Bousfield	Cresswell	i. 528	Brown	Watson	i. 256
Bousfield	Wilson	i. 533	Brown	Whyte	ii. 351
Bow	Spankie	ii. 307	Brown	Wilkinson	i. 609
Bowen	Morris	i. 541	Browning	Browning's Trustees	i. 686
Bowes	Fergus	i. 53	Browning	Stallard	i. 407
Bowie	Watson, Macknight, & Company	i. 388, 392, ii. 526	Bruce		i. 743
Bowman	Malcolm	ii. 106	Bruce	Bruce	i. 43
Boyd	Peter & Hamilton	i. 362	Bruce	Grant	i. 121, 124
Boyd	Robertson	i. 415	Bruce	Hamilton	i. 129, 130, ii. 205
Boydell	Drummond	i. 405	Bruce	Hunter	i. 534
Boys	Amherst	i. 405	Bruce	Jones	i. 662
			Brunt	Midland Railway Company	i. 505
			Brunton	Dullens	i. 407
			Bryan	Lewis	i. 531
			Bryant	Nix	i. 222, 233
			Bryant	Flight	i. 535
			Bryden	Craig	i. 62

Bryson	Coles	i. 529	Campbell	Munro	i. 142
Bryson	Wylie	i. 507	Campbell	Myles	ii. 292, 295
Buchanan		ii. 287, 563	Campbell	Orphan Hospital	i. 24
Buchanan	Angus	ii. 5	Campbell	Rickards	i. 666
Buchanan	Barr	i. 642	Campbell	Stewart	i. 271
Buchanan	Dickie	i. 407, 514	Campbell	Webster	i. 446
Buchanan	Douglas	i. 401	Campbell	Welsh	ii. 132
Buchanan	Dunlop	ii. 360	Campbell & Company	Shepperd	ii. 330
Buck	Buck	i. 533	Campbell, Robertson, & Co.	Shepherd	i. 261
Buckland	Butterfield	i. 789	Campbell's Trustees	Paul	ii. 56
Buckley	Jackson	i. 427	Campbell's Trustees	Thomson	ii. 503
Budd	Fairmaner	i. 470	Campion	Benyon	i. 109
Bulmer		i. 533	Campion	Colvin	ii. 95
Bullen	Sharp	ii. 500	Capp	Topham	i. 535
Bulley	Henderson	ii. 317	Cargill	Dundee & Perth Ry. Co.	i. 492
Bunney	Poyntz	i. 184	Carlyle	Lowther	ii. 147
Burden	Barkus	ii. 523	Carmichael	Carmichael	i. 143
Burges	Wickham	i. 665	Carmichael	Carmichael's Trustees	i. 139
Burleigh	Fearn	ii. 143	Carne	Manuel	ii. 457
Burnet	Calder	ii. 328	Carphin	Clapperton	i. 684, ii. 176
Burnett	Bouch	i. 535	Carr	Hinchliff	i. 527
Burnett	Burnett	i. 389, 405	Carr	Jackson	i. 543
Burns	Lawrie	i. 103	Carruthers	Payne	i. 275, 279, 507
Burns	Lawrie's Trustees	i. 304, ii. 113	Carruthers	Sydebotham	i. 601
Burns	Pennel	i. 468	Carruthers	Thomson	i. 346
Burnyeat	Hutchinson	i. 320	Carswell	Scott	i. 537, 573
Burrell	Jones	i. 541	Carter		ii. 334
Burroughs	Lock	i. 467	Carter	Boehm	i. 665
Burrows	MacFarquhar's Trustees	i. 54	Carter	MacIntosh	i. 421, 423, ii. 18
Burt	Bell	ii. 344	Carter	Whalley	ii. 533
Burton	Hughes	i. 273	Cashborne	Dutton	i. 414
Bushell	Beavan	i. 411	Cashill	Wright	i. 500
Busk	Davies	i. 200	Cassels	Keddie	ii. 476, 480
Busk	Spence	i. 221	Cassillis, Earl of	Ramsay	ii. 32
Butler	Wildman	i. 632	Castellain	Thompson	ii. 87
			Castling	Aubert	i. 407, 408
Caffrey	Darby	i. 474, 477, 531, 533	Cathcart	Cathcart	ii. 5
Cahill	North-Western Railway Co.	i. 496	Cathcart	Gammell	i. 47
Calder	Steele	i. 776	Cathcart	MacLaine	i. 489, 743
Caldwell	Ball	i. 213	Catlin	Bell	i. 531
Caledonian Bank	Kennedy's Trustees	i. 379, 391	Catteral	Hindle	i. 528
Caledonian Dairy Co.	Campbell	ii. 507, 535	Catterns	Tennent	ii. 28
Caledonian Railway Co.	Hunter	i. 494	Catton	Simpson	i. 417
Caledonian, etc., Ry. Co.	Lockhart	i. 694	Caves	Spence	i. 409
Callander	Laidlaw	ii. 108	Chalmers	Chalmers	i. 33
Cameron	Anderson	i. 38	Chalmers	Smith	ii. 456
Cameron	Burns	ii. 108	Chambers	Davidson	ii. 92
Cameron	Morrison	i. 416	Champion	Plumer	i. 405
Cameron	Young	i. 54	Change, The		i. 580
Campanari	Woodburn	i. 526	Chanter	Borthwick	i. 515
Campbell		ii. 287	Chanter	Hopkins	i. 467
Campbell	Breadalbane, Marquis of	i. 46	Chaplin	Allan	i. 402
Campbell	Brown	ii. 350, 368, 372	Chapman	De Tastet	i. 535
Campbell	Caledonian Railway Co.	i. 496	Chapman	Speller	i. 299
Campbell	Campbell	i. 38, 760, ii. 8, 9, 18	Chapman	Walton	i. 666
Campbell	Campbell & Clason	i. 490	Charlotte, The		i. 642
Campbell	Cullen	ii. 137	Chase	Westmore	ii. 92
Campbell	Dunn	i. 26	Chedworth, Lord	Edwards	i. 295, 533
Campbell	Farquhar	i. 362	Cheesman	Exall	i. 533
Campbell	Fleming	i. 466	Cherry	Colonial Bank	i. 544
Campbell	Gordon	ii. 140, 141, 408	Cheyne	Cheyne	ii. 38
Campbell	Grierson	i. 347	Cheyne	Guthrie	ii. 303
Campbell	Hamilton	i. 24	Cheyne	Little	ii. 519
Campbell	Hicks	i. 537	Cheyne	MacDonald	i. 399
Campbell	Keith	i. 696	Cheyne	MacGungle	ii. 434
Campbell	Kennedy, Lord	i. 485	Cheyne	Walker	ii. 519
Campbell	Macalister	ii. 178	Chieftain, The		ii. 99
Campbell & Company	MacLintock	ii. 531	Chiene	Western Bank	i. 421
Campbell	MacNeille	ii. 371	Child	Morley	i. 534
Campbell	Mersey Dock Co.	i. 191, 198	Chisholm	Denholme	ii. 476
Campbell	Mullen	ii. 449	Christie	Henderson	i. 419
			Christie	Lewis	i. 587

Christie	Royal Bank of Scotland	i. 772, ii. 529, 530	Corbet	Porterfield	i. 709
Christie	Ruxton	ii. 23, 135	Cormack	Anderson	ii. 207, 211, 338, 340
Church of Eng. Ass. Co.	Wink	i. 346, 377	Cornfoot	Campbell	ii. 306
City of Glasgow Bank	Langton	ii. 343	Cornish	Fowke	i. 469
Clapham	Cuthbertson	i. 665	Cornwall	Abington	i. 314
Clark	Glasgow Insurance Co.	ii. 325, 328	Corsan	Wilson	i. 514, 532
Clark	Leach	i. 26, 725	Cory	Crawford	ii. 302, 303
Clark	Mitchell	ii. 522	Cory	Scott	i. 439
Clark	Shee	ii. 302	Cothay	Thames Ironworks Com- pany	i. 479
Clark	Wink	i. 529	Cousins	Fennell	i. 527
Clarke	Dickson	ii. 303	Courtenay	Hutcheson	i. 535
Clarke	Dixon	i. 466, 468	Couturier	Waggstaff	ii. 500
Clarke	Fell	i. 469	Coventry	Hastie	i. 406, 408
Clarke	Spence	ii. 92	Coventry	Barclay	ii. 503
Clason	Jones	i. 189	Coventry	Coventry	ii. 417
Clegg	Edmondson	ii. 109	Coventry	Gladstone	i. 215
Cleghorn	Wright	ii. 522	Coventry	Hutchison	i. 368
Clerk	Brook	i. 362	Cowan	Begg	ii. 457
Clifford	Brook	i. 405	Cowan	Cowan	i. 85
Clift	Schwabe	i. 402	Cowan	Crawford	i. 31
Clinan	Cooke	i. 677	Cowan	Kerr	i. 56
Cloverhill	Cooke	i. 405	Cowan	Perry	ii. 31
Clyde Shipping Company	Glasgow, etc., Steam Packet Company	i. 362	Cowan	Spence	i. 259
Clyne	Clyne's Trustees	i. 627	Cowasjee	MacMicken	ii. 150
Clyne's Trustees	Clyne	i. 90	Cox	Thomson	i. 222, 233, 243
Coates	Railton	i. 38	Coxe	Middleton	i. 468
Cochrane	Bogle	i. 232	Craig	Harden	i. 214, 221
Cochrane	Gilkison	ii. 10	Craig	Galloway	i. 676
Cochrane	Green	i. 579	Craigie	MacBeath	i. 699
Coey	Smith	ii. 125	Crane	Paton	i. 346
Cogan	Lyon	i. 658	Cranstoun	Gordon	i. 133
Coggs	Bernard	i. 82	Craw	Price	i. 106
Cohen	Paget	i. 483, 488, 530, ii. 21	Crawford	Bontine	ii. 200
Colgrave	Dias Santos	i. 535	Crawford	Commercial Bank	i. 515
Coleman	Riches	i. 789, 790	Crawford	Bennet	i. 130, 131
Coles	Bell	i. 469, 511	Crawford	Dawson	ii. 448, 449
Coles	Trecothick	i. 513	Crawford	Dundonald	i. 31
Collen	Wright	i. 404, 405	Crawford	Mackerrrow	ii. 311
Collins	Jackson	i. 544	Crawshaw	Eades	i. 184, 219
Collins	Marquis' Creditors	ii. 503	Craythorne	Swinburne	i. 367
Collins	Martin	i. 184	Crichton	Bell	ii. 344
Collins	North British Bank	i. 523	Crichton	Crichton's Trustees	i. 141
Collins	Prosser	ii. 507	Crichton	Russell	ii. 137
Collins	Young	i. 367	Croickford	Winter	i. 469
Colquhoun	Walker	ii. 524, 527, 528	Croil		ii. 283
Colquhoun	Wilson's Trustees	i. 29	Crombie	Napier	ii. 268
Columbian Insurance Co.	Ashby	i. 346	Croockewit	Fletcher	i. 417
Colville	Ledingham	i. 635	Crook	Jadis	i. 428
Colvin	Dixon	ii. 302	Crookshank	Rose	i. 320
Commercial Bank	Kennard	i. 332, 514	Cross	Gardiner	i. 466
Connal & Company	Loder	i. 343	Crossly	Beverley	i. 109
Const	Harris	i. 216	Crowder	Watson	ii. 455
Cook	Greenock Marine Ins. Co.	ii. 522	Cruikshank	Williams	ii. 345
Cook	Jeffrey	i. 664	Culcreuch Cotton Com- pany	Mathie	ii. 508
Cooke	Falconer	ii. 285	Cullen	Buchanan	ii. 137
Cooke	Falconer's Representatives	i. 490	Cullen	Dykes	ii. 122, 436
Cooke	Hemming	ii. 143	Cullen	MacFarlane	ii. 308, 309, 311, 562
Cooke	Jeffrey	i. 278	Cullen	Smith	ii. 436
Cooke	Wilson	ii. 338	Cullen	Thomson	ii. 436
Coope	Twynam	i. 540, 541	Cullens	Tuffnell	i. 789
Cooper	Bill	i. 368	Cumming	Forrester	i. 395, 408
Cooper	Blakemore & Company	i. 195, 231	Cumming	Hendrie	i. 461
Cooper	Smith	ii. 357	Cumming	Hogg	i. 31
Cooper & Aves	Clydesdale Shipping Co.	i. 405	Cunninghame's Trustees	Munro	i. 140
Coore	Callaway	i. 469	Curtis	Hutton	ii. 274, 415
Copenhagen, The	Craig	i. 513	Cusack	Sandison	i. 700
Coppin	Walker	i. 635	Cuthbert	Robinson	i. 218
Coppin	Bower	i. 529	Cutter	Ross	ii. 107
Coppock		i. 529	Cynthia, The	Powell	i. 455, 535
		i. 323			i. 579

Daer	Hamilton	ii. 8	Dickson	Dickson	i. 55
Dalby	India Life Insurance Co.	i. 103, 675, 676, ii. 131	Dickson	Dumfries, Magistrates of	ii. 272
		i. 477, 531	Dickson	Henderson	i. 478
Dale	Hill	i. 532	Dickson	Moncrieff	ii. 417
Dale	Sollett	i. 532	Dickson	Porteous	i. 69, ii. 122
Dalgleish	Buchanan	i. 672	Dickson	Zizania	i. 470
Dalhousie	Dunlop & Company	ii. 28	Dickson's Tutors	Scott	i. 38
Dalmahoy	Brechin, Magistrates of	i. 694	Diggins	Gordon	i. 684
Dalton	Irwin	i. 535	Dimmack	Dixon	i. 336
Dalzell	Marr	i. 529	Dimmack	Hallet	i. 467
Dalziel	Dalziel	i. 31	Dingwall	Duff	i. 61
Dansay	Richardson	i. 498	Diplock	Blackburn	i. 533
D'Arcy	Lyle	i. 534	Dirks	Richards	ii. 91
Darling	Adamson	i. 693	Dixon & Company		ii. 376
Darlington	Gray	i. 362, 363	Dixon	Baldwin	i. 231
Darnley	Kirkwood	i. 419	Dixon	Bovill	i. 219
Darroch	Ranken	i. 725	Dixon	Bromfield	i. 404
Davey	Mason	i. 505	Dixon	Fisher	i. 787
David	Ellice	ii. 529	Dixon	Hammond	i. 533
Davidson	Cooper	i. 417	Dixon	Hatfield	i. 410
Davidson	Jenkins	i. 642	Dixon	Knox	i. 415
Davidson	Lockwood & Company	ii. 364	Dixon	Sadler	i. 664
Davidson	Mackenzie	ii. 143	Dixon	Stansfield	ii. 112
Davidson	Robertson	i. 508	Dixon	Yates	i. 184, 194, 219, 243
Davidson	Stanley	i. 510, 512	Dixon, Langdale, & Co.	Cowan	ii. 205
Davidson	Swanson	i. 337	Dixon's Trustees	Campbell	ii. 368
Davidson's Trustees	Carr	ii. 320	Dobbie	Johnston	i. 467
Davies	Duncan	ii. 451	Dobbie	Nisbet	ii. 74
Davies	Wilkinson	ii. 130	Dobbin	Foster	ii. 528
Davis		ii. 500	Dobell	Hutchinson	i. 405
Davis	Garrett	i. 474, 477, 531	Dobell	Stevens	i. 468
Davis	Hepburn	ii. 162	Dobie	Lothian, Marquis of	i. 74
Davis	Jones	i. 789, 790, 791	Dobie	Macfarlane	ii. 184
Davis	Miller	i. 113	Dobie	Scales	ii. 345
Davis	Shields	i. 404	Dods	Fortune	i. 69
Davy	Chamberlain	i. 484	Dods	Ireland	ii. 304, 312
Dawes	Peck	i. 218	Dodson	Wentworth	i. 231
Dawson	Chamney	i. 500	Doe	Laming	i. 498
Dawson	Lauder	ii. 200	Doe	Oliver	i. 314, 511
Dawson	Morgan	i. 431	Doe d. Lyster	Goldwin	i. 513
Dawson	Remnant	i. 320	Doe d. Mann	Walters	i. 513
Dean	Allalley	i. 790	Doggett	Emerson	i. 514
Dean	Hogg	i. 587	Domett	Beckford	i. 615
Dean	Keate	i. 484	Donald	Colquhoun	i. 709
Deans	Steele	i. 348	Donaldson	Donaldson's Trustees	i. 38
De Beil	Thomson	i. 405	Donaldson	Manchester Insurance Co.	i. 672
De Comas	Prost	i. 526	Donaldson	Ord	ii. 377
Deering	Winchelsea	i. 367	Dormay	Borrodaile	i. 677
De Hahn	Hartley	i. 663	Dorsettei, The		i. 642
Delaney	Stoddart	i. 531	Douglas	Craig	ii. 196
Delauney	Barker	i. 289	Douglas	Douglas	ii. 136
Delauney	Strickland	ii. 544	Douglas' Trustees	Douglas	i. 145
Dempster	Potts	i. 130	Douglas	Douglas' Trustees	i. 140
Denholm	London and Edinburgh		Douglas	Kemble	i. 544
	Shipping Company	i. 493, 691	Douglas, Heron, & Co.	Cant	i. 56
Dennistoun	Mudie	i. 131	Douglas, Heron, & Co.	Gordon	ii. 528
Denovan	Cairns	ii. 449	Douglas & Company	Wallace	i. 399
Denton	Great Northern Rail. Co.	i. 468	Dove	Henderson	ii. 137
Deposit, etc., Assurance Co.	Ayscough	i. 466	Dow	Beith	i. 144
De Ribeyre	Barclay	ii. 506	Dow	Hay	ii. 33
Deslandes	Gregory	i. 541	Downie	Barr	i. 391
De Tastet	Carroll	i. 255	Downman	Williams	i. 541
De Tastet	Crousillat	i. 531	Dracachi	The Anglo - Egyptian	
De Tastet & Company	MacQueen	ii. 364		Navigation Co.	i. 214, 219, 524
Dewar	Burden	i. 704	Drain & Company	Scott	i. 573
Dewar	Nairne	i. 509	Dresser	Bosanquet	ii. 104
Dick & Sons	Murison	ii. 358, 395, 436	Dresser	Norwood	i. 527, 538, 539, ii. 125
Dickenson	Jardine	i. 638, ii. 99	Drew	Drew's Trustees	ii. 122
Dickie	Dick	ii. 455	Drinkwater	Goodwin	i. 528
Dickie	Gatzmer	i. 315	Drover	Maxwell	i. 54
Dickson	Barbour	ii. 79	Drummond		ii. 283
Dickson	Cunninghame	i. 47	Drummond	Crichton	i. 420

Drummond	Holiday	ii. 519	Elton, Hammond, & Co.	Nelson	i. 392
Drummond	Montgomerie, Lady	i. 691	Elwes	Maw	i. 789, 790, 791
Drummond	Thomson's Trustees	ii. 520	Emancipation, The		i. 578
Drummond	Watson	ii. 195	Emerson	Blonden	i. 404
Dryden & Company	Hamelin & Company	i. 243	Emly	Lye	i. 527, 540, ii. 516
Drysdale	Johnston	i. 375	Emmerson	Heelis	i. 405
Drysdale	Kennedy	ii. 149	Emond	Haddington, Mags. of	ii. 441, 443
Duckworth	Alison	ii. 122	Empson	Soden	i. 789, 791
Dudgeon	Dudgeon's Trustees	i. 705	Emslie	Groat	ii. 6
Dudley	Warde	i. 790	English and Irish Church, etc., Society		ii. 500
Duff	Brown	i. 187	Erskine	Cormack	i. 361
Duff's Trustees	Scripture Readers	i. 693	Erskine	Erskine's Trustees	i. 91
Duke of Manchester, The		i. 642	Erskine	Wright	i. 730
Dumas		i. 507	Essell	Hayward	ii. 527
Duncan	Clyde Trustees	i. 516	Ettles	Robertson	i. 337, ii. 385, 386
Duncan	Rae	ii. 5	Evans	Bicknil	i. 402
Duncan	Topham	i. 458	Evans	Edmonds	i. 467
Duncan	Union Canal Company	ii. 502	Evans	Martlet	i. 213
Duncan	Wylie	ii. 338	Evans	Nichol	i. 222
Dundas	Dundas	i. 37, 142	Evans	Trueman	i. 239, 521, 523
Dundee, Magistrates of	Kidd	i. 22	Evans	Collins	i. 538
Dundee, Magistrates of	Morris	i. 37	Everett	Watt	i. 55
Dundee, Magistrates of	Taylor	ii. 70	Ewart	Latta	i. 364, 366, ii. 364, 421
Dundee, Magistrates of	Taylor & Grant	ii. 71	Ewart	Murray	i. 347
Dunfermline, Earl of	Callender, Earl	i. 54	Ewing	M'Clelland	ii. 137, 407
Dunlop	Greenlees' Trustees	i. 139	Ewing	Malloch	i. 407
Dunlop	Higgins	i. 458	Ewing	Wright	i. 405
Dunlop	Jeffrey	ii. 301	Ewing & Company	M'Lelland	ii. 71
Dunlop	Johnston	i. 687	Exeter, The		i. 583
Dunlop	Lambert	i. 218, 605	Eyre	Dunsford	i. 402
Dunlop	Speirs	ii. 306			
Dunmore, Earl of	Dickson	ii. 242			
Dutton	Solomonson	i. 218			
Dyce	Paterson	ii. 285, 291, 307, 311, 361			
Dyer	Hargrave	i. 468	Fairholme	Fairholme's Trustees	i. 89
			Fairlee	Fenton	i. 541
Eadie	Mackinlay	i. 193, 196	Fairlie	Neilson	ii. 34
East Anglian Railway Co.	Lythgoe	ii. 131	Fairlie's, Sir W. C., Trs.	Taylor	ii. 324
East India Company	Henchman	i. 533	Falconer	N. of Scot. Banking Co.	i. 377
Eastwood	Kenyon	i. 410	Falconer	Weston	ii. 379
Edinburgh Gas Light Co.	Taylor	i. 23	Falke	Fletcher	i. 221
Edinburgh Royal Infirmary	Lord Advocate	i. 32	Falkner	Case	ii. 21
Edin. and Glasgow Bank	Samson	i. 417	Farebrother	Simmons	i. 404
Edin. & Leith Brewing Co.	Reid	i. 464	Farina	Home	i. 194, 195, 206
Edinburgh, Magistrates of	Horsburgh	i. 691	Farmer	Davies	i. 542
Edmond	Aberdeen, Magistrates of	ii. 338	Farmer	Rose	ii. 249
Edmond	Grant	ii. 172, 175	Farmer	Russell	i. 533
Edmond	Mowat	i. 270	Farquhar		i. 362
Edmonston	Lang	i. 403	Farquhar	Hamilton	i. 704
Edmunds	Bushell	i. 510	Farquharson	Farquharson's Trustee	i. 38
Edward	Grant	ii. 229	Farquharson	Thomson	ii. 364, 424
Edward	Shiell	i. 55	Farrant		i. 299
Edward	Brewer	i. 242, 243	Farrant	Barnes	i. 468
Edwards	Dick	i. 319	Farrar	Definne	ii. 533
Edwards	Kelly	i. 407, 408	Farrar	Hutchinson	ii. 506
Edwards	Martin	i. 539	Faulds	North British Bank	ii. 115
Edwin, The		ii. 99	Favene	Roxburgh	ii. 502
Eglinton, Earl of	Montgomerie	i. 47	Fawkes	Bennet	i. 528
Eicke	Meyer	i. 535	Fellowes	Lamb	i. 541
Eiston	Eiston	i. 61	Felton	Gwyder, Lord	i. 314
Elder	Allan	i. 187	Fenwick	Greaves	i. 109
Elder	Elder & Thomson	ii. 291, 292, 294	Feret	Robinson	i. 660
Elder	Young	i. 437	Ferguson	Hill	i. 466
Ellershaw	Magniac	i. 217, 220, 595	Ferguson	Logan	i. 58
Elliot	Pringle's Trustees	ii. 245	Ferguson	Marjoribanks	i. 31
Ellis		ii. 535	Ferguson & Stewart	Smith	i. 354
Ellis	Mason	i. 414	Ferguson's Trustees	Grant	ii. 108
Ellis	White	i. 351	Fergusson	Hamilton	i. 55
Elmsley	Brown	i. 29, 730	Fergusson	M'Kechnie's Trustees	ii. 348
Elton	Larkins	i. 666	Fernie	Link	i. 361
			Ferrand	Smith	ii. 424
				Creditors	ii. 480
				Bischoffsheim	i. 527, ii. 125

Ferrier	Dodds	i. 536	Francis	Rucker	i. 431
Ferrier	Gartmore's Creditors	ii. 239	Fraser's Trustees		ii. 337
Ferrier	Graham's Trustees	i. 319	Fraser	Bowie	ii. 4
Ferrier	Graham	ii. 329, 330	Fraser	Fraser	i. 136
Ferrier	Hector	i. 76	Fraser	Fraser's Trustees	i. 133
Fidgeon	Ross	ii. 242	Fraser	Hankey	i. 38
Field	Sharpe	i. 255	Fraser	Hill	ii. 511
Fife	Watt's Trustees	i. 692	Fraser	Kershaw	ii. 527
Fife		ii. 297	Fraser	MacLennan	i. 415
Fife	Innes	i. 350	Fraser	Morrice	i. 103
Fife, Earl of	Duff	i. 133, 703	Fraser	Worms	i. 636
Findlay, Bannatyne, & Company's Assignation	Donaldson	i. 694, ii. 372, 526	Freeman	Baker	i. 466
Findlay	Mackintosh	ii. 109, 237	Freeman	Birch	i. 245
Findlay	Currie	i. 140	Freeman	Cooke	i. 314
Finlay	Currie	i. 415	Fricker	Thomlinson	i. 403
Finlayson	Smith	i. 371	Friend	Harrison	i. 318
Fish	Hutchinson	i. 410	Frith	Forbes	ii. 89
Fish	Kempton	i. 527, ii. 125	Frost	North of Scotland Banking Company	i. 140
Fish	Knapton	i. 529	Fry	Bank of India, London, and China	ii. 96
Fisher		i. 356	Fuentes	Montes	i. 522
Fisher	Dixon	i. 146, ii. 2	Fullarton	Dickson	ii. 524
Fisher	Fisher's Trustees	i. 97	Fullerton	Brand	ii. 480
Fisher's Trustees	Fisher	i. 54, 98	Fulton	Lead	ii. 207
Fisk	Masterman	i. 648	Fyfe	Woodman	i. 272
Fiske	Walpole	i. 350			
Fiskin	Glasgow Gas Company	i. 337			
Fitzgerald	Dressler	i. 408, 410	Gabriel	Evill	ii. 501
Fitzherbert	Mather	i. 511	Gairdner	Royal Bank	i. 103
Fitzherbert	Shaw	i. 790	Gaitskill	Greathead	i. 120
Fleet	Morrison	i. 474	Galam, Cargo <i>ex</i>		ii. 38, 99
Fleeter	Heath	i. 544	Gale	Luttrell	ii. 123
Fleming	Burgess	ii. 337	Gall	Bird	i. 140
Fleming	Campbell, Sir J.	ii. 509	Galloway	Moffat	i. 420
Fleming	Thomson	i. 379	Galloway	Scrivens	ii. 480
Fleming	Hector	i. 510, ii. 544	Galloway, Earl of	Grant	i. 514
Fletcher	Alexander	i. 636	Garden		ii. 297
Fletcher	Boucher	i. 468	Garden	Gregory	i. 409
Fletcher	Dyche	ii. 122	Gardner	Gardner	i. 93
Fletcher	Heath	i. 521	Gardner	Grant	i. 121, 124
Fletcher	Marshall	i. 534	Gardner	Leith, Trinity House of	i. 24
Flowerdew		ii. 246	Gardner	M'Hutcheon	i. 535
Forbes	Aspinall	i. 661, 662	Gardner	Stevenson	i. 705
Forbes	Drummond	ii. 3	Gardner	Walsh	i. 417
Forbes, Sir W., & Co.	Dundas	i. 387	Gardner	Woodside	ii. 295
Forbes	Forbes	i. 46	Gardner	Royal Bank	i. 29, 725
Forbes	Manson	ii. 291, 310	Garland	Stewart	ii. 6
Forbes, Lord	Gammell	i. 47	Garpel Hæmatite Company	Andrew	ii. 518
Ford	Muirhead	ii. 457	Garratt	Callum	i. 507
Fordyce	Bridges	ii. 136	Garrett	Handley	i. 405, 527
Foreman	Foreman's Trustees	i. 89	Gascoigne	Manford	ii. 312
Forman	Nicholson	i. 758	Gaziot	Creditors	ii. 476
Forrest	Borthwick	ii. 307, 310	Geddes	Geddes	ii. 136, 137
Forrest	Campbell	i. 130	Gemmel	North British Bank	ii. 308, 369
Forrest	Forrest	i. 55	Gemmel's Executors	Moon	ii. 352
Forrest	Henderson	i. 699	George	Clagget	i. 286, 527, 537, ii. 126
Forrester	M'Kenzie	ii. 303	Gibb	Brock	ii. 365, 423
Forsyth	Hare & Company	ii. 508	Gibb	Hamilton, Magistrates of	ii. 448
Forsyth	Wishart	i. 379	Gibson	Brand	i. 106
Forth	East India Company	ii. 97	Gibson	Bray	i. 289
Forth	Stanton	i. 408	Gibson	Carruthers	i. 248, 253
Foster	Bank of England	i. 101	Gibson	Crick	i. 535
Foster	Bates	i. 512	Gibson	Forbes, Sir C.	i. 192, ii. 196
Foster	Charles	i. 402, 467	Gibson	Greig	ii. 309, 419
Foster	Colby	ii. 97	Gibson	Kennedy	i. 84
Foster	Frampton	i. 218, 241	Gibson	Scoon	i. 130
Foster	Smith	i. 466	Gibson	Small	i. 663
Foulds	Meldrum	ii. 291	Gibson	Stephenson	ii. 348
Foulds	Thomson	i. 319	Gibson	Watson	i. 133
Fowrin	Oswell	i. 531	Gilbart	Dale	i. 494
Fowler	M'Taggart & Kymer	i. 232	Gilfillan		ii. 352
Fragano	Long	i. 218, 233			

Gilkison	Middleton	ii. 95, 97	Gratitudine, The	i. 580, 584
Gilkison	Thomson	i. 342	Gray	ii. 297
Gill	Cubit	i. 428	Gray	Gray's Trustees
Gillanders	Craig	i. 699	Gray	Hutton
Gillard	Brittan	i. 252	Gray	Low
Gillespie	Gillespie	i. 88	Gray	Sutherland
Gillies	Maclachlan	i. 38	Gray	Walker
Gilmour	Clark	i. 493, 494	Gray	Wardrop's Trustees
Gilmour	Ferrier	ii. 417	Great Western Ry. Co.	Crouch
Gilmour	Finnie	i. 410	Greaves	Ashlin
Gilmour	Gilmour's Trustees	ii. 245	Green	Bartlett
Gilpin	Rendell	i. 320	Green	Kopke
Glaholm	Hays	i. 260	Green	Mules
Glaser	Cowie	i. 531	Gregory	Williams
Glasgow		i. 31	Greig	Christie
Glasgow, etc., Canal Co.	Greenock Railway Co.	i. 699	Greig	Crichton
Glas. & Monklands Ry. Co.	Tennent	ii. 519	Grieve	Grieve's Creditors
Glasgow, University of	Faculty of Surgeons	i. 700	Grieve	Wilson
Glass	Stewart	ii. 272	Griffith	Lee
Glassford's Executors	Scott	i. 737	Griffiths	Perry
Glen	Black	i. 383, ii. 436	Grill	General Iron Screw Collier Company
Glen	Borthwick	ii. 291	Grimshaw	Malcolm
Glen	National Bank	ii. 115	Grindlay	Drysdale
Glenmanna, The		i. 580	Grosvenor	Green
Globe Insurance Co.	Scott's Creditors	ii. 383	Grove	Dubois
Globe Insurance Co.	Turner	ii. 348	Grymes	Boweren
Gobbi	Lazzaroni	i. 349	Guerreiro	Peile
Goddard	Stewart	i. 686	Guild	Orr, Ewing, & Co.
Godfrey	Furzo	i. 507	Gurney	Behrend
Godsall	Boldero	i. 103, 676		i. 214, 215, 236, 245, 306, 523, 524
Godts	Rose	i. 191	Guthrie	ii. 350
Goldie	Oswald	ii. 28		
Goldshede	Cottrel	i. 538		
Goldsmid	Gaden	i. 523		
Goodman	Chase	i. 407	Hadaway	Barker
Goodman	Harvey	i. 523	Hagedorn	Oliverson
Goodsir	Fleming	ii. 441	Haggart	Robertson
Gordon	Davidson	ii. 36	Hague	Dandesan
Gordon	Douglas' Trustees	ii. 263	Haigh	Brooks
Gordon	Duncan	ii. 136	Haille	Smith
Gordon	Glen	ii. 359	Haines	Busk
Gordon	Gordon	ii. 2	Haines	East India Company
Gordon	M'Cubbin	ii. 308, 311, 534	Haines	Shaw
Gordon	Mackintosh	i. 55	Haining	Young
Gordon	Martin	i. 411	Hair	Berwick
Gordon	Millar	ii. 276, 334, 335	Hair	M'Cubbin
Gordon	Paul	ii. 291	Haldane	Haldane
Gordon	Sinclair	i. 517	Hale	Rawson
Gordon	Stephen	i. 434	Hall	Ashurst
Gordon	Suttie	ii. 27	Hall	Barrows
Gordon	Suttie, Sir G.	ii. 356	Hall	Grant
Gordon, Lady	Kemp	ii. 338	Hall	Jansen
Gordon's Trustees	Harper	i. 31	Hambridge	De la Cronée
Gore	Gardiner	i. 579	Hamilton, Duke of	Baillie
Gorissen	Perren	i. 470	Hamilton	Bell
Gosling	Birnie	i. 199, 533	Hamilton	Boswell
Gowans	Thomson	i. 501, 612	Hamilton	Bruce's Trustees
Graham	Ackroyd	ii. 108	Hamilton	Cuthbertson
Graham	Arthur	ii. 36	Hamilton	Dunn
Graham	Cuthbertson	ii. 290	Hamilton	Glasgow, University of
Graham	Gordon	ii. 33	Hamilton	Hamilton
Graham	Musson	i. 405	Hamilton	Kerr
Graham	Western Bank	i. 39, ii. 513	Hamilton	Main
Grahame	Grahame	i. 47	Hamilton, Magistrates of	Swim
Grahame	M'Nair	i. 669	Hamilton	Watson
Grant	Bain	ii. 109, 348	Hamilton	Western Bank
Grant	Campbell	i. 391, 402		i. 195, 215, 216, 314, ii. 21
Grant	M'Edward's Trs.	ii. 187, 189	Hamilton	Wright
Grant	Munt	i. 468	Hammond	Anderson
Grant	Norway	i. 511, 592	Hammond	Dufrene
Grant	Strachan	i. 362	Hammond	Holiday
Grasswick	Farquharson	i. 416	Hammond	Rogers

Hansen	Craig & Rose	i. 181, 197, 199, 462, 472, 473	Henderson	Dunbar	ii. 28
Hansen	Meyer	i. 191	Henderson	Lacon	i. 467, 514
Hanson	Meyer	i. 197, 200	Henderson	Norrie	i. 39, ii. 118
Hardie	Austin & M'Aslan	i. 464, 465	Henderson	Robb	ii. 332
Hardie	Smith & Simons	i. 464, 466	Henderson	Royal British Bank	i. 467
Hardman	Booth	i. 261, 314	Henry	Dunlop	i. 192
Hardman	Wilcock	i. 533	Henry	Pearson	ii. 135
Hare	London & N.-W. Ry. Co.	i. 323	Heraud	Leaf	ii. 509
Hargreaves	Parsons	i. 410	Hero, The		i. 578
Harkness	Graham	i. 130, 141	Hern	Nichols	i. 306, 469, 511
Harle	Ogilvie	i. 218, 474, 531	Heron	Espie	ii. 6, 7
Harper	Faulds	ii. 93	Hewison	Guthrie	ii. 92
Harper	Williams	i. 541	Hewitt	Elliot	ii. 123
Harman	Anderson	i. 194, 197, 533	Heyhoe	Burge	ii. 512
Harms	Parsons	i. 322	Heyworth	Hutchison	i. 469
Harrington	Churchward	ii. 512	Hibblewhite	M'Morine	i. 531
Harris	Kemble	i. 468	Hickie	Rodocanachi	i. 657
Harris	Huntbach	i. 407, 544	Higgins	Bretherton	ii. 97
Harrison	Brighton, etc., Ry. Co.	i. 505	Higgins	Dunlop	i. 343, 480
Harrison	Harrison	i. 404	Higgins	Senior	i. 460, 527, 540, 541
Harrison	Lond. & Brighton Ry. Co.	i. 505	Higsons	Burton	i. 261, 314
Hart	Alexander	ii. 529	Hill	Gordon	i. 69
Hart	Baxendale	i. 505	Hill	Gray	i. 316
Hart	Bush	i. 218	Hill	Hunter	i. 144
Harvie	M'Intyre	i. 131	Hill	Ketching	i. 535
Harvie	Reston	i. 85	Hill	Kid	i. 22
Harvey	Haldane	i. 76	Hill	Lindsay	ii. 16, 17, 520, 555
Harvey	Calder	i. 125, 126	Hill	Merchant Maiden Hospital	i. 22
Harvey	Harvey	i. 789, 790	Hill	Pickersgill	i. 512
Harvey	Harvey's Trustees	i. 144	Hill	Wylie	ii. 509, 524
Harvey	Miller	i. 320	Hilton	Eckersley	i. 321
Harvey	Smith	i. 664	Hinde	Whitehouse	i. 405
Harvey	Wood	ii. 123	Hinton	Dibdin	i. 483
Harwood	Great Northern Rail. Co.	i. 107	Hirschfeld	Smith	i. 417, 441
Hasleham	Young	ii. 506	Hitchcock	Coker	i. 322
Hastelow	Jackson	i. 534	Hoadley	M'Lean	i. 461
Hastie	Campbell	i. 477	Hoare	Dawes	i. 206
Hastings, Marquis of	Oswald	i. 24	Hobson	Cowley	ii. 528
Hatfield	Phillips	i. 521	Hobson	Foster	ii. 455
Hatton	Royle	ii. 507	Hodge	M'Lure	ii. 298
Haughton	Ewbank	i. 510	Hodgman	West Midland Rail. Co.	i. 505
Havilland, Routh, & Co.	Thomson	i. 573	Hodgson	Anderson	i. 410
Hawes	Watson	i. 196, 199, 231, 533	Hogan	Musselburgh, Mags. of	ii. 158
Hawkes	Dunn	i. 246	Hogg	Grieve	ii. 4
Hawkes	Eastern Counties Rail. Co.	i. 318	Holbrook	Wight	i. 533
Hawkes	Smith	i. 494	Holder	Soulby	i. 498
Hawkins	Hawkins	ii. 6	Holderness	Collinson	ii. 104
Hawkins	Wedderburn	ii. 136	Holl	Griffin	i. 533
Hay	Cockburn's Trustees	i. 569	Holland	King	ii. 509, 524
Hay	Durham	ii. 305, 307	Holland	Russel	i. 544
Hay	Gray	i. 531	Holmes	Mitchell	i. 405
Hay	Marshall	ii. 334	Holmes	Reid	ii. 358
Hay	Morrison	ii. 136	Home	Tutton	i. 529
Hay	Simpson	i. 531	Home	Donaldson	i. 347
Haycroft	Creasy	i. 402	Home	Menzies	i. 38
Hayman	Flewker	i. 521	Home	Pringle	i. 38
Hazard	Treadwell	i. 510	Homer	Ashford	i. 322
Heald	Kenworthy	i. 536, 537, 543	Homer	Graves	i. 322
Heap	Dobson	ii. 539	Hood	Cochrane	i. 541, 542
Hearn	Lond. and South-Western Railway Company	i. 505	Hood	Miller	i. 73
Heath		i. 439	Hooper	Ferguson & Company	ii. 324
Heath	Sansom	ii. 532	Hooper	Lusby	i. 553
Hedderwick	Campbell	i. 93	Hope	Dickson	i. 56, 140
Heggie	Heggie	ii. 324	Hope	Moncrieff	ii. 254
Heinekey	Earle	i. 255, 256	Hopkins	Hitchcock	i. 466
Helgoland, The		i. 581	Hopkins	Tanqueray	i. 466
Hellawell	Eastwood	i. 790	Horn	Baker	i. 507, 790, 791
Henderson	Barnewall	i. 404	Horn	M'Lean	ii. 32
Henderson	De Salvi	ii. 298	Horn	Redfearne	i. 414
Henderson's Trustee	Drummond	ii. 71	Hornby	Lacy	i. 395, 408
			Horncastle	Farran	ii. 96
			Horne	Hay	ii. 176, 211

Horne	Smith	ii. 456	Ironsides	M'Gowan	ii. 311
Hornsby	Miller	i. 273	Irvine	Irvine	ii. 3, 509, 524
Horsfall	Fauntleroy	i. 512, 537	Irvine	M'Laren	i. 126
Horsfall	Virtue & Company	ii. 290, 400	Irvine	Tait	i. 141
Hoskins	Glaxton	i. 542	Irving	Copland	i. 376
Hossack	Laidlaw	ii. 476	Irving	Manning	ii. 131
Houldsworth	British Linen Company	i. 433, 516	Irving	Richardson	i. 662
Houston	Aberdeen Town and County Bank	ii. 64	Irving	Swan	i. 134
Houston	Bordenave	ii. 129	Isaacson	Wiseman	i. 326
Houston	Duncan	ii. 319	Iveson	Edinburgh Silk Company	i. 336
Houston	Speirs	i. 387	Ivory	Gourlay	i. 348
Houston's Executors	Speirs' Trs.	ii. 364, 421, 427, 529			
Hovil	Pack	i. 514	Jack	Elder	i. 509
How	Bank of England	ii. 367, 373	Jack	Jack	i. 89
Howard		i. 677	Jack	Roberts	i. 344
Howard	Chapman	i. 528	Jackson	Attril	i. 320
Howard	Jemmet	i. 277	Jackson	Cummins	ii. 100
Howard	Tucker	i. 534	Jackson	Lowe	i. 405
Howie	Anderson	i. 478	Jackson	Nichol	i. 194, 231, 232, 241, 244
Howison		i. 410	Jackson	Smellie	ii. 451
Howison	Howison	i. 375	Jaffé	Ritchie	i. 464
Hubbersty	Ward	i. 511, 592	Jaffray	Carrick	ii. 30
Huckman	Fernie	i. 510	Jale	Thornton	i. 470
Hudson	Ede	i. 622	James	Catherwood	i. 338
Hudson	Grainger	i. 528, ii. 90	James	Downie	i. 510
Hughes	Dove	i. 320	James	Griffin	i. 194, 219, 231, 254
Hughes	Graeme	i. 544	James	Patten	i. 404
Hullet	Hague	i. 106	Jameson	Wilson	ii. 436
Humble	Hunter	i. 527	Jane, The		i. 579
Hume	Middlemass	i. 304	Jardine	Harvie	ii. 291
Hume	Miller	ii. 334	Jardine's Trustees	Carron Company	ii. 520
Hunt	Hunt	i. 321	Jarman	Woolton	i. 271
Hunt	Royal Exchange Assur- ance Company	i. 553	Jarvis	Wilkins	i. 414
Hunt	Silk	i. 466	Jeffrey	Brown	ii. 320
Hunt	Ward	i. 232	Jeffrey	M'Taggart	ii. 335
Hunter	Cochrane's Trustees	ii. 502	Jendwine	Slade	i. 466, 469
Hunter	Miller	i. 72	Jenkins	Brown	i. 217, 221
Hunter	North of England Bank	ii. 29	Jenkins	Hutchinson	i. 421, 543
Hunter	Prinsep	i. 514	Jenkyns	Usborne	i. 195, 222, 233, 246
Hunter	Thomson	i. 347	Jennings	Broughton	i. 468
Hunter	Sanderson	i. 534	Jessell	Bath	i. 592
Huntley			Jewan	Whitworth	i. 523
Hurlet and Campsie Alum Company	Glasgow, Earl of	i. 691	Job	Langton	i. 635
Hurst	Holding	i. 535	Johnson	Dodgson	i. 405
Hussey	Christie	i. 542	Johnson	Gilbert	i. 408
Hutcheson	National Life Assurance Company	i. 677	Johnson	Hill	ii. 99
Hutchings	Nunez	i. 512	Johnson	Lansley	i. 533
Hutchins	Nunes	i. 245	Johnson	Macdonald	i. 470
Hutchinson	Bell	i. 402	Johnson	Midland Railway Company	i. 496
Hutchison	Cameron's Trustees	i. 783	Johnson	Stear	i. 206
Hutchison	Stevenson	ii. 356	Johnson	Windle	i. 300
Hutton	Brag	i. 587	Johnston & Sharp	Baillie	i. 531, 533
Hutton's Trustees	Hutton	i. 55	Johnston	Clark	i. 344
Hyslop	Maxwell	i. 40	Johnston	Duncan	ii. 92
			Johnston	Greigs	ii. 6
			Johnston	Losh	ii. 307
			Johnston	Robertson	i. 699
			Johnston	Romans	i. 407
			Johnston	Scott	i. 340
Iley	Frankenstein	i. 289	Johnstone		ii. 355
Imrie	Commercial Bank	ii. 291	Johnstone	Attwell	i. 339
Inglis	Gardner	ii. 370	Johnstone & Company	Baird	ii. 308
Inglis	Lumsden	ii. 507	Johnstone	Boone's Trustee	ii. 416
Inglis	Port Eglinton Spinning Co.	i. 256	Johnstone	Cliftonhall Coal Company	i. 425
Inglis	Renny	ii. 107	Johnstone	Dundas' Trustees	ii. 72
Inglis	Usherwood	i. 243	Johnstone	Grant	i. 346, ii. 330
Inglis & Company	Paul	ii. 339	Johnstone	Law	i. 320
Ingram	Thorpe	i. 467	Johnstone	M'Kenzie's Executors	i. 318
Innes	Antrobus	ii. 136	Johnstone	Peddie	ii. 448
Innes	Gordon	i. 737, ii. 8	Johnstone		ii. 319
Innes	Gordon, Duke of	i. 141	Jones		i. 455
Ironsides	Gray	ii. 353	Jones	Barkley	

Jones	Bowden	i. 316	Kirchner	Venus	i. 457, ii. 95
Jones	Cooper	i. 409	Kirkland & Sharpe	Gibson	ii. 34, 320
Jones	Downman	i. 544	Kirkman	Shawcross	ii. 103
Jones	Holm	i. 588	Kirkpatrick		i. 133
Jones	Jones	i. 184, 219	Kirwan	Kirwan	ii. 529
Jones	Just	i. 469	Kisch	Venezuela Railway Co.	i. 468
Jones	Littledale	i. 540, 541	Knight	Boughton	ii. 9
Jones	Noy	ii. 525	Knight	Crockford	i. 404
Jones	Pearle	ii. 99	Knight	Plymouth, Lord	i. 474, 531
Jones	Peppercorne	ii. 114	Knight	Robertson	i. 60
Jones & Company	Ross	i. 612	Knill	Hooper	i. 664
Jones	Starkey	ii. 104	Knowles	Crooks	ii. 292
Jones	Tarleton	ii. 91	Knox	Paterson	i. 401
Jones	Thurloe	ii. 99	Koster	Easson	i. 541
Jones	Tyler	i. 500	Kyle	Allan	i. 130
Jones	Waite	i. 321	Kyle	Jeffreys	i. 116
Jopp	Hay	ii. 395	Kyle	Kyle	i. 87, 136
Jopp	Leith Hay	ii. 295	Kymer	Suwercrop	i. 537
Joseph	Pebrer	i. 535			
Josling	Kingsford	i. 470			
Joule	Jackson	i. 507	Lackington	Atherton	i. 194, 231
Jowett	Woolley	ii. 455	Lacy	M'Neile	i. 407
Jowett	Stead	i. 183, 193	Ladbroke	Lee	ii. 116
Joyce	Swan	i. 221	Lafitte	Slatter	i. 439
			Laidler	Burlinson	i. 189
			Laidlaw & Son	Wilson	ii. 302, 311, 314
Kain	Old	i. 466	Laing	Cheyne	ii. 174
Kaye	Brett	i. 529	Laing	Darling	i. 488
Keates	Cadogan	i. 316	Laing	Duff	i. 73
Keele	Wheeler	i. 314	Laing	Muirhead	ii. 138
Keiller		ii. 372	Laing	Westren	i. 465
Keir	Ferguson	i. 411	Lamb	Attenborough	i. 521
Keith	Logie's Heir	ii. 2	Lamb	Jedburgh, Mags. of	ii. 437, 457
Keith	Penn	ii. 502	Lambert		i. 448
Keith's Trustees	Keith	i. 56, 140	Lambert	Robinson	ii. 97
Kellas	Brown	ii. 70, 72	Lamont		ii. 138
Kelly	Macindoe	i. 689	Lane	Burghart	i. 407
Kelly	Morris	i. 118	Lane	Nixon	i. 665
Kemble	Mitchell	i. 391	Lang	Brown	ii. 428
Kemp	Watt	i. 538	Lang	Bruce	i. 187, 192
Kemp	Young	ii. 107	Lang	Lang	i. 45
Kemp's Trustees	Ure	ii. 417	Langridge	Levy	i. 468
Kennard & Sons	Wright	i. 347	Langton	Higgins	i. 191
Kennedy	Green	i. 239	L'Apostre	Plaistrier	i. 507
Kennedy	Keir	ii. 476	Latta	Park & Company	i. 278, 471
Kennedy	Kennedy	i. 525	Laurie & Company	Anderson	ii. 103, 105
Kennedy	Wightman	i. 38	Laurie & Company	Denny's Trustee	ii. 102
Kenworthy	Schofield	i. 405	Laurie	Ritchie	i. 696
Ker	Erskine	i. 91	Law	Hollingsworth	i. 664
Ker's Trustee	Justice	i. 684	Law	M'Laren	ii. 311
Kern	Deslandes	ii. 96	Lawranson	Mason	i. 405
Kerr	Ailsa, Marquis of	ii. 291	Lawrence		i. 468
Kerr	Anderson	ii. 476	Lawrie	Harvie	ii. 305
Kerr	M'Ewan	ii. 361	Lawrie	Lawrie	ii. 337, 338
Kerr	Wood	ii. 345	Lawrie	Stewart	i. 367
Kerslake	Clark	ii. 455	Lawson	Jopp	ii. 434, 476
Key	Cotesworth	i. 221, 259	Lawson	Ogilvie	i. 699
Keyser	Suse	i. 206	Lawther	Belfast Harbour Commrs.	ii. 96
Kieran	Sanders	i. 533	Lawton	Lawton	i. 789, 790, 791
Kilpatrick	Wighton	ii. 356	Laythoarp	Bryant	i. 403
Kilshaw	Jukes	ii. 500	Leach	Thomas	i. 789
King	Bickley	i. 439	Leadbitter	Farrow	i. 540
King	Creighton	i. 418	Learmont	Shearer	ii. 71
King	Jaffray	ii. 8	Learmonth	Patton	ii. 291
King	Meredith	i. 218	Learmonth	Trinity Hosp., Govrs. of	i. 23, 24
King	Stair, Earl of	i. 47	Learoyd	Robinson	i. 523
Kinghorn	Cleland	i. 407	Leather Cloth Company	American Leather Cloth Co.	i. 120
Kingsford	Merry	i. 233, 261, 467	Leck	Fulton	i. 73
Kingston	Phelps	i. 670	Leck	Gairdner	ii. 331
Kinnear	Low	ii. 310	Leckie	Leckie	i. 33, 725
Kinnear	Thomson	ii. 528	Le Conteur	South-Western Rail. Co.	i. 496
Kirby	Scindia, The, Owners of	i. 670	Lee	Bullen	i. 541

Lee	Jones	i. 316	Loundes	Buchanan	i. 69
Lee	Risdon	i. 791	Lovatt	Hamilton	i. 470
Leechman	Sievright	i. 73	Love	Anderson	ii. 308
Leeds	Wright	i. 231	Love	Storie	i. 714
Lees	Wilson	ii. 3	Lovell	Hicks	i. 469
Legge	Harlock	ii. 122	Low	Baxter	ii. 291, 307, 308, 310
Leigh	Hind	i. 322	Lowe	Fleming	ii. 303
Leighton	Wales	i. 322	Lowson	Craik	i. 245
Leiper	Cochran	i. 130	Lucas	De la Cour	i. 527
Leitch	Wilson	i. 620	Lucas	Dorrien	i. 194
Leith Bank	Bell	i. 381	Lucena	Crawford	i. 512
Leith	Leith	i. 92, 93	Luckie	Bushby	ii. 131
Lemayne	Stanley	i. 404	Lumsden	Buchanan	i. 39, ii. 513
Lenaghan	Monkland Iron Company	i. 691	Lumsden	Lorimer	i. 28
Lennard	Robinson	i. 541	Lumsden	Peddie	ii. 514
Lennox	Robertson	ii. 140	Lumsden	Stewart	i. 28
Leslie	Curtis	i. 568	Lupton	Whyte	i. 295, 533
Lesly	Pringle	ii. 435	Lusk	Elder	ii. 380, 563
Leuckhart	Cooper	i. 245, ii. 97	Lyall	Cooper	ii. 2
Levenson	Lane	ii. 504	Lyon	Butter	i. 437
Levick	Caddell & Company	ii. 352, 360	Lyon	Easter Ogle, Creditors of	ii. 136
Levy	Pyne	i. 510, ii. 504	Lyon	Knowles	ii. 500
Lewis	Great Western Company	i. 505	Lyon	Lamb	i. 402
Lewis	Lyster	i. 538	Lyons	Barns	i. 289
Lewis	MacKee	i. 595	Lysney	Selby	i. 468
Lewis	Marling	i. 106			
Lewis	Nicholson	i. 421, 541, 544			
Lewis	Reilly	ii. 527, 534	Mabon	Christie	ii. 509
Leycester	Logan	i. 609	Mabon	Perkins	ii. 150
Lickbarrow	Mason	i. 213, 214, 237, 306, 523	Macalister	Macalister	i. 78
Lillie	Lillie	i. 82	Macalister	Macalister's Executors	i. 689
Lindsay	Barmcotte	i. 33, 675	Macalister's Trustees	Macalister	i. 61
Lindsay	Clelland	ii. 288, 372, 373	Macandrew	Chapple	i. 588
Lindsay	Davidson	i. 725, ii. 338	Macandrew	Robertson	ii. 520
Lindsay	Gordon	ii. 348	M'Arthur	M'Brair	ii. 334
Lindsay	Lindsay	i. 31	Macartney	Hannah	i. 436
Lindsay	London & N.-W. Rail. Co.	ii. 70	Macartney	Mackenzie	i. 375, 410
Lindsay	Paterson	ii. 376	Macartney	Macreadie's Creditors	i. 199, 221
Lindsay's Trustees	Watson	i. 133	Macaulan		i. 31
Lindus	Bradwell	i. 404	Macbryde	Weekes	i. 467
Linn	Shields	i. 179	M'Call & Company	Black & Company	ii. 112
Liston	M'Intosh	ii. 310, 361	M'Call	Taylor	i. 505
Litt	Cowley	i. 249	M'Callum	M'Callum	ii. 456
Littlejohn	Hamilton	ii. 245	M'Callum	Sea Insurance Company	i. 664
Livesay	Hood	i. 507	M'Cance	Lond. and North-Western	
Livingstone	Macfarlane	ii. 142, 411		Railway Company	i. 511
Livingstone	Reid	ii. 131	M'Clelland	M'Cowan	ii. 564
Lloyd	Sigourney	i. 529	M'Clymont	Cathcart	ii. 29, 32
Lock	De Burgh	ii. 9	M'Clymont	Hughes	i. 38
Lockhart	Denholm	i. 24	M'Corkle	Murison	i. 656
Lockhart	Mitchell	ii. 289, 291, 292, 295, 310, 313	M'Cormick	Rittmeyer	i. 463
			M'Cowan	Wright	ii. 229
Lockhart	Paterson	ii. 364	M'Cubbin	Stephen	i. 414
Lockwood	Levick	i. 535	M'Cubbin	Turnbull	i. 417, ii. 306, 309, 310
Lockyer	Offley	i. 677	Macdonald		i. 131, ii. 355
Logan	Galbraith	i. 57	Macdonald	Auld	ii. 293
Logan	Le Mesurier	i. 191	M'Donald	Inverness, Magistrates of	ii. 448
Logan	Maxwell	i. 55	Macdonald	Jopling	i. 563
Logan	Stephen	ii. 122, 131	Macdonald	Langton	i. 427
Lombart	Woollet	i. 277	M'Donald	Thomson	i. 604
London and Edinburgh			Macdonald	Union Bank	i. 389, 432
Shipping Company	M'Corkle	ii. 508, 519	Macdougall		ii. 246
London and Birmingham			Macdougall's Trustees	Law	i. 400, ii. 68
Bank		ii. 113	Macdougall	Marshall	i. 131
London Joint-stock Bank	Stewart	i. 573	M'Dougall	Whitelaw	i. 272
London and N.-W. Rail.	Bartlett	i. 245	Macdowal	Loudon	i. 351
Longfellow	Williams	i. 403	M'Eachern	Ewing & Company	i. 210
Longmeid	Holliday	i. 468	M'Ewan	Cleugh	ii. 307
Lord	Hall	i. 404, 510	M'Ewan	Smith	i. 195-6, 206-11, 222-6, 343, 524
Losh, Wilson, & Bell	Douglas	ii. 116			
Loudon	Christie	ii. 317	M'Ewan	Young	ii. 335
Loudon	Loudon	i. 142	Macfarlane	Giannocopulo	i. 537

Macfarlane	Grieve	ii. 302, 315	M'Lellan	Turner's Executors	i. 338
Macfarlane	Johnstone	i. 414	Macleod	Tosh	ii. 505
Macfarlane	Nicoll	ii. 400	Macleod	Wilson	ii. 82, 85
Macfarlane	Norris	ii. 125	M'Manus	Lancashire, etc., Ry. Co.	i. 505
Macfarlane	Sanderson	ii. 70	M'Michael	Barbour	i. 131, 404
M'Gavin	Cuddy	i. 613	M'Millan	Armstrong	i. 38
M'Gavin	Ogilvie	ii. 287	M'Millan	Campbell	i. 35
M'Geachy	Mellis	ii. 335	M'Millan	M'Kellar	i. 362
M'Gibbon	M'Gibbon	i. 128, 130, 141, 737	M'Millan	M'Millan's Executors	ii. 5
M'Gill	Ferrier	ii. 451	M'Nab	Hunter	ii. 294
M'Gillivray	M'Arthur	ii. 417	M'Nair	Broomfield	i. 38
M'Gillivray's Executors	Masson	i. 71	M'Nair & Company	Gray	ii. 505
M'Glashan	Athole, Duke of	ii. 364	M'Naughton	Alhusen & Company	i. 573
M'Glashan	Dundee and Perth Rail. Co.	i. 492	M'Naughton	Halbert	ii. 434
M'Glashan	Newman	ii. 352	Macnee	Gorst	i. 523
M'Gowan	M'Kellar	ii. 175	M'Neill	M'Murchev	ii. 59
M'Gowan	Robb	i. 55	Macpherson	Macpherson	i. 31
M'Gown	Nelson	i. 402	Macpherson's Trustees	Macpherson	i. 38
M'Gregor	Bainbridge	ii. 503	Macqueen	Hay	ii. 38
Macgregor	Ballantine	i. 58	Macra	Bowman's Trustees	ii. 324
M'Gregor	Beith	ii. 246	M'Rae	M'Cartney	ii. 456, 464
M'Gregor	Dobie	ii. 335, 483	M'Rae	M'Pherson	i. 69
Macgregor	Forrester	i. 54	M'Rostie	Halley	i. 417, ii. 285, 292
Macgregor	Howie	ii. 68	M'Taggart	Kymer	i. 220
Macgregor	Macdonald	i. 783	M'Target	Monteith	ii. 79
M'Gregor	Stirling	ii. 254	M'Tavish	Matheson	ii. 302
M'Gregor	Turnbull	i. 337	M'Turk	Hunter	i. 709
M'Intosh	Cooper	ii. 324	M'Whannel	Dobbie	ii. 522, 535
M'Intosh	Duncan	ii. 351	Madden	Currie's Trustees	i. 54
M'Intosh	M'Intosh	i. 55, 483	Magee	Atkinson	i. 540, 541
M'Intosh	M'Queen	i. 750	Mahoney	Kekule	i. 541, 543
M'Intosh	Pitcairn	i. 339	Maiklem	Walker	i. 140, 415
M'Intyre	Macdonald	ii. 122	Maillard	Argyle, Duke of	i. 538
Macintyre	M'Ruill	i. 322	Maitland	Cockerell	i. 725, ii. 79
M'Iver	Linkithgow, Magistrates of	ii. 448	Maitland	Rattray	i. 320
Mackay	Campbell's Trustees	i. 703	Malcolm	Bardner	ii. 300
Mackay	Davidson	i. 82	Malcolm	Bateman	i. 141
Mackay	M'Lachlan	ii. 326	Mallet	Hodgton	i. 408
Mackay	Ure	i. 351	Malloch	Hodgton	i. 461
M'Keand	Laird	ii. 526	Malloch	M'Lean	ii. 3
M'Kellar	Livingston	ii. 463	Mann	Dickson	ii. 303, 313
M'Kellar	Marquis	i. 54, 55	Mann	Forrester	i. 529
M'Kenna		ii. 506	Mansfield, Earl of	Gray	i. 24
Mackenzie		i. 24	Mansfield	Maxwell & Company	ii. 329
Mackenzie	Cox	i. 488	Mansfield	Stuart	i. 136, ii. 176
Mackenzie	Dott	i. 441	Mansfield	Walker's Trs.	i. 141, ii. 199, 338
Mackenzie & Company	Finlay	ii. 70	Mantle	Miller	ii. 457
Mackenzie	Gordon	ii. 428	Manuel	Manuel	i. 130
Mackenzie	Mackenzie	i. 22, 71, ii. 417	Mar, Earl of	Ramsay	i. 28
M'Kenzie	M'Lean	ii. 448, 449	Marjoribanks	Amos	ii. 372
Mackenzie	Ross & Ogilvie	ii. 10	Marquand	Banner	ii. 95
Mackersey	Galloway	ii. 315	Marsh	Pedder	i. 538
M'Kersey	Guthrie	ii. 291	Marshall	Dobson	ii. 456
Mackersey	Muir	ii. 324	Marshall	Lamont	ii. 435
M'Kinlay	Gillon	ii. 512	Marshall	Lyell	ii. 5
M'Kinlay	M'Kinlay & Company	i. 347	Marshall	Mather	i. 22
M'Kinney	Van Heck	i. 414	Marshall	Philip	ii. 364
Mackinnon	Hanson & Company	ii. 21	Martin	Cotter	i. 468
M'Kinnon	Nairne	ii. 454	Martin	Martin	i. 141
Mackinnon	Nanson & Company	i. 216	Martin's Trustees	Milliken	i. 55
M'Kirby	North British Insurance	i. 674	Martindale	Smith	i. 252
M'Knight	Irving	i. 787	Mason	Bradley	i. 417
M'Laggan	Dewar	ii. 316	Mason	Lickbarrow	i. 214
M'Lanahan	Universal Insurance Co.	i. 666	Massey	Banner	i. 474, 531
Maclean & Son		ii. 287	Massey	Davis	i. 533
M'Lean	Cameron	i. 64	Massey	Johnson	i. 403
M'Lean	Dunn	i. 405	Massie's Trustees	Massie	ii. 5
M'Lean	Grant	i. 474	Masters	Baretto	i. 436
Maclean & Hope	Munck	i. 592	Mather		i. 318
M'Lean	Sheriff	ii. 149, 364	Matheson	Allison	i. 187, 192
M'Leish's Trustees	M'Leish	i. 37	Matheson	Fraser	ii. 505
M'Lellan	Bank of Scotland	ii. 306, 419	Mathie	Gavin	ii. 326

Matson	Wharram	i. 406, 409	Milne's Trustees	Cowie	i. 37
Matthew	Fawns	ii. 70	Milne	M'Lean	i. 517
Maure	Harrison	i. 366	Milne & Company	Miller	i. 474
Maxton	Mackintosh's Creditors	i. 411	Milne & Company	Milne	ii. 294
Maxwell	Logan	i. 46	Miner	Taggart	i. 531
Maxwell	Maxwell	i. 46	Mintner	Wells	i. 106
Maxwell & Company	Stevenson & Company	i. 184, 204, 205, 210	Minto	Kirkpatrick	i. 143, ii. 3, 502, 547
May	Chapman	i. 239	Mitchell	Allhusen	i. 446
May	Roberts	i. 477, 531	Mitchell's Trustees	Barrow	ii. 320
Mayhew	Nelson	i. 505	Mitchell	Burnett & Mowatt	i. 523, 524
Maynard	Rose	i. 673	Mitchell	Ede	i. 215, 595
Mayne	M'Keand	i. 38	Mitchell	Mein	ii. 317
Mead	Anderson	ii. 6, 10	Mitchell	Rodger	ii. 205
Meadows		ii. 114	Mitchinson	Begbie	ii. 97
Mechanics' Bank	New York and New Hampshire Railway Company	i. 511	Moakes	Nicholson	i. 221
Megget	Spence	ii. 371	Mody	Gregson	i. 470
Meiklam	Glassford	i. 760, 762	Moes, Molière, & Tromp	Leith and Amsterdam Shipping Company	i. 591, 606
Meiklam's Trustees	Meiklam's Trustees, Mrs.	ii. 5	Moffat	Lawrie	i. 535
Medina	Stoughton	i. 466	Moffat	Robertson	i. 38
Mein	M'Nair	i. 701	Moinet	Hamilton	ii. 335
Mein	Saunders	ii. 364	Moller	Young	i. 544
Mein	Taylor	i. 55	Moncrieff	Dundas, Lord	i. 691
Mein	Tower	ii. 330	Moncrieff	Hay	i. 78
Mein	Turner	ii. 284, 336, 377	Moncrieff	Miln	ii. 7
Melanotte	Teasdale	i. 414	Moncrieff	Skene	ii. 417
Meletopulo	Ranking	i. 185, 222, 233	Moncrieff	Union Bank	ii. 211
Mellis	Royal Bank	ii. 373	Moncrieff	Whittembury	i. 521, 522, 529
Mellish	Motteux	i. 316	Monnypenny	Buchan, Earl of	i. 126
Melrose & Company	Hastie	i. 179, 196, 209-11, 243, 337	Monro	Bruce	i. 315
Melville		i. 31, ii. 254	Monro	Edinburgh Cemetery Co.	ii. 524
Melville	Critchley	i. 465, 472	Monteith	Pattison	i. 375
Melville, Lord	Paterson	ii. 286, 341	Montgomery	A B	ii. 108
Melville, Lord	Preston	i. 31	Montgomery	Hart	ii. 311
Menzies	Gillespie's Creditors	i. 776	Moore		i. 431
Menzies	Murdoch	i. 767, ii. 108, 135, 140, 407	Moore	Clementson	i. 527
Menzies	North British Insur. Co.	i. 673	Moore	Gledden	ii. 22
Mercer	Livingstone	i. 449	Moore	Hart	i. 405
Meredith	Meigh	i. 218	Moran	Jones	i. 635
Merry	Howie	i. 92	Moray, Earl of	Mansfield	ii. 419
Mestaer	Atkins	i. 535	More	Slate	ii. 332
Metcalfe	Pulvertoft	ii. 144	Morewood	Pollock	i. 609
Meyer	Blogg	ii. 326	Morgan	Morgan	i. 414
Meyerstein	Barber	i. 206, ii. 21	Morgan	Ravey	i. 500, 501
Middleditch	Sharland	i. 533	Moridel	Steel	i. 466
Middleton	Fowler	ii. 97	Mories	Glen	ii. 311
Midland Railway Company	Bromley	i. 494	Morison	Bartolomeo	i. 626, 658
Miles	Gorton	i. 184, 243	Morison	Forbes	ii. 449
Mill	Paul	ii. 123	Morison	Gray	i. 246
Millar	Dodd	ii. 298	Morley	Allenborough	i. 299
Millar	Little	i. 415	Morley	Hay	i. 245
Millar	Small	i. 730	Morrice	Scott	i. 388
Miller	Cabbell	ii. 355	Morris	Ashbee	i. 118
Miller	Geils	ii. 36	Morris	Cleasby	i. 395, 396, 408
Miller	Lambert	ii. 291, 309, 310, 361	Morris	Tennant	i. 55, 90, 91
Miller	Low	ii. 197	Morris	Williams	ii. 104
Miller & Paterson	M'Nair	ii. 97, 111, 112, 125, 126	Morris	Wright	i. 118
Miller	Marsh	i. 90	Morrison		ii. 513, 524
Miller	Mitchell	i. 536, 543	Morrison	Allardes	ii. 147
Miller's Trustee	Shield	ii. 200	Morrison	Balfour	i. 378, ii. 352, 359
Miller	Sorely	ii. 315	Morrison	Carron Company	ii. 196
Miller	Stewart	ii. 188	Morrison	Maclean's Trustees	i. 133
Miller	Tetherington	i. 632	Morrison	Millar	i. 38, ii. 272
Miller	Thorburn	ii. 526	Morson & Co.	Burns	i. 465
Miller	Woodfall	i. 657	Morton	Abercromby	i. 185, 222, 233, 237, 264
Miller	Wright	ii. 338	Morton	Black	i. 568
Miller	Young	i. 489	Morton	Hunter & Co.	ii. 224
Mills	Ball	i. 244	Morton	Middleton	i. 109
Miln	Boyack	ii. 351, 360	Moses	Gifford	ii. 296
			Moss	Sweet	i. 289
			Mowbray	Cunningham	i. 406, 409

Moyes	Whinney	ii. 436	Noble	Armstrong	i. 347
Mucklow	Mangles	i. 189	Norfolk, Duke of	Worseley	i. 529
Muir	Collet	i. 399, ii. 455, 526	Normand	Macartney	i. 515
Muir	Dickson	ii. 534	North Star, The		i. 579
Munro	Bothwell	ii. 36	North British Bank	Ayrshire Iron Company	ii. 539
Munro	Fraser	ii. 407	North British Bank	Collins	ii. 524
Munro	Graham	ii. 245	North British Insurance Co.	Lloyd	i. 316
Munro	Munro	i. 130	North British Insurance Co.	Tunnock	i. 676
Munro	Tolmie	ii. 337	North-Western Bank	Bjornstrom	i. 573
Munster	South-Eastern Railway Co.	i. 496	Norton	Herring	i. 541
Murdoch	Glasgow, Magistrates of	i. 37	Norton	Pickering	i. 439
Murdoch	Murdoch's Trustees	i. 74	Norwich, Mayor of	Norfolk Railway Company	i. 318
Murray	Donnelly	ii. 298, 324	Nunn	Fabian	i. 403
Murray	Mann	i. 467, 543	Nye	Moseley	i. 318
Murray	Moncur	ii. 356			
Murray	Murray	ii. 10			
Murray	Murray's Trustees	i. 93, 141	Oakes	Turquand	i. 261, 467, 469
Musselburgh, Magistrates of	Brown	i. 25	Oakford	Drake	i. 246
Myles	Calman	i. 54	Oakley	Pashetter	i. 410
Mylne	Blackwood	ii. 137	O'Connell	Russell	i. 320
			Ogilvy	Boswell, Lady	i. 38
			Ogilvy	Crombie	ii. 272
			Ogle	Atkinson	i. 220, 221
			Ollive	Booker	i. 663
			Oppenheim	Russell	ii. 97
			Ord	Barton	i. 568
			Ord	Hill	i. 121
			Ormiston	Greig	i. 85
			Ormson	Clark	i. 107
			Orr	Mackenzie	i. 701
			Orr	Magennis	i. 439
			Orr & Company	Pollock	ii. 503, 539
			Oswald's Trustees	Dickson	ii. 555
			Oursell		i. 507
			Overend, Gurney, & Co.		i. 448
			Owen	Burnett	i. 505
			Owen	Gooch	i. 540
			Owen	Roman	i. 316
			Owen	Wilkinson	ii. 123
			Owens	Porter	i. 320
			Padgett & Company	M'Nair	i. 465
			Padon	Bank of Scotland	ii. 531
			Paice	Walker	i. 541
			Palethorp	Furnish	i. 404
			Palmer	Blackburn	i. 662
			Palmer	Grand Junction Canal Co.	i. 496
			Panmure, Lord	Croat	i. 97
			Panton	Panton	i. 295, 533
			Park	Wood's Trustees	ii. 143
			Park	Eliason	i. 277
			Parker		ii. 365
			Parker	Beasley	i. 541
			Parker	Great Western Rail. Co.	i. 496
			Parker	Ibbetson	i. 535
			Parker	Winlow	i. 540, 541
			Parkhurst	Foster	i. 498
			Parkins	Moravia	i. 410
			Parkinson	Lee	i. 470
			Parry	Roberts	i. 534
			Parsons	Gingell	ii. 100
			Parsons	Hayward	ii. 522
			Pasley	Freeman	i. 402, 466
			Paterson	Bonar	i. 410
			Paterson	Duncan	ii. 312
			Paterson	Gandasequi	i. 286, 541
			Paterson	Hamilton, Duke of	i. 734
			Paterson	Lumsden	ii. 308, 311
			Paterson	Moncrieff	i. 140
			Paterson	Samuel	ii. 327
			Paton		ii. 463
Napier & Co.	Bruce	i. 406			
Napier	Lang	i. 485			
Napier	Orr	i. 684, ii. 5			
Napier	Schneider	i. 431			
Napier	Spiers	i. 691			
National Bank	Johnstone	ii. 161			
National Bank	Martin	i. 515			
National Exchange Co.	Drew	i. 467, 469, ii. 507, 519			
National Exchange Com- pany of Glasgow	Robertson	ii. 535			
Navulshaw	Brownrigg	i. 523			
Naylor	Collinge	i. 790			
Neate	Ball	i. 255, 289			
Neilson	Baird	i. 106, 107			
Neilson	Househill Company	i. 107			
Neilson	Murray	i. 54			
Neilson	Stewart	i. 91			
Neptune the Second		i. 601			
New	Swain	i. 243			
Newall's Trustees	Aitchison	ii. 294			
Newberry	Colvin	ii. 95			
Newbigging & Company's Trustees	Heywood, Collins, & Com- pany's Trustees	ii. 421			
New Brunswick, etc., Rail- way Company	Conybeare	i. 468, 469, 514			
New Brunswick Rail. Co.	Muggeridge	i. 468			
Newcome	Thornton	i. 239			
Newhall	Vargas	i. 512			
Newsom	Thornton	i. 214			
New Steam-Tug Company	M'Clow	i. 622			
Newton	Newton	i. 90, 321			
New York Central Insur. Co.	National Protective Ins. Co.	i. 508			
Nicholls	Le Feuvre	i. 245			
Nicholson		i. 31			
Nicholson	Gooch	i. 533			
Nicholson	Knowles	i. 533			
Nicol		i. 468, 469			
Nicol	Edmond	ii. 327			
Nicoll	Romanes	ii. 311			
Nicolson	Kinloch	i. 366			
Nielson	Leighton	i. 433			
Nieman	Moss	i. 623			
Nimmo	Brown	i. 407			
Nisbet	Cairns	ii. 272			
Nisbet	MacLelland	ii. 328			
Nisbet	Nicoll	ii. 291, 310			
Nisbet	Rennie	ii. 7			
Nisbett	Nisbet	i. 56			
Nisbett	Nisbett's Trustees	i. 57			
Noble	Adams	i. 185, 233			

Paton	Wyllie	ii. 22	Pollock	King	ii. 328
Patrick	Nichol	ii. 5	Pollock	M'Alpin	i. 610
Patten		ii. 254	Pollock	Marnock	i. 675
Patten	Royal Bank	i. 290, ii. 113	Pollock	Murray	ii. 428
Patten	Thompson	i. 214, 243	Pollock	Scott	ii. 72
Paul (Hard)	Anstruther	ii. 9	Pollock	Wilkie	i. 489
Paul	Black	ii. 290	Pooley	Harradine	i. 410
Paul	Boyd's Trustees	ii. 17	Pope	Garland	i. 468
Paul	Cuthbertson	i. 51, 95, 187, 792, ii. 2, 337	Poplet	Stockdale	i. 319
Paul	Dickson	ii. 107	Pordage	Cole	i. 455
Paul	Gibson	ii. 305, 308, 310, 314	Portalis	Tetley	i. 523
Paul	Hill	i. 121	Porterfield	Grahame	i. 54
Paul	M'Leod	i. 47	Porter's Trustees	Stout	i. 404
Paul	Meikle	ii. 108	Portland, Duke of	Baird	i. 75
Paul	Robb	ii. 328	Pothill	Walter	i. 421
Paul	Ross	ii. 484	Pott	Eyton	ii. 500, 512
Paul	Turnbull	ii. 338	Potter	Bartholomew	ii. 68
Paxton	Forster	i. 419, 420	Pow	Muirhead	ii. 436
Payne	Ives	ii. 506	Powell	Davis	i. 544
Paynter	James	i. 591	Powell	Dillon	i. 405
Peacock	Rhodes	i. 523	Power	Horton	i. 471
Pearce	Brookes	i. 318	Power	Barham	i. 466, 469
Pearce Brothers	Irons	i. 463, 465	Power	Butcher	i. 529
Pearson	Ogilvie	ii. 5	Powles	Whitmore	i. 634
Pearson & Company	Brock	ii. 334	Powles	Hider	i. 497
Pease	Gloahee	i. 215, 236, 239, 261	Prescott	Page	ii. 531, 533
Pechell	Walter	i. 543	Preston	Flinn	i. 510
Pedder	Preston, Mayor of	ii. 123	Preston	Dundonald's, Earl of, Crs.	i. 22
Peddle	Beveridge	i. 694	Preston	Edinburgh, Magistrates of	i. 691
Peddle	Brown	i. 410	Prestwick	Gregor	ii. 32
Peebles	Watson	ii. 338	Price	Marshall	i. 510
Peek	North Staffordshire Rail- way Company	i. 505, 606	Price	Groom	ii. 514
Pellecat	Angell	i. 326	Priestley	Macaulay	i. 468
Pender	Henderson & Co.	i. 508, ii. 502	Prince	Fernie	i. 538, 543
Pender	M'Arthur	ii. 449	Proctor	Pallet	i. 218
Pennell	Alexander	i. 236, 245	Proctor, The	Nicholson	i. 320
Penry	Brown	i. 791	Pugh	Leeds, Duke of	i. 677
Penton	Robert	i. 791	Pulsford	Richards	i. 467
Perryman	M'Clymont	ii. 291	Pulteney	Keymer	ii. 110, 112
Perston	Perston's Trustees	i. 38	Purchell	Salter	i. 527
Peruvian Railway Co.	Thames, etc. Insurance Co.	i. 539	Purdon	Spence	ii. 332
Peters	Milligan	i. 635	Pust	Dowie	i. 455
Petries' Executors	Aitchison & Company	i. 556	Pyper	Thomson	i. 484
Phillips	Bistolli	i. 314			
Phillips	Clark	i. 591, 606	Queensberry, Marquis of	Scottish Union Insur. Co.	i. 676
Phillips	Huth	i. 521			
Philpot	Jones	i. 320			
Phoenix Life Assur. Co.		ii. 107	Rabone	Williams	i. 527, ii. 126
Pickard	Sears	i. 305, 467, 511	Rae	Henderson	ii. 448
Pickering	Busk	i. 510	Raffles	Wichelhaus	i. 314
Pickering	Dowson	i. 468	Railton	M'Laren	ii. 303
Pickford	Grand Junction Rail. Co.	i. 496	Railton	Matthews	i. 382
Piggott	Stratton	i. 511	Rain	Glasgow & S.-W. Ry. Co.	i. 505
Pike	Nicolas	i. 118	Ralston		i. 696
Pilkington	Scott	i. 322	Ramsay	Beveridge	i. 55
Pilling	Drake	ii. 362	Ramsay	Commercial Bank	i. 73, 75
Pilmore	Hood	i. 468	Ramsay	Donaldson	ii. 199
Pinnock	Harrison	ii. 92	Ramsay	Goldie	ii. 7
Pirie	Steele	i. 660	Ramsay, Bonnar, & Co.	Mackersy	i. 396, 516
Plock	Wallace	ii. 284	Ramsay	M'Lellan & Son	i. 465
Plummer	Seils	i. 510	Randell	Trimen	i. 544
Plummer	Wildman	i. 634	Rankine	Rankine	i. 130
Plummer	Whitley	ii. 9	Ransan	Mitchell	i. 465
Pochin	Robinow & Marjoribanks	i. 195, 216, 523	Raphael	Bank of England	i. 523
			Rapp	Latham	i. 469
Pole	Leask	i. 537, ii. 500	Rathbone	Glennie	i. 415
Pollexfen	Stewart	i. 38	Ratray	White	ii. 337, 377, 379
Pollock	Begg	ii. 457	Rawlins	Wickham	i. 468
Pollock	Edinburgh, Mags. of	i. 691	Rayner	Grote	i. 543
Pollock	Glasgow, University of	ii. 436	Read	Dreaper	i. 540, 541

Read	Hollinshead	ii. 506	Robertson	Henderson	ii. 324
Reader	Kingham	i. 407, 408, 410	Robertson	Lamb	i. 31
Reading	Menham	i. 484	Robertson	Lockie	ii. 525
Redfearn	Maxwell	i. 60	Robertson	M'Leod	ii. 350
Redpath	Forth Marine Ins. Co.	ii. 328	Robertson	Ogilvie's Trustees	i. 341
Reed	Rann	i. 535	Robertson's Trustee	Oughterson	ii. 328
Reeve	Palmer	i. 488	Robertson	Paton	ii. 272
Reeves	Capper	ii. 21	Robertson	Robertson	i. 142
Reg.	Saddlers' Co.	i. 466	Robertson	Rutherford	ii. 263
Reid	Baxter	i. 133	Robertson	Thom	ii. 520
Reid	Berry	ii. 303	Robins	May	i. 414
Reid	Chalmers	ii. 515	Robinson	Fife, Earl of	ii. 246
Reid, Irving, & Company	Buchanan	ii. 370	Robinson	Hawksford	i. 435
Reid	Douglas	ii. 507	Robinson	Nation	i. 510
Reid	Mackie	i. 493	Robinson	Read	i. 538
Reid	Nash	i. 406, 408, 410	Robinson	Rutter	i. 529
Reid	Royal Exchange Ass. Co.	i. 675	Robinson	Thoms	i. 642
Renaux	Teakle	i. 510	Robson	Drummond	i. 527
Rennie		ii. 468	Robson	Macnish	ii. 3
Rennie	Ritchie	i. 125	Rodger	The Comptoir d'Escompte de Paris	i. 232, 239
Rennie	Sang & Adam	ii. 72	Rodger	Gellatly's Trustees	ii. 294
Rennie	Smith's Trustees	i. 391	Rodger	Miller	ii. 448
Renny		ii. 239	Roger	Jamieson	ii. 528
Renny	Kemp	ii. 108	Rogers	Scott	i. 61
Renny & Webster	Myles	ii. 107	Rose	Cunninghame	i. 405
Rex	London Thorpe, Inhab. of	i. 790	Rose	Fraser	i. 57
Rex	Mawbey	i. 467	Rose	Medical Invalid Ins. Co.	i. 675
Rex	Otley, Inhabitants of	i. 790	Rose	Rose	i. 130
Rex	St. Dunstan, Inhab. of	i. 790	Ross		ii. 123, 297
Reynell	Sprye	i. 467, 468	Ross	Bogie	i. 38
Rhind	Mitchell	ii. 315	Ross	Bradshaw	i. 677
Rich	Coe	i. 542	Ross	Bramstead	ii. 21
Richards	James	ii. 122	Ross	Drummond	i. 47
Richards	Porter	i. 405	Ross	Fleming	i. 271
Richards	Symons	ii. 104	Ross	Hawkins	i. 71
Richardson	Anderson	i. 528	Ross	Hill	i. 497
Richardson	Gavin's Trustees	ii. 380	Ross	Hutton	ii. 176
Richardson	Goss	i. 231, 255	Ross	King	i. 55
Richardson	Mellish	i. 321	Ross	Lindsay	i. 389
Richardson	Merry	i. 348	Ross	Matheson	i. 339
Richardson	Nourse	i. 636	Ross	Robertson	i. 419
Richardson	Richardson	i. 92, 139	Ross	Corney	i. 412
Richmond & Company	M'Phun	ii. 317	Rothschild	Currie	i. 441
Richmond	Railton	ii. 184	Rothschild	Stevenson	ii. 68
Richards	Madock	i. 666	Roughhead	Miller	ii. 74
Riddell's Trustees	Riddell	ii. 9	Rough's Trustees	Thompson	i. 512, 513
Riddle	Christie	ii. 370	Routh	Grant	i. 405
Ridley	Sloan	ii. 95, 106	Routledge	Salvador	i. 654
Right d. Fisher	Cuthill	i. 513	Roux	Bar	ii. 34
Rintoul & Company	Bannatyne	ii. 22	Rowan	Pickford	i. 216, 231
Risbourg	Bruckner	i. 543	Rowe	Scoullar	ii. 360
Ritchie	Atkinson	i. 259	Roy		i. 581
Ritchie	Mackay	ii. 330	Royal Arch, The	Gardyne	i. 730
Ritchie	Paterson	ii. 298	Royal Bank	Ranken	i. 382
Ritchie	Wyllie	ii. 197	Royal Bank	Hiller	i. 439
Robb	Forrest	ii. 290	Rucker	Minett	i. 473
Robertson	Robertson	i. 60	Rugg	Scarlett	i. 510
Roberts	Brett	i. 455	Rusby	Hadfield	ii. 97
Roberts	Jackson	i. 535	Rushforth	Bangley	i. 528
Roberts	Ogilvy	i. 533	Russel	Freen	i. 346
Roberts	Smith	i. 535	Russell	Breadalbane, E. of	i. 725, ii. 339
Robertson's Trustees		ii. 354, 356	Russell	M'Inturner	ii. 245
Robertson	Adam	ii. 344	Russell	Mudie	i. 689
Robertson	Ainslie's Trustees	ii. 400	Russell	Palmer	i. 531
Robertson	Burdequin	i. 437	Russell	Russell	i. 709, 710
Robertson	Campbell	ii. 451	Ryall	Rowles	ii. 21
Robertson	Chisholm	ii. 453	Ryan	Sams	i. 510
Robertson	Collins	ii. 446			
Robertson	Connolly	i. 488			
Robertson	Dennistoun	i. 508	Sadler	Belcher	i. 277
Robertson	Duff	i. 725	Sadler	Lee	ii. 506
Robertson	Forbes	i. 361			

Salte	Field	i. 195	Sharp	Harvey	i. 375
Salter	Woollams	i. 212	Sharp	Sharp	i. 47
Samson	M'Cubbin	ii. 61	Sharpe	Grey	i. 497
Samson	Nasmyth	ii. 415	Shaw	Campbell's Executors	i. 92
Samuel and Company	Brown	ii. 502	Shaw	Harvey	i. 279, 288, 507
Sandemann	Scurr	i. 232	Shaw	Maxwell	i. 407
Sanderson	Bell	i. 529	Shaw	Shaw	i. 47
Sangster	Burness	ii. 406	Shearer	Christie	i. 271
Sard	Rhodes	i. 538	Shepherd	Harrison	i. 221
Saunders	Aston	i. 106	Shepherd	Kain	i. 466
Saunderson	Griffiths	i. 512	Shepley	Davies	i. 200
Saunderson	Jackson	i. 404, 405	Sheridan	New Quay Company	i. 533
Savory	Price	i. 109	Shiells	Blackburn	i. 531
Sawyer	Goodwin	ii. 506	Shipton	Thornton	i. 584
Sayere	Moore	i. 118	Shortrede	Cheke	i. 405
Scarfe	Morgan	ii. 91	Shotton & Company	M'Neill	i. 760
Scheider	Heath	i. 468	Sibbald	Gibson	ii. 112
Schmalz	Avery	i. 543	Sibley	Tut	i. 431
Schneider	Norris	i. 404	Sigourney	Lloyd	i. 529
Scholes	Hampson & Merriot	i. 410	Siffken	Wray	i. 255
Scholfield	Templar	i. 467	Siffkin	Walker	i. 527, 540
Schotsmans	Lancashire and Yorkshire Rail- way Company	i. 221, 232, 252	Silree	Tripp	i. 414
Schuster	M'Kellar	i. 222, 590	Sim	Grant	i. 179, 270
Schuermans & Son	Goldie	i. 230, 256, ii. 364	Sim	Yuile	ii. 436
Scothorn	S. Staffordshire Rail. Co.	i. 195	Sime	Harvey	i. 787
Scotland, Bank of		i. 347	Simey	Peter	i. 588
Scotland, Bank of	Robertson	ii. 76	Simmons	Edwards	i. 271
Scott	Brown	i. 775	Simmons	Swift	i. 184, 191
Scott	Dixon	i. 468	Simond	Braddon	i. 470
Scott	Edmond	i. 689	Simons	Great Western Railway Co.	i. 505
Scott	Falconer	i. 22	Simons	Patchett	i. 544
Scott	Gillespie	i. 612	Simpson	Fleming	i. 389
Scott	Gilmore	i. 320	Simpson	Holliday	i. 109
Scott	Grahame	i. 387	Simpson	Howden, Lord	i. 323
Scott	Irving	i. 528	Simpson	Lamb	i. 535
Scott	Littledale	i. 314	Simpson	Penton	i. 534
Scott	Maxwell	i. 55	Sims	Bond	i. 527
Scott	Mitchell	i. 391	Simson	Duncanson's Creditors	i. 189
Scott	N. of Scotland Banking Co.	ii. 436	Simson	Grahame	ii. 271
Scott	Pettit	i. 231	Sinclair	Dunbar	i. 704
Scott	Price	i. 271	Sinclair	Sinclair	i. 693
Scott	Rutherford	ii. 168	Sinclair	Staples	ii. 64
Scott	Scott	ii. 292	Skinner	Henderson	ii. 337
Scott	Stevenson	ii. 302	Skinner	London B. and S. Rail. Co.	i. 484
Scott	Tawse	i. 704	Skinner, Notman, & Co.	M'Indoe	i. 517
Scott & Gillespie	Thomson	ii. 108	Skinner	Stocks	i. 527
Scott	Yates	i. 514	Sligo	Menzies	ii. 417
Scottish Central Rail. Co.	Ferguson	i. 343, ii. 15	Slim	Croucher	i. 467
Scottish Insurance Co.	Pringle	i. 410	Slubey	Hayward	i. 184, 212
Scottish Marine Insur. Co.	Turner	i. 657	Small	Miller	i. 29
Scottish N.-E. Rail. Co.	Stewart	i. 323	Small	Montes	ii. 97
Scougall	White	ii. 200	Smart	Begg	i. 465
Sea Insurance Company	Gavin	i. 653	Smart	Ogilvy	ii. 28
Seaforth's Trustees	Macaulay	ii. 136	Smart	Sanders	i. 526, 529
Selby	Selby	i. 404	Smethurst	Mitchell	i. 537, 538
Selkirk	Law	i. 140	Smith		i. 395, 455
Selkrig	Sommerville	ii. 330	Smith	Aikman	ii. 103
Sellar		ii. 355	Smith	Allan & Poynter	i. 196, ii. 22
Seller	Work	i. 530	Smith	Annan, Magistrates of	ii. 444
Selway	Fogg	i. 467	Smith	Borthwick	ii. 289, 307
Semenza	Brinsley	i. 527, ii. 126	Smith	Boucher	i. 535
Semple	Weddell	ii. 294	Smith	Bromley	i. 534
Serle	Norton	i. 435	Smith	Campbell	i. 378
Seth	Hain	i. 33	Smith	Cologan	i. 513
Seton	Dawson	i. 38	Smith	Craven	ii. 539
Seton	Hawkins	ii. 136	Smith	Crystal	ii. 332
Seton	Seton	i. 46	Smith	Dearlove	ii. 100
Shand	Blaikie	i. 676	Smith	Ferrand	i. 538
Shand	Sanderson	ii. 97	Smith	Fleming & Company	i. 660
Shankland	Athya & Co.	i. 592	Smith	Frier	ii. 333
Shanks	Thomson	i. 127	Smith	Goss	i. 232
			Smith	Gould	i. 579

Smith's Trustees	Grant	ii. 81, 82, 278	Stevenson & Company	M'Nair	ii. 507
Smith	Gurman	i. 405	Stevenson	Mortimer	i. 529
Smith	Hall	ii. 359	Stevenson	Newnham	i. 261
Smith	Harris	i. 402, 709	Stewart	Aberdein	i. 528
Smith	Hudson	i. 218, 231	Stewart	Auld	ii. 378
Smith	Jeyes	ii. 527	Stewart	Baillie	i. 140
Smith	Kay	i. 468	Stewart	Central Bank of Scotland	i. 285
Smith	Little	ii. 138	Stewart	Forbes	ii. 503
Smith	M'Ewan	i. 523	Stewart	Gordon	i. 465
Smith	Macintosh	ii. 486	Stewart	Greenock Marine Insurance Company	i. 657
Smith	M'Lean's Trustees	i. 701	Stewart	Jamieson	i. 464
Smith & Company	M'Lellan	ii. 326	Stewart	Lond. and North-Western Railway Company	i. 496
Smith	Melvin	i. 484	Stewart	Lowrie	i. 383
Smith	Mercer	i. 470	Stewart	M'Naughton	i. 97
Smith	Murray	i. 143	Stewart	Russell	i. 23
Smith	Nicolson	ii. 447	Stewart	Rutherford	i. 75, 78
Smith	O'Reilly	i. 363	Stewart	Scott	ii. 197
Smith	Reese River Company	i. 467, 468	Stewart	Simpson	i. 62, ii. 535
Smith	Robertson	ii. 356	Stewart	Snodgrass	i. 130
Smith Brothers	Rostron	ii. 296	Stewart	Stephen	i. 144
Smith	Smith	i. 689	Stewart	Stewart	i. 47
Smith	White	i. 318	Stirling's Trustees		ii. 250
Smith & Davidson	Wilson	i. 107	Stirling & Sons	Duncan	ii. 111
Smout	Ilbery	i. 467, 526, 543, 544	Stirling	Ewart	i. 23, 24
Smurthwaite	Wilkins	i. 544	Stirling & Son	Stirling	ii. 338
Smyth	Anderson	i. 537, 543	St. John, Lady	Pigot	i. 789
Smyth	Walker	ii. 436	Stock	Aitken	i. 440
Smyth	Wyllie	ii. 176	Stocker	Brocklebank	ii. 512
Snead	Watkins	ii. 99	Stoessiger	South-Eastern Railway Company	i. 505
Snodgrass	Hair	ii. 289, 534	Stokes	Moore	i. 404
Soblomstein, The		i. 618, ii. 99	Stonard	Dunkin	i. 199, 533
Solarte	Palmer	i. 439	Stone	Aberdeen Marine Insurance Company	i. 669
Solomons	Dawes	i. 513	Stoppel & Son	M'Laren	i. 339
Somes	British Empire Shipping Company	i. 472, ii. 93, 100	Stoppel & Company	Stoddard	i. 249, 252, 253
Souter's Creditors	Brown	ii. 448	Storer	Gowen	i. 483
South Carolina Bank	Case	ii. 516	Storer	Hunter	i. 273
South Yorkshire Rail. Co.	Great Northern Rail. Co.	i. 318	Stracey	Deey	i. 527
Southern	How	i. 469	Strathmore's, Lord, Trs.	Kirkcaldy's Trustees	i. 76, ii. 34
Southgate	Bohn	i. 336	Street	Blay	i. 466
Sowerby	Butcher	i. 540	Strickland	Neilson	i. 573, 604
Spalding	Farquharson	i. 693	Strong	Strong	i. 689
Spalding	Ruding	i. 215	Struthers	Commercial Bank	ii. 333
Speid	Stirton	ii. 286	Struthers	Dykes	ii. 436
Speirs	Speirs	ii. 5	Stuart	Macgregor	ii. 22, 87
Spence	Garden	ii. 369	Stubbs	Lund	i. 232
Spence	Gibson	ii. 330	Stuckley	Bailey	i. 466
Spence	Ormiston	i. 474	Summers	Marianski	ii. 298
Spenceley	Greenwood	ii. 528, 534	Summers	Solomon	i. 510
Spencer	Smith	i. 320	Sutherland	Sun Fire Insurance Co.	i. 763
Spiers	Mackie	i. 82	Sutherland	Sutherland	ii. 161, 166
Sprot	Pennycook	i. 55	Sutton	Mitchell	i. 609
Sprott	Morrison	i. 69	Swain	Wall	i. 368
Stainbank	Shepherd	i. 578	Swan		i. 448
Stainbank	Stainbank	i. 581	Swan	Bank of Scotland	i. 382, 386
Stair, Earl of	Stair's, Earl of, Trustees	i. 38	Swan	Martin	i. 463, 690
Stammers	Elliot	ii. 123	Swan	Nesmith	i. 408
Stavers	Curling	i. 455	Swan	North British Australasian Company	i. 305, 511, 524
Stead	Cox	ii. 320	Swan	Western Bank	i. 737
Stead	Liddard	i. 405	Sweet	Sothern	i. 200, 463
Stead	Salt	ii. 507	Sweeting	Pym	i. 245
Steamboat New World	King	i. 483	Sword	Pearce	i. 528
Steele	M'Ewan	ii. 294	Sykes	Sinclair	i. 314
Steel & Company		ii. 354, 372, 566	Syme	Gill	i. 528
Steins	Hutchison	i. 256	Syme	Charles	i. 38
Stein's Assignees	Sheriff	i. 395	Symers	Harvey	ii. 2
Stephen	Smith	ii. 36		Glasgow Marine Insurance Company	i. 651
Stephen	Strachan	ii. 350, 372			
Stevenson	Campbell	i. 537			
Stevenson	Cooper	ii. 32			
Stevenson	Kyle	i. 348			
Stevenson	Likly	ii. 96			

Tait	Wilson	i. 375, 410, 411	Thresher	East London Water-	
Tamvaco	Simpson	ii. 96	Tidey	works Company	i. 791
Tanner	Christian	i. 541	Tierney	Mollet	i. 455
Tanner	Scovell	i. 184	Tigress, The	Court	i. 725
Tansley	Turner	i. 195	Tipper		i. 236
Tapley	Martens	i. 538	Tobin	The King	ii. 335
Tapp	Lee	i. 402	Tobin	Crawford	i. 544
Tarling	Baxter	i. 472	Tod	Harford	i. 661
Tasker	Shepherd	i. 526, ii. 528	Tod	Dunlop	i. 730
Tawney	Crowther	i. 405	Todd	Smith	ii. 335
Taylor		ii. 355	Todd	Reid	i. 528
Taylor & Wright	Adie	i. 382	Tolmie		ii. 297, 298
Taylor	Ashton	i. 467	Tomison	Tomison	i. 83
Taylor	Brewer	i. 535	Tomkins	Barnet	i. 534
Taylor	Caldwell	i. 473	Tooke	Hollingsworth	i. 277, 507
Taylor	Drummond	ii. 291, 309	Torbet	Borthwick	ii. 320
Taylor	Farrie	ii. 200, 211	Townley	Crump	i. 222, 243
Taylor	Forbes	i. 604	Traill	Baring	i. 467, 468
Taylor	Hunter	ii. 285	Traill	Dangerfield	ii. 263
Taylor	Hutton	i. 709	Treasury, Lords of	M'Nair	ii. 150
Taylor	Kirkland & Esplin	ii. 286	Treuttel	Barandon	i. 529
Taylor	Kymer	i. 521	Trotter	Cunningham	ii. 8
Taylor	Lendie	i. 534	Trotter	Trotter	i. 142
Taylor	Macdonald	ii. 483	Trout	Begg	i. 415
Taylor	Macfarlane	i. 314, 469	Truck	Walker	i. 277
Taylor	Manford	ii. 291	Trueman	Loder	i. 405, 527
Taylor	Plumer	i. 277, 512, 514, 529, 533	Tucker	Humphrey	i. 231, 232
Taylor & Cunninghame	Waddell	i. 389	Tulloch	Davidson	ii. 507
Taylor	Watson	i. 38	Tulloch	Pollock	ii. 485
Telfer	Barron	i. 438	Turnbull	Allan & Son	ii. 520
Telford's Executor	Blackwood	ii. 71	Turnbull	M'Naughton	ii. 310
Templar	Graham	i. 38	Turner	Davies	i. 370
Templeton	Macfarlane	i. 107	Turner	Liverpool Docks, Trus-	
Tenant	Elliot	i. 533	Turner	tees of	i. 217, 220
Tenant	Carmichael	i. 604	Turrill	Molison	ii. 507, 535
Tennant & Company	Bunten	i. 391	Tweeddale, Marquis of	Crawley	ii. 99
Thames Ironworks Co.	Patent Derrick Company	ii. 91, 93	Tweedie	Aytoun	i. 691
Thicknesse	Bromilow	ii. 504	Tyler	M'Intyre	ii. 356
Thistlewood		i. 356	Tyrie	Fletcher	i. 431
Thom	Bigland	i. 467			i. 648
Thom	Black	ii. 451	Udell	Atherton	i. 469, 514
Thom	Bridges	ii. 324, 334, 372	Union, The		i. 581
Thom	North British Bank	ii. 519, 528, 543, 553	Union Bank	Mackenzie	i. 271
Thomas	Cooke	i. 409	Union Canal Company	Carmichael	i. 693
Thomas	Day	i. 488	United Mutual Insur. Co.	Murray	i. 346
Thomas	Thomson	ii. 226, 229	Upstone	Marshall	i. 338
Thomas	Williams	i. 408	Urie	Cheyne	i. 363
Thompson	Carrington	i. 513	Urie	Lumsden	ii. 507, 535
Thompson	Giles	i. 277	Urquhart		ii. 317
Thompson	Havelock	i. 535	Urquhart	Brown	i. 38, 605
Thompson	Hopper	i. 663	Urquhart	Urquhart	i. 140, 143
Thompson	Hunter	i. 660			
Thomson	Campbell	i. 38	Vale	Bayle	i. 218, 474
Thomson	Christie	i. 38	Valpy	Gibson	i. 231
Thomson	Davenport	i. 286, 527, 537, 541, 542, 543	Van Casteel	Booker	i. 217, 220, 232, 242, 254
Thomson	Dove	i. 122	Van	Corpe	i. 468
Thomson	Dudgeon	ii. 394	Van Oppen	Arbuckle	i. 344, 463
Thomson	Fullerton	i. 508, 516, ii. 520	Van Toll	South-Eastern Railway Company	i. 314, 505
Thomson	Gourlay	ii. 176	Veitch	Murray	i. 391
Thomson	Izat	ii. 352	Veitch	Young	ii. 2
Thomson	James	i. 344, 458	Venables	Wood	ii. 512, 542
Thomson	Ker	ii. 459	Vere	Ashby	i. 512
Thomson	Miller	i. 705	Vernede	Weber	i. 470
Thomson	Pagan	i. 130	Vertue	Jewell	i. 239
Thomson	Stephenson	ii. 555	Vielie	Osgood	i. 404
Thomson	Stewart	i. 776	Vigers	Pike	i. 467, 468
Thomson	Thomson	i. 82			
Thornburn	Martin	i. 38, 141			
Thorold	Smith	i. 528			

Vulliamy	Noble	ii. 123	Weeks	Goode	ii. 91
Vyse	Wakefield	i. 677	Weir	Advocate, Lord	ii. 5
			Weir	Knox	i. 83
			Weir & Gardner	Scott	ii. 294
Waddell	Hope	i. 341	Welford	Beazeley	i. 404, 405
Waddell	Russell	ii. 456	Wellard	Perkins	i. 462
Waddell	Waddell	i. 125	Wells	Proudfoot	ii. 33
Waddell	Waddell's Trustees	i. 133	Wellwood	Ross	i. 38
Wade	Tatton	i. 468	Wemyss, Earl of	Hewatt	ii. 34, 334
Wain	Walters	i. 402	Wentworth	Outhwaite	i. 184, 214, 231, 252
Wainwright	Bland	i. 677	West	Jones	i. 305, 511
Waite	Baker	i. 217, 218, 220, 595	Western	Russel	i. 405
Wake	Harrop	i. 540, 541	Western Bank of Scotland	Addie	i. 466, 467, 468, 469, 514
Walker	Duncan	i. 403	Western Bank	Baird & Others	ii. 507
Walker	Hamilton	i. 431	Western Bank	Douglas	i. 363
Walker	Hill	i. 407	Western Bank of Scotland	Needell	ii. 530
Walker	Hunter	ii. 143	Westzinthus	La Page & Company	i. 215, 240
Walker	Inglis	i. 371	Wetherell	Howells	i. 789
Walker	M'Gilp	ii. 369	Whealer	Methuen	i. 463
Walker	Walker	ii. 305, 314	Wheatcroft	Hickman	ii. 500, 514
Walker	York & N. M. Railway Co.	i. 505	Wheatley	Williams	i. 414
Wall	Stubbs	i. 467	Wheelton	Hardisty	i. 469
Wallace	Breeds	i. 200	Whistler	Forster	i. 300
Wallace	Corsan	i. 362	Whitbread	Jordan	i. 239
Wallace	Crawford's Executors	i. 691	White	Bartlett	i. 533
Wallace	Davies	ii. 17	White	Briggs, Thorburn, & Com-	
Wallace	Eglinton, Earl of	i. 22, 691	White	pany	ii. 197, 376
Wallace	Fielden	i. 579	White	Burt	ii. 319
Wallace	Telfair	i. 530	White	Garden	i. 467
Wallace	Wallace	i. 403	White	Girdwood	ii. 291
Wallace	Montgomery	i. 217	White	Lincoln, Lady	i. 533
Walley	Provan	ii. 123	White	M'Intyre	ii. 539, 542
Walshe	Dodson	i. 405	White	Maxwell	i. 516
Walton	Fotherby	i. 405	White	Proctor	i. 405
Wankford	Maton	i. 789	White	Robertson	ii. 449
Wansbrough	Griffin	ii. 99	White	Spence	i. 347
Warbrook	Evans	i. 528	White	White	ii. 5
Ward	Felton	i. 544	White	Wilks	i. 198
Ward	Usher	i. 790	Whitehead		i. 356
Wardell	Potter	ii. 437	Whitehead	Anderson	i. 196, 231, 245, 249, 255
Wardrop	Cutfield	ii. 9	Whitehead	Henderson	i. 417
Waring	Coxe	i. 214	Whitehead	Tuckett	i. 510
Warlow	Harrison	i. 544	Whitehouse	Frost	i. 198, 472
Warne & Company	Lillie	i. 379	Whitfield	Brand	i. 279, 507
Warner	Mackay	i. 527, 529, ii. 126	Whittaker	Howe	i. 322
Warner	Smith	ii. 516	Whytte's Trustees	Burt	ii. 345
Warrington	Early	i. 417	Wickham	Wickham	i. 408, 469
Waters	Taylor	ii. 527	Wight	Brown	i. 675
Watkins	Vince	i. 404, 405, 510	Wight	Forman	i. 258, 259
Watney	Wells	ii. 527	Wight	Hopetoun, Earl of	i. 75
Watson	Bruce	i. 534	Wightman	De Lisle	i. 142
Watson	Cowan	ii. 307	Wightman	Graham	i. 300
Watson	Johnston	i. 54	Wilkie		ii. 327
Watson	King	i. 526	Wilkie	Dunlop	i. 131
Watson	Merrilees	i. 699	Wilkie	Flowerdew	i. 339, 776
Watson	Morrison	ii. 304, 309	Wilkie	Tweeddale	ii. 138
Watson	Neuffert	i. 322	Wilkins	Bromhead	i. 276
Watson	Peachie	i. 273	Wilkinson	Coverdale	i. 530
Watson	Shand	ii. 245	Wilkinson	Kitchen	i. 534
Watson	Swann	i. 512	Wilkinson	Martin	i. 535
Watson	Threlkeld	i. 510	Willard	Perkins	i. 473
Watt	Barnett's Trustees	ii. 428	Williams	African Steamship Co.	i. 610
Watt	Findlay	i. 256, 263, 334, 336	Williams	Carwardine	i. 405
Watt	Mitchell	i. 480	Williams	Evans	i. 528
Watt's Trustees	Pinkney	ii. 18	Williams	Jarret	i. 338
Watts		ii. 104	Williams	Lake	i. 405
Way	Hearne	i. 316	Williams	Leper	i. 408, 410
Webb		i. 356	Williams	Millington	i. 529
Webster	Bray	ii. 503	Williams & Company	Newlands & Company	i. 536
Webster	De Tastet	i. 531	Williamson	Barton	i. 540, 541
Webster	M'Calman	i. 421, 540	Williamson	Forbes	ii. 32
Webster	Young	i. 489			

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